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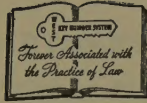


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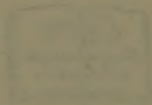
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CALIFORNIA REPORTER

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277 PACIFIC REPORTER SECOND SERIES

43 Cal.2d 656

W. W. BIRD, Plaintiff and Appellant,
v.

**C. V. KENWORTHY, Defendant and
Respondent.**
Sac. 6479.

Supreme Court of California.
In Bank.

Nov. 30, 1954.

Action by buyer to rescind conditional sales contract, to be relieved of forfeiture, and to recover payments made thereunder. The Superior Court, San Joaquin County, Thomas B. Quinn, J., entered judgment for seller and buyer appealed. The Supreme Court, Edmonds, J., held that in determining extent of unjust enrichment obtained by seller, payments made would be balanced against reasonable rental value of equipment during time it was in buyer's possession, rather than against amount of its value to buyer during time he had possession.

Judgment affirmed.

Prior opinion, 265 P.2d 943.

1. Sales ⇨130(3), 481

In action to rescind conditional sales contract and for recovery of amount paid seller, evidence on issue as to whether buyer was entitled to have benefit of statute providing for relief against forfeitures, supported finding that buyer's breach was willful and grossly negligent. Civ.Code, § 3275.

2. Sales ⇨481

Although the purchaser in a conditional contract for the sale of real estate is willful defaulter, he may recover amount which constitutes unjust enrichment, and such recovery may be had though purchaser could receive no relief under Civil

Code section affording, in certain circumstances, relief against forfeitures. Civ. Code, § 3275.

3. Sales ⇨481

To have benefit of rule against unjust enrichment burden is upon defaulting buyer to show that payments made by him exceed seller's damages. Civ.Code, § 3275.

4. Sales ⇨481

In determining extent of unjust enrichment obtained by seller when buyer breached conditional sales contract, resulting in return of equipment to seller and a forfeiture of payments already made, payments made would be balanced against reasonable rental value of equipment during time it was in buyer's possession, rather than against amount of its value to buyer during time he had possession.

John G. Evans, San Francisco, for appellant.

Rutherford, Jacobs, Cavalero & Dietrich and Stephen Dietrich, Stockton, for respondent.

EDMONDS, Justice.

The appeal of W. W. Bird is from an adverse judgment in an action to rescind a conditional sales contract and for the recovery of the amount he paid to C. V. Kenworthy, the vendor. Bird also asked for relief from a forfeiture which assertedly resulted in the unjust enrichment of Kenworthy.

In 1948, Bird and Kenworthy entered into a conditional sales contract and Bird took possession of the tractors described in it. The purchase price was approximately \$29,500, of which \$5,000 was paid

at that time. Bird agreed to pay the remainder in monthly installments of \$2,000.

Time was made the essence of the contract. It also provided: "Should I fail to make any monthly payment above specified when the same is due, * * * then the entire unpaid balance of purchase price shall at your option, become immediately due and payable and shall bear interest thereafter at the highest lawful rate, and I agree to make full payment of such balance. Should I return said chattels to you or if you repossess said chattels, then you may retain all payments previously made as compensation for use of said chattels, and you may, at your option, sell said chattels at public or private sale, with or without notice, and credit the net proceeds, after expenses, on the amounts unpaid hereunder." The contract made no requirement for the seller to give notice of his exercise of the option to repossess.

During the year immediately following the execution of the contract, Bird paid eight of the installments, none of them at the time when due. Five months elapsed during which no payment was made.

Kenworthy testified that in the latter part of October, 1949, he advised Bird over the telephone that unless payment in full were made, he would repossess the equipment. He took that action about one month later. Bird then tendered the balance of the principal and interest due but Kenworthy refused to accept it. Thereupon Bird served notice of rescission and demanded the return of the amounts he had paid.

The trial court found that Kenworthy did not "waive prompt payment of future installments, or waive the right to repossess the equipment." Another finding was "that plaintiff Bird's failure promptly to pay the installments to defendant Kenworthy under the conditional sale contract was grossly negligent and willful." The reasonable rental value of the equipment, while in the possession of Bird, was determined to be \$2,200 a month, or a total of \$37,500.

Bird alleged that he rescinded the contract because of the unlawful repossession by Kenworthy. That cause of action was

based upon an asserted promise by Kenworthy to take no action to repossess the equipment without notifying Bird. But assuming that Kenworthy made such a promise, the court found that, before the repossession, Kenworthy demanded the payment of the amount due or the return of the equipment.

[1] Another ground for relief relied upon by Bird is that he is entitled to recovery under section 3275 of the Civil Code which provides: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty." However, the finding that Bird's breach was willful and grossly negligent is supported by substantial evidence. The record shows that during the time he had possession of the equipment he earned a considerable amount for work done by him. Also, while he had possession of the tractors he collected rent from contractors to whom he leased the tractors. There is also evidence that Bird frequently made it as difficult as possible for Kenworthy to find him.

[2] In *Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish*, 37 Cal.2d 16, 230 P.2d 629, 31 A.L.R.2d 1, it was held that, although the vendee in a conditional contract for the sale of real estate is a willful defaulter, the vendee may recover the amount which constitutes unjust enrichment of the vendor by reason of the termination of the contract. Such recovery may be had though the vendee could receive no relief under section 3275 of the Civil Code.

[3] To have the benefit of the rule against unjust enrichment, the burden of proof is upon the defaulting vendee to show that the payments made by him exceed the vendor's damages. *Major-Blakeney Corp. v. Jenkins*, 121 Cal.App.2d 325, 332, 263 P.2d 655; *Baffa v. Johnson*, 35 Cal.2d 36, 40, 216 P.2d 13. Here the trial court found that the reasonable rental value of the property while in the possession of Bird

was \$37,400, an amount much in excess of the amount he paid under the contract.

[4] But Bird argues that the issue of unjust enrichment should not be determined by balancing the payments made by him against the reasonable rental value of the equipment during the time it was in his possession. He contends that the rental value should be the amount of its value to him during the time he had possession of it. However, this is not the measure of such value.

In *Elrod-Oas Home Building Co. v. Mensor*, 120 Cal.App. 485, 8 P.2d 171, a defaulting vendor sought a decree quieting title to certain real property. The court ordered the vendors to return the amount of the payments they received, less the reasonable rental value for the time the vendees were in possession. It said, "While defendants actually occupied the premises for about ten months, * * * nevertheless they held undisturbed possession for eighteen months. The whole period should, we think, have been allowed for at the monthly rate impliedly admitted by defendants and found to be reasonable * * *." 120 Cal.App. at page 490, 8 P.2d at page 173.

The vendors of the real property which was the subject of controversy in *Heintzsch v. LaFrance*, 3 Cal.2d 180, 44 P.2d 358, were allowed to set off the reasonable rental value of the land against the amounts paid by the vendees. And in *Roberts v. Lebrain*, 113 Cal.App.2d 712, 717, 248 P.2d 810, a defaulting vendor was allowed to keep the purchase payments, since they were a reasonable sum for the use and occupancy of the premises.

There is dictum in *Nelson v. Canavan*, 11 Cal.App.2d 156, 160, 53 P.2d 201, to the effect that where the vendee is seeking damages because of asserted fraud in the sale of a chattel, the vendor may set off the reasonable rental value of the property while it is in the possession of the vendee. Support for this position may also be found in *Quinlan v. St. John*, 28 Wyo. 91, 201 P. 149, 152, 203 P. 1088. There the Wyoming Supreme Court refused equitable relief from forfeiture in a land sale contract be-

cause the plaintiff did not "offer to account for the value of the use of the property during the time she held it." She did not show that the amounts paid by her were greater than the rental value of the property. "[W]ith her petition in its present form," said the court, "the rental value of the property may have equalled or exceeded the monthly payments made; * * *."

Had the contract been completed by Bird, Kenworthy would have received a little over \$29,000. By repossession of the equipment, which the parties agree had a value of \$28,000 at the time of repossession, and the payments of \$24,000 which Bird made, the vendor has received approximately \$52,000. But if he had rented the equipment for the period Bird had possession of it, he would have earned \$37,400 in rentals and have the tractors worth \$28,000 or a total of \$65,400.

The purpose of the rule in the *Freedman* case is to prevent unconscionable inequities resulting from a forfeiture. But where, as here, the vendor would have received greater benefit if the property had remained in his hands than the amount obtained by him because of the forfeiture, there is no inequity.

The authorities relied upon by Bird all involve actions for damages where there had been an unlawful dispossession, or where there was a breach of contract. In the present case, the only question is whether the vendor has been unjustly enriched if he is allowed to keep the payments received by him.

Bird also complains that certain evidence offered by him concerning the value of the use to him should have been admitted, either to ascertain the amount of consideration he should restore if rescission were granted, or to determine the vendor's set off if relief were given from the forfeiture. As Bird has shown no ground for rescission, he was not prejudiced by the rejection of this evidence.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

43 Cal.2d 677

Archie B. SHORE, Plaintiff and Respondent,**v.****Alberta Mae SHORE, Defendant and Appellant (two cases).****L. A. 23024, 23025.****Supreme Court of California.****In Bank.****Dec. 3, 1954.****Rehearing Denied Dec. 29, 1954.**

Actions for partition of certain personal property in defendant's possession and to cancel deed and declare trust in an undivided one-half interest in certain realty held by defendant. The Superior Court, Kern County, William L. Bradshaw, J., rendered judgment for plaintiff in each case, and defendant appealed. The Supreme Court, Traynor, J., held that annulment action decree which determined that the property claims of both parties were without merit was a binding determination on that issue and barred man's subsequent action, even though subsequent action was not based on community property theory while earlier claim had been so based.

Judgments reversed.

Carter, Shenk and Schauer, JJ., dissented.

Prior opinion, 268 P.2d 569.

1. Marriage ⚭63

Where property rights of parties are properly put in issue by pleadings in an annulment action, the court may determine them.

2. Marriage ⚭63

Where a purported marriage was not entered into in good faith, a court, in an annulment action, may not properly award property of parties as if marriage had been valid and the property community in character.

3. Marriage ⚭63

Decree which was entered in annulment action and which, with reference to parties' property claims, stated that, since both parties were at fault, court declined for lack of jurisdiction to make any award of property alleged to be community in character, was tantamount to a dismissal

of the parties' claims with respect to property interests.

4. Judgment ⚭563(1)

A judgment refusing to determine an issue on the ground of lack of jurisdiction is not ordinarily *res judicata*, but when the decision on the jurisdictional question is based upon a determination of the merits of an issue before the court, it constitutes a binding determination of that issue.

5. Marriage ⚭54

That a man and woman do not in good faith believe they are married does not preclude the court from protecting their respective interests in jointly acquired property.

6. Marriage ⚭65

Annulment action decree which determined that the property claims of both parties were without merit was a binding determination on that issue and barred man's subsequent action, even though subsequent action was not based on community property theory while earlier claim had been so based.

7. Judgment ⚭725(1)

A judgment in a prior action between the same parties on the identical cause of action is *res judicata* and a bar to a second suit thereon, not only as to all issues actually determined therein but also as to issues necessarily involved.

Siemon & Siemon and Alfred Siemon, Bakersfield, for appellant.

Kendall & Howell and William A. Howell, Jr., Bakersfield, for respondent.

TRAYNOR, Justice.

Archie B. Shore brought these actions to establish his title to an undivided one-half interest in certain real and personal property in the possession of defendant Alberta Mae Shore and to secure a partition of the personal property. The actions were consolidated for trial. In her answers, Alberta pleaded that Archie's actions were barred by a decree of annulment between the parties and that Archie had given her his one-half interest in the property while

they were living together as husband and wife. Title to all of the property had originally been taken by the parties as joint tenants. The trial court found that the annulment decree was not a bar to these actions and that Archie had not made a gift of his interest in the property to Alberta. It further found that Archie had deeded his interest in the real property to defendant to protect his interest from unfounded claims against him by third parties and that Alberta held Archie's interest on an oral trust for him. Since a confidential relationship had existed between the parties and since the claims against Archie were unfounded, it concluded that the oral trust was enforceable and entered judgment that each party was the owner of an undivided one-half interest in the real property. In the action for partition of the personal property it entered judgment that each of the parties was the owner of an undivided one-half interest and ordered a partition. Alberta has appealed from both judgments.

Relying on the following facts, Alberta contends that the trial court erred in holding that the decree in the annulment action was not a bar to these actions. At the time of the annulment action in 1951, title to the real property stood in her name and she was in possession of both the real and personal property. In her complaint for divorce or annulment she alleged that the property involved in this action was her separate property and prayed that the court so determine. In his answer and cross-complaint for annulment, Archie alleged that the property was the community or jointly acquired property of the parties and prayed that it be divided equally between them. The trial court awarded an annulment to Alberta on the ground that Archie had another spouse living at the time of his purported marriage to Alberta. It also found that the parties were in *pari delicto*, and "that the Court, therefore, makes no findings concerning the character of the property set out in the first cause of action of [Alberta's] complaint." As a conclusion of law it stated "That the Court, finding both parties at fault in the purported marriage, declines for lack of

jurisdiction to make any award of property alleged to be community in character."

Alberta contends that the foregoing finding and conclusion constitute a binding adjudication that at the time of the annulment neither party was entitled to relief against the other with respect to the property here in question. Archie contends, on the other hand, that a denial of relief for lack of jurisdiction does not constitute a judgment on the merits and that in any event no adjudication with respect to the property was carried into the formal decree of annulment.

[1-4] When the property rights of the parties are properly put in issue by the pleadings in an annulment action, the court may determine them. *Figoni v. Figoni*, 211 Cal. 354, 357, 295 P. 339; *Schneider v. Schneider*, 183 Cal. 335, 342, 191 P. 533, 11 A.L.R. 1386; see, *Sanguinetti v. Sanguinetti*, 9 Cal.2d 95, 99, 69 P.2d 845, 111 A.L.R. 342. If the purported marriage was not entered into in good faith, however, the court may not properly award the property of the parties as if the marriage had been valid and the property community in character. *Vallera v. Vallera*, 21 Cal.2d 681, 684-685, 134 P.2d 761; *Baskett v. Crook*, 86 Cal.App.2d 355, 362, 195 P.2d 39; *Taylor v. Taylor*, 66 Cal.App.2d 390, 399, 152 P.2d 480. When the decision of the court in the annulment action is viewed in the light of these rules, it is clear that it constituted more than a decision on the issue of jurisdiction. It was also a determination on the merits of Archie's claim that the property should be divided equally as the community or jointly acquired property of the parties. The court did not merely decide that it lacked jurisdiction to award the property, it decided that because the parties were in *pari delicto* neither of them was entitled to legal assistance with respect to their property interests. Accordingly, when the decree of annulment is interpreted in the light of the findings of fact and conclusions of law, see, *City of Vernon v. Superior Court*, 38 Cal.2d 509, 514, 241 P.2d 243; *Gelfand v. O'Haver*, 33 Cal.2d 218, 222, 200 P.2d 790, it is clear that it was tantamount to a dismissal of the

respective claims of the parties with respect to their property interests. The situation is thus closely analogous to that in *Olwell v. Hopkins*, 28 Cal.2d 147, 168 P.2d 972, where it was held that a judgment of dismissal was *res judicata* when it appeared that the dismissal was based upon a determination that the contract sued upon was void. The court recognized that "Ordinarily a judgment of dismissal is not a judgment on the merits and therefore does not operate as a bar to another action on the same cause of action. This court has recognized, however, that a dismissal may follow an actual determination on the merits [citations] as have courts in other jurisdictions. * * * At the hearing upon their motion to dismiss the present action, defendants introduced in evidence the record of the first action. It is clear from that record that the one issue passed upon by the trial court in dismissing the first action was that raised by defendants' contention that plaintiffs' cause of action was based upon a contract that was void. The defense thus interposed went to the merits of plaintiffs' cause of action. * * * [Defendants] raised an issue as to plaintiffs' right to recover under any circumstances upon their alleged cause of action and upon that issue the court rendered judgment against plaintiffs." 28 Cal.2d at pages 149-150, 168 P.2d at page 974. The reasoning in the *Olwell* case is equally applicable here, and accordingly we conclude that although a judgment refusing to determine an issue on the ground of lack of jurisdiction is not ordinarily *res judicata*, *Slaker v. McCormick-Saeltzer Co.*, 179 Cal. 387, 389, 177 P. 155; see also, *Stark v. Coker*, 20 Cal.2d 839, 843-844, 129 P.2d 390, when the decision on the jurisdictional question is based upon a determination of the merits of an issue before the court, it constitutes a binding determination of that issue.

[5-7] In the present actions Archie is not seeking to establish an interest in the property growing out of the purported marital relationship. He relies on evidence with respect to the acquisition of the property and the parties dealings therewith that the trial court found to be sufficient

to establish his claim to a one-half interest without reference to that relationship. As was pointed out in *Vallera v. Vallera*, supra, 21 Cal.2d 681, 685, 134 P.2d 761, the fact that a man and woman do not in good faith believe they are married does not preclude the court from protecting their respective interests in jointly acquired property. Accordingly if Archie advanced the theory of recovery he now relies upon in the annulment action, the court erred in holding that the fact the parties were in *pari delicto* prevented relief. Although it does not appear that Archie sought to establish his interest in the property in the annulment action on the theory now advanced, whether he did or not, these actions are barred by that adjudication. He now seeks to establish the same right in the property that he sought to establish in the annulment action, and the decision in that action went to the merits of his claim. If the court in the annulment action erroneously applied the doctrine of *pari delicto* to deny relief on the theory now advanced, Archie's remedy was by appeal. On the other hand, if Archie failed to present the present theory of recovery in the former action, it is too late for him to do so now. The situation is legally indistinguishable from that in *Krier v. Krier*, 28 Cal.2d 841, 172 P.2d 681, where a wife sought in successive actions to establish an interest in the same property on different legal theories. "In the prior separate maintenance action Mrs. Krier sought and procured an adjudication with respect to her interest in the property. She here seeks a second adjudication relative to her interest in the same property. It is settled, however, that a judgment in a prior action between the same parties on the identical cause of action is *res judicata*, and a bar to a second suit thereon, not only as to issues actually determined therein but also as to issues necessarily involved. [Citations.] And even though the causes of action be different, the prior determination of an issue is conclusive in a subsequent suit between the same parties as to that issue and every matter which might have

been urged to sustain or defeat its determination. [Citations.]

"Having claimed the property in the prior action solely as community property and having procured a decree therein based on its character as such, Mrs. Krier is precluded from seeking in this later action another award thereof based on an entirely different interest (homestead or otherwise) existing, but unclaimed, at the time of the earlier adjudication. Under the circumstances, she was required to advance her entire interest, whether community or homestead, or both, in order to permit the court to make an effective and complete adjudication of the respective interests of the parties. [Citation.] Not having done so, she cannot relitigate the matter, whether it be held that the two suits involved the same cause of action insofar as they concerned her interest in the property, or merely involved a common issue as to her interest in the property." 28 Cal.2d at pages 843-844, 172 P.2d at page 682.

The judgments are reversed.

GIBSON, C. J., and EDMONDS and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I do not agree that the finding of the trial court in the annulment action brought by Alberta to the effect that "the Court, therefore, makes *no* findings concerning the character of the property set out in the first cause of action of [Alberta's] complaint" and the conclusion of law that "the Court, finding both parties at fault in the purported marriage, declines for lack of jurisdiction to make any award of property alleged to be community in character," constituted a binding determination of the property issue so as to constitute a bar to the present actions. It was, in my opinion, a specific declaration that the issue had not been adjudicated.

"There can be no doubt that the dismissal of an action or denial of relief for want of jurisdiction is not a judgment on the merits, and cannot prevent the plaintiff from subsequently prosecuting his action in any Court authorized to entertain and

determine it. No question other than the jurisdictional one is concluded by such a judgment, since after the Court has determined its lack of jurisdiction, any further finding or judgment as to the matters alleged is wholly ineffective. * * * Refusal to pass on a particular matter for lack of jurisdiction is not an adjudication of it." (Freeman on Judgments, 5th Ed., Vol. 2, p. 1546, § 733.) In *Slaker v. McCormick-Saeltzer Co.*, 179 Cal. 387, 389, 177 P. 155, 156, this court said: "Looking merely to the judgment in the foreclosure suit, it is very plain that the court did not therein undertake to pass upon the merits of the controversy between Slaker and the McCormick-Saeltzer Company. *What it did was to decline to determine that controversy for the reason that it was without jurisdiction, in that action, so to do. Whether the holding that it had no jurisdiction was sound or erroneous is not a question for consideration here. The essential point is that there was no adjudication of the merits.* * * *" (Emphasis added.) It is elemental that a judgment which has not been rendered on the merits is not res judicata, *Campanella v. Campanella*, 204 Cal. 515, 269 P. 433; *Goddard v. Security Title Ins. & Guarantee Co.*, 14 Cal.2d 47, 52, 92 P.2d 804; *Gonsalves v. Bank of America*, 16 Cal.2d 169, 173, 105 P.2d 118; *Everts v. Blaschko*, 17 Cal. App.2d 188, 61 P.2d 776; *Matteson v. Klump*, 100 Cal.App. 64, 279 P. 669; *Helvey v. Castles*, 73 Cal.App.2d 667, 167 P.2d 492; *Jacobs v. Norwich Union Fire Ins. Soc.*, 4 Cal.App.2d 1, 40 P.2d 899; *Miller v. Ambassador Park Syndicate*, 121 Cal. App. 92, 9 P.2d 267; *Taylor v. Darling*, 22 Cal.App. 101, 133 P. 503; *Security Trust & Savings Bank v. Southern Pac. R. Co.*, 214 Cal. 81, 3 P.2d 1015; *Scheeline v. Moshier*, 172 Cal. 565, 158 P. 222.

What the majority is saying is, in effect, this: When the trial court determined it had no jurisdiction to decide the question of property, it was really a determination on the merits that neither party was entitled to relief and therefore "tantamount to a dismissal of the respective claims of the parties with respect to their property interests." The trial court specifically made no finding as to the character of the

property. As in the Slaker case, it declined to determine the controversy for the reason that it felt it was without jurisdiction. "Whether the holding that it had no jurisdiction was sound or erroneous is not a question for consideration here. The essential point is that there was no adjudication of the merits. * * *" In order to reach the conclusion reached by the majority, too many "ifs" are involved. First it is said "if Archie advanced the theory of recovery" now relied on, the court erred in holding that the doctrine of *pari delicto* prevented relief. Then that "if" is discarded with the statement that "it does not appear that Archie" did seek to establish his interest on the theory now advanced. Secondly, it is said "if the court in the annulment action erroneously applied the doctrine of *pari delicto* to deny relief on the theory now advanced, Archie's remedy was by appeal." Then it is said: "On the other hand, if Archie failed to present the present theory of recovery in the former action, it is too late for him to do so now." The rule set forth in *Krier v. Krier*, 28 Cal.2d 841, 172 P.2d 681, is not applicable here. When a court specifically declines to pass upon an issue, the rule as to issues involved directly, or necessarily involved by implication, does not apply.

Before the trial court could reach any conclusion with respect to the respective property interests involved, it had first to determine the character of the property. This it did not do. That no determination was in fact made is borne out by the language used in the conclusion of law wherein comment is made concerning the "alleged" community character of the property. As we said in *Stark v. Coker*, 20 Cal.2d 839, 840, 843, 129 P.2d 390, 392, "While it is true that as a general rule a judgment is a bar as *res judicata* not only as to a subsequent action on the same matter actually determined, but also as to all issues that might have been litigated as incident to or essentially connected with the subject matter of the litigation and every matter coming within its legitimate purview, Code of Civ.Proc. §§ 1908, 1911; 15 Cal.Jur. 142, et seq., it is also true that that only is adjudged in a former judgment which appears upon its face to have been

adjudged or which was actually and necessarily included therein or necessary thereto. Code Civ.Proc. § 1911. *And when it affirmatively appears that an issue was not determined by the judgment, it obviously is not res judicata upon that issue. A judgment is not an adjudication as to matters which the court expressly refrains from determining.* *Watson v. Poore*, 18 Cal.2d 302, 115 P.2d 478; 15 Cal.Jur. 150." (Emphasis added.)

If we were not faced with the specific finding that no determination was made as to the character of the property the position taken in the majority opinion might be entitled to more credibility. The rule I have just set forth as stated in the *Slaker* case is recognized by the majority, but nevertheless, the conclusion is reached that since the decision of the trial court on the jurisdictional question was based upon a determination of the merits "of an issue before the court, it constitutes a binding determination of that issue." It seems to me to be inescapable that before the trial court could make a binding determination of the property issue based on the merits, it must, first, determine whether it had jurisdiction to make such determination, but it expressly held that it had no jurisdiction to determine such issue and refused to determine it.

It is my view that the majority opinion is clearly in conflict with the rule set forth in *Freeman on Judgments* (supra) and *Slaker v. McCormick-Saeltzer Co.*, supra, as well as *Stark v. Coker*, supra. The rule announced in the majority opinion extends the doctrine of *res judicata* beyond its intended scope in that a majority of this court there concludes, in the face of a clear statement by the trial court to the contrary, that an issue was finally determined so as to constitute a bar to a second action. The logical result of the conclusion reached by the majority is to deprive the plaintiff in such an action of his day in court.

I would affirm the judgments.

SHENK and SCHAUER, JJ., concur.

Rehearing denied; SHENK, CARTER and SCHAUER, JJ., dissenting.

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**T. C. LAUBISCH, Plaintiff, Cross-Defendant,
and Respondent,**
v.

**Mabel ROBERDO, Lily A. Cowan,
Defendants,**

**Jennie Wentworth, Defendant and Cross-
Complainant,**

**Lily A. Cowan, Appellant,
L. A. 22513.**

**Supreme Court of California.
In Bank.
Dec. 7, 1954.**

Action to quiet title to realty and for damages and rent. The Superior Court, Los Angeles County, Samuel R. Blake, J., rendered judgment adverse to defendant, and defendant appealed. The Supreme Court, Edmonds, J., held that where more than five years had elapsed between entry of judgment foreclosing mortgage lien and issuance of writ of enforcement for sale, purchaser at sale took no title.

Judgment reversed.

Prior opinion, 260 P.2d 1004.

1. Adverse Possession ⇨13

To establish title by adverse possession, claimant must show possession by actual occupancy under circumstances constituting reasonable notice to owner, possession hostile to owner's title, claim to property as his own, either under color of title or claim of right, continuous and uninterrupted possession for five years, and payment of all taxes levied and assessed during period.

2. Adverse Possession ⇨58

To be considered hostile, acts of possession relied upon must operate as an invasion of the rights of the party against whom they are asserted.

3. Mortgages ⇨143

A mortgagor or his grantee in possession of mortgaged property may not set up statute of limitations against mortgagee, since mortgagor's possession is presumed to be amicable and in subordination to the mortgage, even after foreclosure.

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4. Limitation of Actions ⇨44(4)

Statute of limitation does not commence running against a purchaser of land at a sheriff's sale until the sheriff's deed has been delivered.

5. Adverse Possession ⇨60(4)

Possession claimed by judgment debtor's grantee was not hostile to interests of judgment creditor nor adverse to purchaser at foreclosure sale until purchaser received commissioner's deed.

6. Adverse Possession ⇨48

That tenant of purchaser at foreclosure sale occupied premises for six months during period in which judgment debtor's grantee claimed adverse possession was a sufficient interruption of the running of the period to prevent acquisition of title by adverse possession.

7. Adverse Possession ⇨114(1)

In quiet title action by purchaser at foreclosure sale against grantee of judgment debtor, evidence supported finding that grantee had not acquired title by adverse possession.

8. Judgment ⇨768(1)

Statute providing that recordation of abstract of judgment with county recorder creates lien upon judgment debtor's property is intended to give judgment creditor immediate security for subsequent enforcement of judgment. Code Civ.Proc. § 674.

9. Mechanics' Liens ⇨298

Title of one who purchased at foreclosure sale following judgment foreclosing a mechanic's lien derived title from the mechanic's lien and the foreclosure sale made to enforce it rather than from statutory judgment lien, and title was not defeated by lapse of the judgment lien. Code Civ.Proc. § 674.

10. Mechanics' Liens ⇨246

Rules relating to civil actions generally apply to proceedings for foreclosure of mechanic's liens. Code Civ.Proc. §§ 681, 1201.1.

11. Mechanics' Liens ⇨1, 245(1)

A mechanic's lien is in the nature of a mortgage, and an action for its foreclosure

resembles a proceeding to foreclose a mortgage, and the same procedural and substantive principles are generally appropriate.

12. Mortgages ⇨499

Statute providing that judgment creditor may, within five years after entry of judgment, have writ of execution issued for enforcement, is applicable to a judgment in a foreclosure case. Code Civ.Proc. §§ 681, 1201.1.

13. Holidays ⇨1

Term "holiday" has reference to days set apart for worship, reverence to memory of great leader and benefactor, to rejoice over some great national or historical event, or to rekindle flame of an ideal.

See publication Words and Phrases, for other judicial constructions and definitions of "Holiday".

14. Time ⇨10(1)

April 14, 1945, which was date of funeral of President Franklin Roosevelt and which was made, by presidential proclamation, a day of mourning and prayer was a "holiday" within statute extending time for performance. Code Civ.Proc.1949, § 12a.

15. Time ⇨10(1)

Purpose of statute extending time for performance of required acts by number of intervening holidays was to give persons an extension of time equal to the number of intervening holidays which deprived them of access to public offices or institutions for the transaction of business. Code Civ.Proc.1949, § 12a.

16. Time ⇨10(1)

August 16, 1945, which by presidential proclamation was made a holiday only for purpose of allowing employers reimbursement of wages paid to employees who did not work on those days, was not a "holiday" within statute extending time. Code Civ.Proc.1949, § 12a. Executive Order No. 9600, 40 U.S.C.A. § 326 note.

17. Time ⇨10(1)

VJ Day, August 15, 1945, which had been proclaimed by acting governor to be a legal holiday in state of California and which was subsequently proclaimed a holi-

day by executive order of the President, was a "holiday" within statute extending time. Code Civ.Proc.1949, § 12a; Executive Order No. 9600, 40 U.S.C.A. § 326 note.

18. Time ⇨10(6)

Where period of computation ended on Sunday, but was extended by a number of intervening holidays so that last day of extended period was not Sunday, statute extending time when last day is Sunday did not operate to extend time within which execution on judgment foreclosing mechanic's lien could be made. Code Civ.Proc. 1949, § 12a.

19. Mortgages ⇨145

California has adopted the lien theory of mortgages.

20. Mortgages ⇨483

Judgment foreclosing mortgage need only determine the amount of the debt, the defendant who was personally liable therefor, and direct a sale of the mortgaged lands and an application of their proceeds to satisfy this amount.

21. Mortgages ⇨494, 586

Transfer of title is effected by sale under judgment, rather than by judgment itself, and a provision in judgment for foreclosure is meaningless and redundant.

22. Court Commissioners ⇨5

Sheriffs and Constables ⇨95

A sheriff, or a commissioner appointed by mortgage foreclosure decree bear no such relation to court that they must take notice of its orders and judgments and without process, execute and carry into effect those that require the aid of a ministerial officer.

23. Sheriffs and Constables ⇨98(1)

The general rule is that process is the authority of the sheriff.

24. Mortgages ⇨502

Formerly, under the Practice Act, the procedure in a foreclosure case was to provide the sheriff with a copy of judgment attested by the clerk.

25. Mortgages ⇨502

Formerly, under the Practice Act, the requirements of a mortgage foreclosure judgment were that it direct sale of the

mortgage premises, commit the duty of making the sale to the sheriff, and give general instructions as to the sale.

26. Mechanics' Liens ⇨292

Writ of enforcement, or order of sale, was necessary to give sheriff or appointed commissioner authority to execute judgment foreclosing mechanic's lien. Code Civ.Proc. §§ 682, 684, 685; Government Code, § 26829.

27. Execution ⇨75

At common law, although a judgment was valid for twenty years, execution could not regularly issue after a year and a day from its entry, and thereafter it had to be revived by a procedure known as scire facias.

28. Execution ⇨103

At common law, an execution issued after a year and a day without revival by a scire facias was voidable, but not void, and there could be no collateral attack even by the judgment debtor. Code Civ.Proc. §§ 681, 802.

29. Mortgages ⇨538

Where more than five years had elapsed between entry of judgment foreclosing mortgage lien and issuance of writ of enforcement for sale, purchaser at sale took no title. Code Civ.Proc. § 685.

Ernest W. Pitney, Los Angeles, for appellant.

Glen Behymer, Los Angeles, and Robt. E. Roskopf, Beverly Hills, for respondent.

EDMONDS, Justice.

T. C. Laubisch, the purchaser of certain real property at a sale held pursuant to a judgment foreclosing a mechanic's lien, sued to quiet his title and recover damages and rent. Only Lily A. Cowan has appealed from the judgment in his favor.

At the trial the parties stipulated as follows:

On January 27, 1941, a decree was entered ordering the sale of the property to satisfy a mechanic's lien. This decree directed that the sale be made by a named commissioner and its validity is not ques-

tioned. No further action was taken until January 16, 1946, when the judgment creditor directed the commissioner appointed in the decree of foreclosure to proceed with the sale. A writ of enforcement was issued on February 7th or 8th of that year, and on March 5th the property was sold to Laubisch. There was no redemption within one year and the commissioner's deed to Laubisch was recorded on March 7, 1947.

Before the foreclosure sale, Mabel Roberdo held the fee title to the property through a series of conveyances from the debtor in the foreclosure decree. After the present action was begun, she executed a deed to the property to Jennie Wentworth, who in turn conveyed her interest to Mrs. Cowan. All of these persons were made defendants in Laubisch's action to quiet his title to the property. As to Mabel Roberdo, the action was dismissed in open court. Jennie Wentworth did not appeal from the judgment against her.

By her answer, Mrs. Cowan denied that Laubisch was the owner of the property and admitted that she claimed an interest in it adversely to him. As affirmative defenses, she pleaded ownership of the property by adverse possession and that Laubisch's action is barred by laches.

The court found that the foreclosure sale, duly and regularly conducted under the writ of enforcement, was timely held, and that Laubisch has been the owner of the property since March 7, 1947. It also found that Mrs. Cowan has failed to establish the elements of ownership by adverse possession. A further finding was that neither Laubisch nor his predecessor in interest was guilty of laches.

Mrs. Cowan challenges the findings as to her lack of title by adverse possession and the regularity of the sale upon the ground that they are without evidentiary support. Furthermore, she asserts, Laubisch is barred by laches from claiming any interest in the property. Laubisch takes the position that the evidence supports the findings in all respects. In any event, he argues, Mrs. Cowan may not, under the pleadings in this suit, question the validity of the foreclosure sale.

[1] The record does not require a finding that Mrs. Cowan acquired ownership by adverse possession. To establish such title, the claimant must show: (1) his possession by actual occupation under such circumstances as to constitute reasonable notice to the owner; (2) his possession hostile to the owner's title; (3) his claim to the property as his own, either under color of title or claim of right; (4) his continuous and uninterrupted possession for five years; (5) the payment by him of all of the taxes levied and assessed upon the property during the period. "Unless each one of these elements is established by the evidence, the plaintiff has not acquired title by adverse possession." *West v. Evans*, 29 Cal.2d 414, 417, 175 P.2d 219, 220.

[2-4] In at least two respects Mrs. Cowan failed to establish title by adverse possession. To be considered hostile, the acts relied upon must operate as an invasion of the right of the party against whom they are asserted. *City of San Diego v. Cuyamaca Water Co.*, 209 Cal. 105, 133, 287 P. 475. The situation here is analogous to a mortgagor-mortgagee relationship. A mortgagor or his grantee in possession of mortgaged property may not set up the statute of limitations against the mortgagee; the possession of the mortgagor is presumed to be amicable and in subordination to the mortgage. *Comstock v. Finn*, 13 Cal.App. 2d 151, 157, 56 P.2d 957; *Baumgarten v. Mitchell*, 10 Cal.App. 48, 51, 101 P. 43. The bare fact of foreclosure does not alter the situation. *Knowlton v. Coye*, 76 N.D. 478, 484, 37 N.W.2d 343. Moreover, "[t]he statute of limitations does not commence running against a purchaser of land at a sheriff's sale until the sheriff's deed has been delivered". *Leonard v. Flynn*, 89 Cal. 535, 542, 26 P. 1097, 1098; *Jefferson v. Wendt*, 51 Cal. 573, 575; *Comstock v. Finn*, supra, 13 Cal.App.2d at page 157, 56 P.2d 957.

[5-7] Mrs. Cowan's possession was not hostile to the interests of the judgment creditor, who had only a lien upon the land, nor adverse to Laubisch until March, 1947, when he obtained the commissioner's deed. Furthermore, the evidence shows that one Hamilton occupied the premises, as a ten-

ant of Laubisch, from April until October, 1947, a sufficient interruption of the running of the five-year period commencing August, 1942, to prevent the acquisition of title by adverse possession. Mrs. Cowan also failed to prove that she paid the taxes for the necessary period. There is no evidence as to who paid the taxes for 1945, and it is stipulated that Laubisch paid them for 1947. In these circumstances it is clear that there is substantial evidence to support the trial court's determination that no title by adverse possession was acquired.

[8] Mrs. Cowan next urges that the sale to Laubisch was void because conducted more than five years from the entry of the decree of foreclosure. One ground relied upon is that the judgment constituted a lien upon the real property which expired five years from the date of entry. She maintains that the right to have the property sold was dependent upon the existence of a lien acquired pursuant to section 674 of the Code of Civil Procedure. Under that statute, upon recordation of an abstract of judgment with the county recorder, the judgment becomes a lien upon all real property of the judgment debtor, not exempt from execution, located within the county. Its purpose is to give the judgment creditor immediate security for the subsequent enforcement of the judgment. See *Menges v. Robinson*, 132 Cal.App. 647, 651, 23 P.2d 526. The lien continues "for five years from the date of the entry of the judgment or decree unless the enforcement of the judgment or decree is stayed on appeal."

[9] Laubisch's title, however, was not obtained by the enforcement of the statutory judgment lien; his rights are based upon a sale directed by the judgment itself, to enforce a lien of an entirely different origin. A similar situation existed in *Lone Jack Mining Co. v. Megginson*, 9 Cir., 82 F. 89, a case arising under California law. There the purchaser at a sale to foreclose a mortgage sued to quiet its title. The record showed that the sale was conducted more than five years from the entry of judgment, although an order of sale was obtained before that time. Claimants of the mortgagor contended that the sale was

void because of the expiration of the period provided for a judgment lien. The court said: "The lien which was enforced upon the foreclosure sale was not a statutory judgment lien, but was the contract lien of the mortgage * * *. The complainant's title rests upon the mortgage lien, and upon the foreclosure sale made in pursuance thereof, and the rights of the parties are those of the mortgagors and the mortgagee." 82 F. at page 93. Similarly, Laubisch's title does not stem from a judgment lien authorized by section 674, but rests upon the mechanic's lien and the foreclosure sale made to enforce it.

Another ground for asserting that the sale was void is that the writ of enforcement, pursuant to which the sale was made, was ineffectual to authorize the commissioner to transact the sale, having been issued more than five years after the entry of judgment in the foreclosure suit and without an order of the court made after notice and motion.

Section 681 of the Code of Civil Procedure provides: "The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement. If, after the entry of the judgment, the issuing of execution thereon is stayed or enjoined by any judgment or order of court, or by operation of law, the time during which it is so stayed or enjoined must be excluded from the computation of the five years within which execution may issue." Section 684 of that code provides that "when the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment * * *." The following section, in part, provides: "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the dis-

cretion of the court, be sufficient, shall be ground for the denial of the motion".

[10-12] The quoted sections of the Code of Civil Procedure are applicable to proceedings in an action to foreclose a mechanic's lien. Code Civ.Proc. sec. 1201. 1; *Withington v. Shay*, 47 Cal.App.2d 68, 73, 117 P.2d 415, 119 P.2d 1. Such a lien is in the nature of a mortgage and an action for its foreclosure resembles a proceeding to foreclose a mortgage; the same procedural and substantive principles are generally appropriate in both cases. *Curnow v. Happy Valley Blue Gravel & Hydraulic Co.*, 68 Cal 262, 264, 9 P. 149; *Ritter v. Stevenson*, 7 Cal. 388, 389; *Withington v. Shay*, supra, 47 Cal.App.2d at page 73, 117 P.2d 415, 119 P.2d 1. The limitation of time imposed by section 681 is applicable to a judgment in a foreclosure case, although the provision refers only to "the execution" of a judgment. *Wheeler v. Eldred*, 121 Cal. 28, 30, 53 P. 431; *Jacks v. Johnston*, 86 Cal. 384, 385, 24 P. 1057; *Dorland v. Hanson*, 81 Cal. 202, 204, 22 P. 552; see *Southern California Lumber Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 223, 29 P. 627.

Laubisch takes the position that the writ of enforcement was timely issued. Although he concedes that it issued more than five calendar years after the entry of judgment, he asserts that the statutory time was extended by intervening holidays. He relies upon section 12a of the Code of Civil Procedure which, at the time the writ was issued, provided: "As to any act provided or required by law to be performed within a specified period of time, such period of time is hereby extended * * * (b) By such number of days as equals the number of holidays (other than special holidays) appointed by the President or by the Governor and which occur within or during such period; * * *."

Judgment was entered on January 27, 1941. The writ of enforcement was issued on either the 7th or 8th of February, 1946, but the record shows that the parties accepted the later one as correct. This date is 12 days after the expiration of five years from the entry of judgment.

Courts take judicial notice of "[p]ublic and private official acts of the legislative, executive and judicial departments of this state and of the United States". Code Civ.Proc. § 1875, subd. 3. The parties concede that during the period in question there were nine holidays within the meaning of section 12a, subsection (b). The controversial dates are April 14, 1945, the day of the funeral of President Franklin Roosevelt, August 15, 1945, known as a "V-J Day", and August 16, 1945, also known as a "V-J Day".

[13] Section 6700, subd. (n), of the Government Code (formerly section 10 of the Political Code) now provides that holidays include "every day appointed by the President or Governor for a public fast, thanksgiving, or holiday". A holiday "has reference to a day set apart for worship, for reverence to the memory of a great leader and benefactor of humanity, to rejoice over some great national or historical event, or rekindle the flame of an ideal". *Vidal v. Backs*, 218 Cal. 99, 105, 21 P.2d 952, 955, 86 A.L.R. 1134.

[14] By presidential proclamation, April 14, 1945, was "a day of mourning and prayer". Although a strict construction of the Government Code would uphold the conclusion that the day was not a holiday, the common understanding of the word as stated in *Vidal v. Backs*, supra, is to the contrary.

[15, 16] The purpose of section 12a was to give to persons required by law to perform an act within a certain period an extension of time equal to the number of intervening holidays which deprived them of access to public offices or institutions for the transaction of business. But August 15th and 16th of 1945 were fixed as "holidays" only for the purpose of allowing employers reimbursement for the wages paid to employees who did not work on those days, and Executive Order 9600, 40 U.S.C.A. § 326 note, so providing was not issued until August 20th. Those days, therefore, cannot be considered as holidays within the meaning of section 12a.

[17] However, Acting Governor Houser, on August 14, 1945, proclaimed August 15th "to be a legal holiday in the State of California, in official commemoration of the surrender of Japan and the close of the terrible world wide struggle in which we have had a part." Accordingly, that date must be considered a holiday so as to extend the five-year period an additional day. With April 14, 1945, this holiday brings to 11 the total of holidays during the five-year period—one less than that required to support issuance of the writ of enforcement.

An additional day is claimed by Laubisch under subsection (a) of section 12a. That section extends the period of computation "if the last day of such period falls upon a holiday." Because January 27, 1946, the date when the five years originally would have elapsed, was a Sunday, he asserts that the period should be extended an additional day.

[18] The holidays referred to in subsection (b) had occurred prior to that date and caused the period to extend beyond it. See *Trujillo v. Trujillo*, 71 Cal.App.2d 257, 258-259, 162 P.2d 640. Thus, the last day of the period was not a Sunday, and this is true whether it be held that there were 9, 10, 11, or 12 holidays intervening. Insofar as *In re Estate of Harker*, 88 Cal. App.2d 6, 198 P.2d 51, announces a contrary rule, it is disapproved.

Even if the writ of enforcement was not timely issued Laubisch next contends, that defect does not render the sale void. One basis for this contention is the view that the writ is superfluous. As he reads section 684 of the Code of Civil Procedure, a writ of enforcement is not essential to carrying into effect a decree of foreclosure. Particularly is this true, he argues, when the commissioner named in the decree and directed to perform the sale in fact carries the sale into effect.

[19-21] In an ordinary action of foreclosure in California, which has adopted the lien theory of mortgages, see, *Sichler v. Look*, 93 Cal. 600, 610, 29 P. 220, 222, "the judgment need only determine the amount of the debt, the defendant who is

personally liable therefor, and direct a sale of the mortgaged lands, and an application of their proceeds to satisfy this amount." Blochman Commercial & Savings Bank v. F. G. Investment Co., 177 Cal. 762, 767, 171 P. 943; Sichler v. Look, supra, 93 Cal. at page 610, 29 P. 220, and see Code Civ. Proc. sec. 726. Under this system the term "foreclosure" has acquired a modern significance. "Instead of being effected by the judgment itself, [the transfer of title] is effected by the sale under the judgment; and therefore a provision in the judgment for the foreclosure becomes meaningless and redundant." Sichler v. Look, supra, 93 Cal. at page 611, 29 P. at page 222.

[22, 23] It is clear that in this state a judgment in the form shown by the present record will not support a sale of the specified property. "The Sheriff [or commissioner appointed by the decree] does not bear such a relation to the Court that he must take notice of its orders and judgments, and without process execute and carry into effect those that require the aid of a ministerial officer. The general rule is that process is the authority of the Sheriff, and no reason is given why in case of a decree of foreclosure * * * an exception should be found to the rule." Heyman v. Babcock, 30 Cal. 367, 369.

[24, 25] Formerly, under the Practice Act of this state, the procedure in a foreclosure case was to provide the sheriff with a copy of the judgment attested by the clerk. Newmark v. Chapman, 53 Cal. 557, 558-559; Heyman v. Babcock, supra, 30 Cal. at page 370. The requirements of such a judgment were that it direct a sale of the mortgaged premises, commit the duty of making the sale to the sheriff, and give general instructions as to the sale. See, Heyman v. Babcock, supra, at page 369. Process called an "order of sale", which included the essential provisions of the judgment, also was validly employed. Heyman v. Babcock, supra, at page 369, and see concurring opinions, at pages 370-371. In apparent recognition of both practices the clerk was authorized to collect a fee "[f]or issuing every copy of decree or or-

der of sale of mortgaged property." Stats. 1869-70, ch. 144.

In 1874, the Legislature changed the procedure. At that time section 684 of the Code of Civil Procedure was amended to provide that "when the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith." Newmark v. Chapman, supra, 53 Cal. at page 559. Despite the use of the permissive language "may," this court held that under the statute as amended, a writ of enforcement, or an order of sale as it is often denominated, Hager v. Astorg, 145 Cal. 548, 79 P. 68; 6 Bancroft's Code Practice and Remedies [1928] sec. 5061, p. 6625, is the only process which may be used for the enforcement of a judgment directing the sale of mortgaged property. Southern California Lumber Co. v. Ocean Beach Hotel Co., supra, 94 Cal. at page 220, 29 P. 627; Newmark v. Chapman, supra, 53 Cal. at pages 558-559; see Hager v. Astorg, supra, 145 Cal. at page 553, 79 P. 68.

[26] In Newmark v. Chapman, supra, "[t]he process under which the mortgaged property was sold was only a copy of the judgment issued and attested by the Clerk. It did not conform to secs. 682 and 684 of the Code of Civil Procedure, as it did not purport to have been issued in the name of the People, nor was it directed to the Sheriff, nor did it direct him to execute the judgment." 53 Cal. at page 558. The court noted that "[t]he judgment itself directed the Sheriff to do all that process, issued in the most formal and regular manner, could have directed him to do," at page 559, but held that a sale made without the authority of further process was erroneous, but not void. That conclusion was reaffirmed in Hager v. Astorg, supra. In 1907 the Legislature authorized the clerk to collect a fee "[f]or issuing an execution or order of sale in any action." Stats. 1907, ch. 282, p. 549. At the present time, the statute reads: "The fee for issuing an or-

der of sale is two dollars." Gov.Code, sec. 26829. Clearly, this enactment and section 684 of the Code of Civil Procedure set up the procedure which must be followed to enforce a judgment which requires the sale of specific property. Without a writ of enforcement or order of sale, whichever it may be called, the sheriff or appointed commissioner has no authority to execute the judgment.

The final question, which is decisive of the present controversy, concerns the effect of a sale conducted pursuant to a writ of enforcement issued more than five years after the entry of judgment, and without compliance with the procedure prescribed by section 685 of the Code of Civil Procedure. Mrs. Cowan's position is that the sale is void and confers no title. Laubisch argues that it is voidable only, subject to being set aside by the court upon motion or in a proceeding in equity timely instituted.

[27,28] At common law, although a judgment was valid for 20 years, execution could not regularly issue after a year and a day from its entry. (Freeman on Void Judicial Sales [4th ed.], § 24, p. 97.) Thereafter, it had to be revived by a procedure known as *scire facias*. An execution issued after a year and a day without revival by *scire facias* was voidable, but not void, and there could be no collateral attack even by the judgment debtor. (1 Freeman on Executions, supra, § 29, p. 104.) California abolished the writ of *scire facias* in 1872. Code Civ.Proc. sec. 802. A creditor is entitled to execution as a matter of right within five years from the entry of judgment. Code Civ.Proc. § 681. And until 1933 the court could make an order for the issuance of execution upon *ex parte* application without notice to the judgment debtor. Harrier v. Bassford, 145 Cal. 529, 532, 78 P. 1038.

In 1933, section 685 of the Code of Civil Procedure was amended to allow the issuance of execution after the expiration of five years from the entry of judgment "by leave of the court, upon motion, and after due notice to the judgment debtor".

"[T]he principal object of the new enactment was to place upon a creditor seeking to enforce a judgment more than five years after its entry, the burden of showing why he was not able to satisfy his claim within the statutory period during which he is entitled to an execution as a matter of right." Butcher v. Brouwer, 21 Cal.2d 354, 358, 132 P.2d 205, 206.

In *Da Arauje v. Rodriques*, 50 Cal.App. 2d 425, 123 P.2d 154, a suit to quiet title, the defendant had in a prior action recovered judgment against the plaintiff. More than five years after the entry of judgment, and without a motion having been made or any affidavit filed, a writ of execution was issued and the sheriff sold the property levied upon to the defendant. Thereafter, the plaintiff sued to quiet title. It was held that the procedure in this state is not a substitute for *scire facias* and, after the lapse of the five-year period, a sale is invalid if it is based upon a writ of execution obtained without leave of court upon notice and motion.

The ground of the *Da Arauje* decision is that the procedure now prescribed by section 685 allows the judgment debtor to defeat enforcement of the judgment by showing his creditor's lack of diligence in proceeding against him or some other equitable ground for denying the creditor relief. "It is reasonable to conclude," said the court, "that in requiring the giving of notice to the judgment debtor in all such cases the legislature intended to enact a jurisdictional requirement. * * * To hold that the requirement of notice is procedural but not jurisdictional would be to emasculate by judicial construction an amendment whose sole purpose is clear, that no judgment barred by limitation should be enforced against a judgment debtor without first giving him an opportunity to be heard." 50 Cal.App.2d 431, 123 P.2d 158. This conclusion was followed in *Castle v. Castle*, 71 Cal.App.2d 323, 324, 162 P.2d 656.

Laubisch seeks to draw a distinction between an invalid writ of enforcement and a defective writ of execution. Relying upon *Southern California Lumber Co. v.*

Ocean Beach Hotel Co., supra, 94 Cal. 217, 29 P. 627, 629, he argues that a writ of execution followed by a levy is necessary to authorize the sheriff to proceed against property of the judgment debtor when only a money judgment is involved. But a decree of foreclosure, it is said, affects the property itself, and the court has jurisdiction to enforce the decree when the property already has been taken into its custody.

The Southern California Lumber Co. case involved a sale to foreclose a mechanic's lien conducted within five years from the entry of the decree but after the return date of the writ of enforcement. The court analogized the situation to that where a levy has been made under a writ of execution and held the return date of the writ to be decisive of jurisdiction only as to the levy but not as to a sale. Otherwise stated, a sale made pursuant to a writ of enforcement after the return date of the writ has no jurisdictional defect. But it was recognized that the authority of the officer to conduct a sale is dependent upon an enforceable judgment, and "in making the sale, [he] is only executing the directions of the court." Whether the judgment be one for money or ordering the sale of property, it must be "enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor." Code Civ.Proc. § 685. The requirements of that section are jurisdictional, and a writ issued without compliance with it confers no authority upon the officer to conduct a sale.

[29] As the writ of enforcement upon which the purported sale made to Laubisch was not timely issued he obtained no title. This conclusion makes unnecessary the discussion of other contentions made by Mrs. Cowan.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

Ernest SHOEMAKE, Plaintiff and Appellant,
v.

Phyllis H. WILSEY and James L. Wilsey,
Defendants and Respondents.

Sac. 6483.

Supreme Court of California.
In Bank.

Dec. 3, 1954.

Action for personal injuries sustained when pedestrian was struck by automobile while in crosswalk of street into which automobile was making left turn at uncontrolled intersection. The Superior Court, Mendocino County, Lilburn Gibson, J., entered judgment for defendants, and plaintiff appealed. The Supreme Court, Schauer, J., held that evidence on issue of whether plaintiff, without exercising reasonable care for his own safety, had run in front of automobile and had been guilty of negligence proximately contributing to his injuries supported judgment for defendant.

Judgment affirmed.

Prior opinion, 266 P.2d 807.

1. Automobiles \S 244(50, 58)

In action to recover for injuries sustained when pedestrian was struck by automobile in crosswalk of street into which automobile was making left turn at uncontrolled intersection, evidence on issue of whether pedestrian, without exercising reasonable care for his own safety, ran in front of automobile and was guilty of negligence proximately contributing to his injuries supported judgment for defendant.

2. Automobiles \S 246(4, 31)

In action for personal injuries suffered when pedestrian was struck by automobile while in crosswalk of street into which automobile was making left turn, at uncontrolled intersection, instructions correctly stated duties imposed on pedestrian and driver. Rules on Appeal, rule 15.

Burke & Rawles and John E. Nelson,
Ukiah, for appellant.

Mannon & Brazier, Irving M. Brazier,
Ukiah, and Bronson, Bronson & McKinnon,
San Francisco, for respondents.

SCHAUER, Justice.

Plaintiff appeals from an adverse judgment in his action to recover for personal injuries resulting from an automobile accident. We have concluded that the jury were properly instructed, that the evidence sustains the verdict, and that the judgment should be affirmed.

While plaintiff as a pedestrian was attempting to cross State Street (a north-south thoroughfare), within a marked crosswalk,¹ from west to east at the intersection with Perkins Street in the city of Ukiah, he was struck by defendant husband's automobile then being driven by defendant wife. She had been traveling from east to west on Perkins Street and at the time of impact had turned left (south) into State Street. She had entered the intersection at a speed of approximately five miles an hour, and testified that she did not see plaintiff until she was so close she could not stop before hitting him. The intersection was not controlled by traffic lights or other mechanical device and was free of other traffic at the time.

Plaintiff urges error in instructing the jury on defendants' plea of contributory negligence, contending that there was no evidence of such negligence on plaintiff's part. However, defendant driver testified that when she was some five or six feet from the crosswalk she saw plaintiff, "and he was running across in front of me." The witness Shepard gave the following testimony:

"Q. Did you see the pedestrian? A. I did.

"Q. You saw him as he was hit? A. Yes.

"Q. Did you see him as he left the sidewalk? A. Yes.

"Q. What direction was he moving? A. East.

"Q. East. From the west side of State Street toward the east side of State Street, is that right? A. Yes.

"Q. Was he walking or running? A. As soon as he left the curb."

The same witness testified that he saw plaintiff "run from the sidewalk," that plaintiff "was at a run" when he stepped from the sidewalk, that he did not "see the pedestrian at any time walking in that crosswalk," that plaintiff "ran in front of" defendant's car, and that he ran "To the point where he was hit." Plaintiff himself testified that he saw defendant's car as he left the curb and "I had my eye on it then the rest of the time," that when he realized he was going to hit he "started to run" and had taken two or three running steps before being struck.

[1] It is apparent that the above substantially conflicting evidence is sufficient to support a finding by the jury that plaintiff, without exercising reasonable care for his own safety, ran in front of defendant's automobile and so was guilty of negligence proximately contributing to his injuries. Other evidence indicating that the witness Shepard may not have seen plaintiff as he left the sidewalk merely creates a conflict which was resolved by the jury in defendant's favor and cannot, upon any theory pertinent here, be considered on appeal. (See *Richter v. Walker* (1951), 36 Cal.2d 634, 640, 226 P.2d 593; *Pfingsten v. Westenhaver* (1952), 39 Cal.2d 12, 19, 244 P.2d 395; *Holmberg v. Marsden* (1952), 39 Cal.2d 592, 596, 248 P.2d 417; and *Thomas v. Hunt Mfg. Corp.* (1954), 42 Cal.2d 734, 736, 269 P.2d 12.) *Gray v. Brinkerhoff* (1953), 41 Cal.2d 180, 258 P.2d 834, is clearly not a comparable case. There all of the evidence, devoid of conflict either direct or inferential, was to the effect that the pedestrian entered the marked crosswalk at a time and under circumstances when the defendant's automobile presented no apparent hazard, and that she was crossing with the traffic lights and in a careful manner, whereas here, as stated, there was evidence that plaintiff ran in front of the automobile which was an immediate and perceivable hazard.

[2] Plaintiff also urges that "It is error for the Court to instruct the jury in a pedestrian case that a duty rests upon a pedestrian 'to exercise reasonable care at all times

1. We assume for purposes of decision that plaintiff, as testified by him, was attempting to cross within the crosswalk although there was evidence that shortly after

the accident he was observed lying in the street "approximately four, five feet, something like that" south of the crosswalk.

within a marked crosswalk and to continue to be alert to safeguard against injury' without the qualification to this instruction that the injury which must be anticipated must be something that is known to the pedestrian, or must be at least the lawful act of the other party and can not be an instruction to the effect that the pedestrian must anticipate negligence or unlawful acts on the part of another." Plaintiff does not, however, assert that any such instruction as that which he criticizes was actually given nor point out to us at what place in the record such an instruction, if given, might be found. See Rule 15, Rules on Appeal. We have, nevertheless, read the instructions as a whole and find that the law was fairly stated therein, with respect to the duties and obligations of both pedestrians and drivers.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the judgment of affirmance because it appears beyond question from the record that the issues of negligence and contributory negligence were issues of fact and their determination was within the province of the trier of fact. I can see no real factual distinction between this case and the case of *Gray v. Brinkerhoff*, 41 Cal.2d 180, 258 P.2d 834, where the majority of this court held that the issues of both negligence and contributory negligence were issues of law and reversed a judgment for defendant based upon a jury verdict. The attempt of the majority to show a factual distinction between this case and *Gray v. Brinkerhoff*, supra, is clearly misleading. The factual difference, if any, is clearly in favor of plaintiff here, because defendant testified that she saw the plaintiff at all times after she commenced making the turn from Perkins Street into State Street where her car struck plaintiff while he was in the crosswalk on State Street. In *Gray v. Brinkerhoff*, supra, defendant testified that he did not see plaintiff until after the impact because the traffic was heavy and a post obstructed his view.

It is quite obvious that the only justification for the attempt of the majority to distinguish the *Gray* case from the case at bar is that the majority does not see fit to decide the factual issues in this case as it did in the *Gray* case.

There can be no doubt that the majority decision in *Gray v. Brinkerhoff*, supra, has created considerable confusion in the law involving accidents at street intersections, as several decisions have already been rendered by District Courts of Appeal attempting to apply the rule of the *Gray* case, and in each of said cases this court has granted a hearing. See *Shoemaker v. Wilsey*, Cal.App., 266 P.2d 807. As pointed out in my dissenting opinion in *Gray v. Brinkerhoff*, 41 Cal.2d 180, 186, 258 P.2d 834, the only way to rationalize the majority decision in that case is that the majority of this court usurped the function of the trier of fact and determined the issues of fact contrary to the determination reached by the jury and trial court. Otherwise the judgment in that case as well as in the case at bar would have been affirmed.



43 Cal.2d 690

Richard A. PETERSON, Plaintiff and Respondent,
v.

Merritt David ROBISON, Jr., Defendant and Appellant.
S. F. 19061.

Supreme Court of California.
In Bank.
Dec. 3, 1954.

False imprisonment action predicated upon citizen's arrest. The Superior Court, County of San Mateo, Edward L. Kellas, J., entered judgment for plaintiff, and defendant appealed. The Supreme Court, Schauer, J., held that where owner of parked, unattended automobile, which had been damaged by automobile driven by plaintiff, was told to go to police station by officer who came to scene and police sergeant persuaded him to sign a citizen's ar-

rest form and to make a formal arrest of plaintiff upon plaintiff's arrival at station, owner was not liable even if imprisonment which followed his announcement that he arrested plaintiff was unlawful.

Judgment reversed.

Carter, J., dissented.

Prior opinion, 268 P.2d 96.

1. False Imprisonment ⇨7(4)

A private person does not become liable for false imprisonment when in good faith he gives information, even mistaken information, to the proper authority though such information may be the principal cause of plaintiff's imprisonment.

2. False Imprisonment ⇨7(1)

Imprisonment pursuant to a lawful arrest is not tortious. Penal Code, § 236.

3. False Imprisonment ⇨7(3)

A private person who assists in the making of an arrest pursuant to request or persuasion of a police officer is not liable for false imprisonment. Penal Code, § 236.

4. False Imprisonment ⇨31

In false imprisonment action by motorist, who crashed into unattended, parked vehicle and who was subsequently apprehended by police following notification by owner of parked vehicle, who went through formalities of a citizen's arrest when motorist was brought to police station, evidence was insufficient to establish a lawful citizen's arrest. Penal Code §§ 236, 837.

5. False Imprisonment ⇨7(3)

Where owner of parked, unattended automobile, which had been damaged by automobile driven by plaintiff, was told to go to police station by officer who came to scene and police sergeant persuaded him to sign a citizen's arrest form and to make a formal arrest of plaintiff upon plaintiff's arrival at station, owner was not liable even if imprisonment which followed his announcement that he arrested plaintiff was unlawful.

Roy W. Seagraves, Redwood City, for respondent.

SCHAUER, Justice.

This action for "wrongful arrest and imprisonment" was tried by the court without a jury. Plaintiff recovered judgment for \$900. Defendant moved for a new trial. The trial court ordered that the motion would be denied if plaintiff would consent to the reduction of the amount of the judgment to \$700. Plaintiff consented to such modification. From the judgment as modified defendant appeals. We have concluded that the evidence and the supportable findings fail to warrant the conclusion that plaintiff is entitled to any recovery from defendant and, hence, that the judgment should be reversed.

On Friday night, July 20, 1951, in the City of Burlingame, plaintiff, having shortly theretofore drunk four "old fashioned," moved his car from the position in which it was parked, crashed into the parked, unattended car of defendant, and knocked defendant's car onto the sidewalk with such force that it broke a parking meter. Plaintiff wrote his name, address, and telephone number (but not a statement of the ownership of his car, its license number or the circumstances of the incident, as required by section 483 of the California Vehicle Code) on a slip of paper, put the paper under the windshield wiper of defendant's car, and drove away. According to a witness who saw plaintiff just before and again just after plaintiff struck defendant's car, but who did not see the actual collision, plaintiff appeared intoxicated; plaintiff testified that he was not intoxicated but admitted that within approximately two hours before the crash he had drunk four "old fashioned" and, as to being accustomed to drinking, that "maybe a couple of times a week I will have drinks at home—a couple or three."

Shortly after the collision defendant and his wife returned to their car. A bystander handed defendant the paper on which plaintiff had written his name; the bystander had added the license number and make of plaintiff's car. Defendant, particularly because he noted the damage to city prop-

Cosgriff, Carr, McClellan & Ingersoll, Luther M. Carr, Albert J. Horn, Burlingame, for appellant.

erty, immediately reported the collision, and the broken parking meter, by telephone to the Burlingame police. Police Officer Watson at once came to the scene and radioed a further report of the matter to the police station.

Police Sergeant Todd, on duty at the station, acting on his own initiative, sent an "all points" radio bulletin describing plaintiff's car and asked that the driver be placed in custody. Pursuant to this radio bulletin plaintiff, who was weaving from one lane to another as he drove toward San Francisco, was apprehended, placed in custody, and brought to the police station. In the meantime, at Officer Watson's direction, defendant, with his wife, went to the police station. There Sergeant Todd asked defendant to sign a form requesting the help of the Burlingame Police Department in the making of a citizen's arrest, and said that to effect such an arrest defendant should put his hand on plaintiff's shoulder and say, "I arrest you in the name of the law." Defendant said to Sergeant Todd, "Why should I arrest this man? I have no malice toward him." Defendant's wife suggested, "perhaps we should call in our

lawyer." Sergeant Todd replied that he knew how to handle the matter. Defendant then signed the following form:

"Citizen's Arrest Form:

Date July 20 1951

Time 10:10 A.M.-P.M.

"At the above date and time I have requested assistance from the Burlingame Police Department, on a complaint committed in my presence on private property. I am making a citizen's arrest on the person of Richard Aubrey Peterson relationship None and am requesting the Police to assume custody and detention until such time as may be required by me to obtain a written and signed complaint.

"Officer R. J. Watson Star 5

"Signed M. D. Robison, Jr.

"Complainant"

As above related, South San Francisco police officers in a radio car, who had been alerted by the "all points" bulletin, had already arrested¹ plaintiff, i.e., they had observed his somewhat erratic driving, had ordered him to stop, and removed him from, and taken temporary possession of, his car. In the opinion of the arresting officers

1. Police Officer Bianchini of South San Francisco testified that he received the all-points bulletin from the Burlingame Police Department while he and Officer Johnston were driving on El Camino Real, that he observed the plaintiff's car and followed it; the "vehicle was weaving slightly from the slow to the fast lane, crossing the single white line, so I * * * turned on my red light and blew the siren"; that after plaintiff had stopped he talked with him; that "in my estimation, the man was drinking. He shouldn't have been driving a vehicle * * * So I told the gentleman he would have to come to the South San Francisco Police Station, and he walked over to the police car with me, and I informed Officer Johnston to drive this gentleman's vehicle back to the Police Station, which he did * * * We booked the gentleman—started booking the gentleman, put out a cancellation—we informed the station * * * we had picked up the vehicle, had taken this gentleman into custody, were taking him to the South San Francisco Police Department, and for them to notify the Burlingame Police Department to pick up the man there, which they did; * * * it was approx-

imately 9:43 P.M. when the man was placed under arrest. And I was booking him and Officer Watson of the Burlingame Police Department walked in * * * Then I had Officer Watson sign off our arrest log and turned him over to Officer Watson, and the vehicle was impounded at Simmon's Garage in South San Francisco * * * Q. Was he placed under arrest by you or Officer Johnston? A. We notified him—any time a man is detained he is automatically under arrest, by a police officer. Q. Was he in your custody continuously from the time you stopped his automobile on El Camino Real until he was turned over to Officer Watson? A. That's right, sir."

Officer Johnston testified, "We placed him [Peterson] under arrest for the Burlingame Police Department * * * We told him that we would take him—place him under arrest for the Burlingame Police Department * * * He had a strong odor of alcohol on his breath * * * He was unsteady on his feet * * * [His speech] was slightly slurred * * * [I formed the opinion] that he was under the influence of intoxicating liquors."

plaintiff was under the influence of intoxicating liquor. The officers informed him that he was under arrest and would have to "come over to the South San Francisco Police Station." One of the South San Francisco officers drove plaintiff to the South San Francisco police station in the radio car while the other officer drove plaintiff's car. Although the South San Francisco police were of the opinion that plaintiff had been driving while under the influence of intoxicating liquor in violation of section 502 of the Vehicle Code, they did not file any charge against him; they held him "En route to Burlingame, 481 C.V.C.,"² and radioed to the Burlingame police that they had plaintiff in custody.

Officer Watson of the Burlingame police picked up plaintiff at the South San Francisco police station and brought him to the Burlingame police station. There is evidence that plaintiff at this time appeared to be under the influence of liquor. Defendant, pursuant to Sergeant Todd's direction, placed his hand upon plaintiff's shoulder and said, "I arrest you in the name of the law." Defendant testified that he did this "Only at the suggestion of the authorities" and that he did not know "specifically" for what he arrested plaintiff. Sergeant Todd then told defendant, "Now, from here on we'll handle everything. * * * You just go on home," and defendant and his wife left the police station.

Each of the Burlingame police officers testified that he did not personally "arrest" plaintiff for violation of Burlingame City Ordinance 1279;³ Sergeant Todd testified that there was a "dual charge" against

Peterson; that "the 481 C.V.C. has to do with Mr. Robison's case"; that "He [Peterson] is charged with two charges—in and about, and 481. We take care of the in and about, and he is taking care of the 481," and that "The Burlingame Police Department" made the arrest "for the 1279." Sergeant Todd ordered plaintiff booked and jailed. The records of the Burlingame Police Department state, under the heading "Charge," that plaintiff was held for violation of "Sec. 1279, in and about" and "481, C.V.C." Actually, no pleading charging crime was filed against plaintiff. There was a standing rule of the Burlingame Police Department, originally promulgated by the chief of police, that intoxicated persons were not bailable and were not to be released "until they sober up." Sergeant Todd testified that if defendant had not made the citizen's arrest of plaintiff, plaintiff nevertheless would have been held in jail; "We would have jailed him with 1279, in and about a car. * * * He would have been placed in custody for being intoxicated, until he straightened out, and then he would have been admitted to bail."

Plaintiff was placed in a jail cell at about 10:30 p.m. on Friday. At about midnight Sergeant Todd saw that plaintiff was "coming out of it" and "asked him if he would like to be admitted to bail";⁴ plaintiff replied that "He didn't want to be admitted to bail." On Saturday morning at about 8:30 plaintiff's wife came to the jail with the required bail (\$150) and plaintiff was released.

Plaintiff was asked "to appear before the Police Judge" on Tuesday morning.

2. Section 481, which concerns the duties of the driver of a vehicle involved in an accident which results only in property damage, does not apply where such driver collides with an unattended vehicle. The requirements of section 483, which prescribes the duties of one who strikes an unattended vehicle, had not been met by plaintiff; that section provides that such driver shall "either locate and notify the operator or owner of such vehicle of the name and address of the driver and owner of the vehicle striking the unattended vehicle or shall leave in a conspicuous place in the vehicle struck a

written notice giving the name and address of the driver and of the owner of the vehicle doing the striking and a statement of the circumstances thereof and shall within twenty-four hours forward a similar notice to the police department * * *."

3. Burlingame City Ordinance 1279 provides for the punishment of persons drunk in a public place and drunk in and about an automobile.

4. The police judge had furnished the police department with a list showing bail customarily required for traffic violations.

On that morning defendant spoke with the police judge in chambers and refused to sign a complaint against plaintiff. Plaintiff then spoke with the police judge in chambers and his bail was exonerated. No warrant was ever issued and no complaint against plaintiff was ever signed in connection with the matter.

[1] No liability can be predicated merely on defendant's reporting to the police facts concerning the damaging of his car and the city's parking meter. A private person does not become liable for false imprisonment when in good faith he gives information—even mistaken information—to the proper authorities though such information may be the principal cause of

plaintiff's imprisonment. (Miller v. Fano (1901), 134 Cal. 103, 106, 66 P. 183; Gogue v. MacDonald (1950), 35 Cal.2d 482, 487, 218 P.2d 542, 21 A.L.R.2d 639; Hughes v. Oreb (1951), 36 Cal.2d 854, 859, 228 P.2d 550; Turner v. Mellon (1953), 41 Cal.2d 45, 48, 257 P.2d 15; Walton v. Will (1944), 66 Cal.App.2d 509, 514, 152 P.2d 639.) Defendant relies upon cases which announce this rule and it seems obvious that up to the time plaintiff was brought to the police station in Burlingame that rule would protect defendant. However, it is undisputed that subsequent to that time defendant did more than merely stand on the facts which he had reported to the authorities.⁵ After having reported the

5. Sergeant Todd testified that after plaintiff had been taken in custody by the South San Francisco police in response to the all-points bulletin and after defendant and his wife had arrived at the Burlingame police station in response to Officer Watson's direction, he (Todd) "asked them [defendant and his wife] what was their pleasure in the matter. And they told me they would like to have the man placed in custody * * * Well, maybe it wasn't quite in that light. I told them that we had the man—it would help us if the man was placed in custody * * * I mean, if they would place the charges * * * I explained the fundamentals of the citizen's arrest * * * They asked me if they should get in touch with Mr. Carr [defendant's attorney, and I told them I didn't think we would have to bother him with that at this hour of the night * * * Q. And did you ask them to sign—Mr. Robison to sign this paper [the citizen's arrest form]? He didn't ask for a citizen's arrest form, did he? A. No. Q. Did you hand this to him and ask him to sign it? A. This is Officer Watson's handwriting here (indicating). And that's my pen they used * * * Q. * * * Well then, who asked Mr. Robison to sign it? You or Officer Watson? A. I did the talking. Q. And did you ask him to sign it? A. I did. Q. And did you advise * * * Mr. Robison * * * how to make a citizen's arrest? A. Yes, sir. Q. What did you tell him? A. I told him that he'd have to make the manual arrest * * * I described it to him, and that's what he did when Mr. Peterson came into the Police Station." Sergeant Todd further testified that when Officer Watson brought Peterson into the

station the latter was taken to a part of the station not open to the public and that he, Todd, opened the door so that "Mr. Robison could come in and go through the formalities of the citizen's arrest."

Sergeant Todd was also asked concerning his opinion of plaintiff's condition as to intoxication at the time he was brought into the station. The following appears: "Q. I am just asking if you formed an opinion, based on his [plaintiff's] behavior and appearance, as to whether he was under the influence of intoxicating liquor. A. I have. Q. And what was that opinion? A. That he was intoxicated * * * Q. What * * * were your instructions * * * that were in effect at that time, from the Chief of Police, with reference to releasing an intoxicated person? A. Not to do so until they sober up. Q. And what did you customarily and normally do with them while they were sobering up? A. We put them in the cell-block. Q. And did you put Mr. Peterson in a cell-block? * * * Mr. Seagraves [counsel for plaintiff]: * * * We will stipulate he did * * * Mr. Carr [counsel for defendant]: * * * Did Mr. Robison at any time ask you orally to put Mr. Peterson in jail? A. No. Q. And what was your reason, or the basis on which you put Mr. Peterson in jail? A. Because he was not admissible to bail at that time. Q. Because he was intoxicated, as you testified? A. That's right, sir * * * The Court: * * * Q. Would you have placed this Mr. Peterson under restraint had Mr. Robison not signed this so-called citizen's arrest form? A. Yes, we would have. Q. Would you have placed him under the same restraint had he not made the physical arrest?

facts he stated to plaintiff that he arrested plaintiff (although, as above related, the latter was already in actual custody) and he signed a form by which he requested the police "to assume custody and detention" of plaintiff. Therefore, we treat the matter as not controlled by the stated rule.

[2] False imprisonment is defined by statute as "the unlawful violation of the personal liberty of another." (Penal Code, § 236.) Imprisonment pursuant to a lawful arrest is not tortious. (*Dillon v. Haskell* (1947), 78 Cal.App.2d 814, 816, 178 P.2d 462.) Defendant urges that the citizen's arrest of plaintiff in the Burlingame police station was lawful because within the provision of section 837 of the Penal Code that a private person may arrest another for a public offense committed in his presence. In the state of the record we cannot accept defendant's assumption that as a matter of law it was established that plaintiff was committing a public offense at the time defendant went through the procedure of announcing the citizen's arrest under the direction of Sergeant Todd.

Defendant asserts, "This arrest was lawful because the plaintiff Peterson was committing a misdemeanor in the presence of the defendant in that he was intoxicated in a public place." While the testimony of the officers that plaintiff was intoxicated when he arrived at the station, together with plaintiff's admissions, appears most persuasive on the record, this court cannot hold that plaintiff's intoxication was established as a matter of law, for the testimony that he was intoxicated, together with the effect of his admissions, is contradicted by the testimony of plaintiff himself that in his opinion he was not intoxicated. Nor can this court say that it is established that plaintiff was voluntarily "in a public place," the police station,

in view of the evidence that plaintiff was brought there by and in the custody of Officer Watson after the South San Francisco police had arrested him and turned him over to Watson.

[3, 4] Although we cannot accept defendant's contention that the evidence establishes a lawful citizen's arrest, we must accept his further contention that the uncontradicted evidence shows that all defendant's actions in connection with the citizen's arrest of plaintiff were done, not of defendant's own initiative, but at the request and pursuant to the direction of Sergeant Todd. A private citizen who assists in the making of an arrest pursuant to the request or persuasion of a police officer is not liable for false imprisonment. (*Mackie v. Ambassador Hotel etc. Corp.* (1932), 123 Cal.App. 215, 222, 11 P.2d 3; see 29 A.L.R.2d 825.) It would be manifestly unfair to impose civil liability upon the private person for doing that which the law declares it a misdemeanor for him to refuse to do. (See Pen.Code, § 150 [misdemeanor for man over 18 to refuse officer's lawful request for aid in arrest]; see also *id.*, § 839.)

[5] Defendant found his car and the parking meter damaged by plaintiff; the officer who came to the scene told defendant to go to the police station; when defendant reached the station Sergeant Todd requested him to sign the citizen's arrest form and to make a formal arrest of plaintiff upon plaintiff's arrival at the station; and when defendant expressed reluctance to himself arrest plaintiff Sergeant Todd persuaded defendant to do so by assuring him that that was the proper way in which to handle the matter. In these circumstances defendant is not liable even if it be assumed that the imprisonment which followed his announcement that he arrested plaintiff was unlawful.

A. No, it would have been a different charge. We would have charged him with 1279, in and about a car. Q. Would you have * * * locked him up had Mr. Robison not gone through what you have described as the manual arrest? A. Oh, yes, sir. Yes, sir. He would have been

placed in custody for being intoxicated, until he straightened out, and then he would be admitted to bail. Q. What was the purpose of your requesting Mr. Robison to sign the slip, then? A. So that we would have a 481 C.V.C. Hit-and-run is more than drunk in and about a car."

For the reasons above stated the judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The majority opinion is based upon several false assumptions as well as misstatements of both fact and law.

It appears to be conceded that the arrest of plaintiff, insofar as it was brought about by the acts and conduct of defendant, was unlawful. This must be conceded because an arrest can be made by a private person only,

"1. For a public offense committed or attempted in his presence.

"2. When the person arrested has committed a felony, although not in his presence.

"3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it." (Pen.Code, § 837.)

The majority concedes that there was no basis for the arrest under any of the above provisions. But the majority seeks to justify the arrest on the ground "* * * that all defendant's actions in connection with the citizen's arrest of plaintiff were done, not of defendant's own initiative, but at the request and pursuant to the direction of Sergeant Todd." The majority opinion then states "It would be manifestly unfair to impose civil liability upon the private person for doing that which the law declares it a misdemeanor for him to refuse to do." (Citing Pen.Code, § 150 * which makes it a misdemeanor for a man over 18 years of age to refuse an officer's *lawful* request for aid in making an arrest.) The foregoing reasoning is so basically unsound that I have difficulty

in believing that it would be accepted by any court as a basis for its decision.

Can it be said with any semblance of truth or fairness that when the defendant signed the document entitled "Citizen's Arrest Form" and placed his hand upon plaintiff's shoulder and stated, "I arrest you in the name of the law," he was assisting an officer in making an arrest? The answer to this question is obvious, and is found in the positive declarations to the contrary in the majority opinion. The majority states the undisputed facts to be that plaintiff was first arrested by the South San Francisco police who held him in custody for the Burlingame police and delivered him to the Burlingame police who escorted him to the police station at Burlingame where he was detained in custody by the Burlingame police at the time defendant first saw him. In other words, defendant had nothing whatever to do with the arrest and detention of plaintiff up to that time except to report the information he received after returning to where his automobile had been damaged. For this court to attempt to apply the provisions of section 150 of the Penal Code to a situation of this character, and state, that if defendant had not complied with the request of the police to make a citizen's arrest, he would have been guilty of a misdemeanor, is a rank distortion of the English language. From the plain wording of section 150 of the Penal Code the duty thereby imposed upon a citizen is to assist an officer in making a lawful arrest, when the officer so requests, and keeping the arrested person in custody. Here, plaintiff had already been arrested and was in custody. Whether the original arrest and custody were lawful at the time defendant purportedly made the unlawful citizen's arrest is not an issue here. By no fair or reasonable interpretation of section 150 of the Penal Code can it be said that it was defendant's duty to make an unlawful ar-

* "Every male person above 18 years of age who neglects or refuses to join the posse comitatus or power of the county, by neglecting or refusing to aid and assist in taking or arresting any person against whom there may be issued any process * * * being thereto lawfully

required by any sheriff, deputy sheriff, coroner, constable, judge, or other officer concerned in the administration of justice, is punishable by fine of not less than fifty dollars (\$50) nor more than one thousand dollars (\$1,000)." (Pen. Code, § 150.)

rest at the request of an officer, especially where the person he was requested to arrest had already been arrested and was in custody.

The majority opinion is written under the false assumption that plaintiff was intoxicated at the time his car collided with that of defendant and at all times thereafter until the Burlingame police offered to release him sometime after midnight on the night of the arrest. I say this is a false assumption because the issue of intoxication was not raised until the day of the trial when defendant raised it by an amendment to his answer. Plaintiff denied that he was intoxicated and the trial court stated that if the issue of intoxication was to be considered, it would grant a continuance of the trial to give plaintiff an opportunity to meet the issue. No such continuance was granted and no finding on the issue was made. Although the majority opinion is replete with discussion on the alleged issue of intoxication, it holds that the issue was not determined by the trial court and cannot be determined by this court because of the conflict in the evidence.

The trial court found that *defendant* unlawfully and against his will *arrested* plaintiff; that the arrest *by defendant* was wrongful and without probable cause. Implicit in these findings is a finding that defendant made the arrest; that he was not assisting the officers to make the arrest nor had he been ordered by them to assist. Thus there is no basis for the majority's assumption that defendant was assisting an officer in an arrest pursuant to section 150 of the Penal Code, *supra*, and hence not liable. The evidence supports that finding. Plaintiff was already in the custody of the police and at the police station. They needed no assistance to make an arrest. The statement signed by defendant said he made the arrest and requested the police assistance. Rather than defendant assisting the police, the police *asked defendant to sign a request that the police assist him* in making a citizen's arrest and told defendant how to proceed. The police testified that none of them made the arrest. True, defendant testified he made the arrest only at the suggestion of the author-

ities but that merely created a conflict in the evidence on the question. The trial court resolved that conflict against defendant and this court is bound by it. A volunteer who does not act on the order of an officer in making an arrest is not relieved of liability. *Kirbie v. The State*, 5 Tex. App. 60. It has been said: "Private persons who volunteer to assist officers of the law in the execution of process, without being commanded or requested to do so, and those who act 'officially' in such matters, must do so at their peril; and they are bound to take care that the authority of the officer is sufficient and his precept regular. Such persons put their conduct upon their own judgment, and if that deceives them they are responsible for their acts and liable as trespassers." (*Newell on Malicious Prosecution*, Ch. IV, § 88.) Under facts far weaker than here present a person was held not to have been acting under section 150 of the Penal Code. *City of Long Beach v. Industrial Acc. Comm.*, 4 Cal.2d 624, 51 P.2d 1089.

It is clear that the trial court was justified in concluding that there was no assistance in an arrest; that defendant was not ordered to assist in an arrest; that there was no occasion for assistance in view of plaintiff being in custody at the police station. At most the police were merely suggesting that defendant make the arrest on his own responsibility probably for the reason that he had initiated the endeavor to apprehend plaintiff and the officers knowing they had no basis for an arrest without a warrant did not want to accept the responsibility.

This is another case where the majority of this court has, by specious reasoning and a disregard of settled rules of law, deprived a citizen of redress for an unlawful and unjustified infringement of his right to the enjoyment of life, liberty and the pursuit of happiness guaranteed by the Constitution and laws of this state. Again I say, that by the decision of the majority here, "The dignity and security of the individual citizen is subordinated to the whim and caprice of any fanatical, overzealous person who chooses to point a finger of suspicion at him and thereby cause his

arrest and imprisonment without written charge, complaint or warrant of arrest." See dissenting opinion, *Turner v. Mellon*, 41 Cal.2d 45, 49, 50, 257 P.2d 15, 18.

It has been the settled law of this state from time immemorial that when a citizen's arrest is made, the burden is on the person making the arrest to show justification therefor. *Sebring v. Harris*, 20 Cal.App. 56, 128 P. 7. Here it is conceded that the arrest was unlawful. This concession renders the defendant liable for all damages suffered by plaintiff as a proximate result of the arrest. This always has been and should continue to be the law of this state if we are to continue to maintain our American way of life.

I would affirm the judgment.



Norman O. HOUGE, Plaintiff and Respondent,

v.

Patrick H. FORD, Helen Smith, Individually and as Trustee of the Estate of Carl Hugo Johanson, deceased, Defendants.*

Patrick H. Ford, Appellant.
Civ. 20460.

District Court of Appeal, Second District,
Division 1, California.

Nov. 29, 1954.

Rehearing Denied Dec. 23, 1954.

Hearing Granted Jan. 26, 1955.

Suit for declaratory relief. The Superior Court, Los Angeles County, Philbrick McCoy, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Mosk, J. pro tem., held that attorney who had contract to collect or protect client's interest in estate and had obtained judgment awarding client an interest in trust was obliged under the circumstances, to accede to client's wishes and proceed against trustee to obtain a larger

distribution, and his failure to do so terminated his rights under the contract.

Judgment affirmed.

1. Attorney and Client ⚡147

A contingent fee contract is not ipso facto inequitable or oppressive.

2. Trial ⚡398

Comments of a court, either orally from bench or in a written memorandum, do not preclude making and signing of contrary or conflicting findings of fact and conclusions of law.

3. Attorney and Client ⚡106

Relationship between attorney and client is one of strict fiduciary and confidential nature.

4. Attorney and Client ⚡123(2)

Assignment from client to attorney was presumed to have been entered into without sufficient consideration, and attorney had burden of proof to overcome presumption. Civ.Code, §§ 1614, 2235.

5. Attorney and Client ⚡134(1)

An attorney is under no obligation to undertake litigation which is devoid of merit, and his refusal to do so does not justify arbitrary divestment of his contractual rights with client without cause.

6. Attorney and Client ⚡108

Client always has right to control objectives to be attained.

7. Attorney and Client ⚡149

Attorney who had contingent fee contract to collect or protect client's interest in estate and had obtained judgment awarding client an interest in trust was obliged, under the circumstances, to accede to client's wishes and proceed against trustee to obtain a larger distribution, and his failure to do so terminated his rights under the contract.

MacBeth & Ford, Norman MacBeth, Los Angeles, for appellant.

Harry A. Daugherty, Lyman A. Garber, Beverly Hills, for respondent.

* Opinion vacated 285 P.2d 257.

MOSK, Justice pro tem.

Appellant, an attorney, seeks reversal of an adverse judgment in a declaratory relief action brought against him in the court below by his client. There is little dispute concerning the facts, but the conclusions flowing therefrom present the problem at issue. For purpose of convenience, we shall generally refer to the parties as the client and the attorney.

On February 6, 1941, the client retained the attorney on a contingent fee basis for the purpose of "Drawing contracts and taking other necessary legal steps to protect or collect legacy of client under estate of Carl Hugo Johanson now pending in L. A. Superior Court". The written contract executed on that date provided for a fee of 40 percent "of the amount recovered, preserved or protected by the legal services rendered" and gave the attorney a lien upon all of the client's papers in his possession and "upon any judgment obtained or to be obtained in this matter" as security for the fee.

A period of nine years passed before any tangible result was achieved, but during that period the attorney faithfully performed negotiations and properly exerted all necessary effort on behalf of the client. He conducted a one-day trial, and although the trial court indicated an unfavorable conclusion from the bench, the attorney was able to prevail ultimately and to have his proposed findings and judgment signed. An appeal from that judgment was taken but dismissed. The attorney thus obtained a final distribution of the estate, in which his client obtained both the right to participate as a beneficiary in the income of a testamentary trust which owned certain glove patents and approximately 51 percent of the stock of the Panama Glove Co., a corporation, and a 79% remainder interest in the stock of the Panama Glove Co. on termination of the trust. The trust was to terminate on the death of the sole surviving trustee, one Helen Smith. A stipulation leading to the closing of the estate was dated March 6, 1950.

On that date at the request of the attorney the client executed an assignment, which recited that "For value received, pur-

suant to written contract dated February 6, 1941, the undersigned, Norman O. Houge, hereby assigns, sets over, and transfers to Patrick H. Ford, forty (40) percent of all his right, title, and interest in and to the corpus and beneficial right in the trust created by the Will of Carl Johanson (L.A. Superior Court, Probate No. 191032) of which Helen Smith is now the trustee."

Somewhat over \$1,000 has been received by the attorney in fees to date. The client became dissatisfied with the sums distributed to him, and attempted to persuade the attorney to take legal action to compel the trustee to increase the income of the beneficiaries of the trust. It was alleged that the trustee, Miss Smith, controlled the Panama Glove Company and had taken no action to cause it to declare any dividends, which, had they been issued, would have come into the trust estate. For some two years, the client urged the attorney to seek an accounting from Miss Smith and, if necessary, to petition for her removal as trustee. The attorney, on the other hand, was reluctant to take such action, contending the proceeding would be unmeritorious because it would seriously diminish the small income being produced by the trust if the trustee used trust income to defend her actions. Ultimately the client insisted the attorney was obligated under their contractual relationship to proceed as he directed, but the attorney maintained then, and still does, that the legacy was fully vested by the decree of final distribution, that the contract of 1941 was therefore fully performed, and that he had no further responsibility or duty to the client. The client brought a declaratory relief suit, and prevailed in the court below. This appeal by the attorney followed.

Appellant has been unreservedly critical of the trial court's views, expressed in its memorandum opinion, concerning the contingent fee contract. The court unfortunately did comment that here the attorney "might conceivably receive an amount far in excess of the value of the services actually rendered".

Measured strictly by standard professional rates, many successful contingency cases result in higher than normal legal fees.

But that is not a fair test of the propriety of compensation where payment, if any, is dependent upon success. The attorney, under such a contract, may devote years of dedicated personal service, and receive nothing. He may also be underpaid, or he may be fortunate enough to be overpaid. Such uncertainty is implicit in a contingent fee contract, but it does not render the contract necessarily suspect or unfair. On the contrary, the existence of this recognized form of contract, which many lawyers use in appropriate types of cases, frequently enables a client to obtain competent legal representation although unable or unwilling to pay a cash retainer.

[1] We cannot hold that merely because this was a contingent fee contract it was inequitable or oppressive. The issue is not the validity of the original contract, which we do not question, but performance under the contract.

[2] The appellant next attacks the finding of the trial court that the assignment was invalid for failure of consideration and points out an inconsistency in a memorandum opinion in which the trial judge referred to only a partial failure of consideration. However, the law is clear that comments of a court, either orally from the bench or in a written memorandum, do not preclude the making and signing of contrary or conflicting findings of fact and conclusions of law. *Fisk v. Casey*, 119 Cal. 643, 645, 51 P. 1077; *Magarian v. Moser*, 5 Cal. App.2d 208, 210, 42 P.2d 385. " * * * it is settled", said the court in *Lord v. Katz*, 54 Cal.App.2d 363, at page 367, 128 P.2d 907, at page 909, "that inconsistencies between the written opinion of a trial judge or his antecedent expressions and the findings of fact cannot be considered by an appellate court."

[3,4] Whether the assignment fails for want of consideration is a difficult problem. Ordinarily a written instrument is presumptive evidence of a consideration, Civ.Code, § 1614. But the relationship between attorney and client is one of strict fiduciary and confidential nature, *Bradner v. Vasquez*, 43 Cal.2d 147, 272 P.2d 11, and therefore the transaction is presumed to be entered into

without sufficient consideration. Civ.Code, § 2235. The burden of proof rests upon the attorney to overcome the presumption that there was no consideration for the assignment. *Lady v. Worthingham*, 57 Cal.App. 2d 557, 561, 135 P.2d 205. We do not believe the burden was met here, but whether it was or not is not determinative of the fundamental issue involved.

The assignment and the original contract cannot be divorced or considered independently. Although executed at an interval of nine years, they are clearly an integral part of one transaction, and so recognized by both parties. The instrument itself states it is executed "pursuant to written contract dated February 6, 1941". And the attorney, when testifying on his own behalf in the trial, stated the client "was merely doing what he had agreed to do in the 1941 contract", and again, "I do not claim I was entering into any different contract. He was merely doing an act which he was required to do by the February 6, 1941 contract which is recited right in the assignment."

The basic question with which we are here concerned, then, is not the validity of the assignment, which is merely a means of paying to or collecting by the attorney of that which may become due him under the contract, but of ascertaining and defining the rights of the parties under the contract. If the contract continues to be effective, then the assignment is valid; if the contract falls, the assignment will collapse with it.

As hereinabove indicated, the contract related the attorney was engaged "to protect or collect legacy", and this was done, insists the attorney, when the decree of distribution was signed. The client's interest was then protected against forfeiture. On the other hand, the trial judge held that under the terms of the contract the legacy was not collected by the decree of distribution, that the attorney had a continuing duty to collect the annual income, and that he failed to satisfy that responsibility. We agree with the court's determination.

The fact that the words "protect or collect" are used in the disjunctive is not conclusive. There are many cases in which the word "or" is read as "and" when necessary

to achieve an intelligible meaning. *Arnold v. Hopkins*, 203 Cal. 553, 563, 265 P. 223; *Abbey v. Board of Directors*, 58 Cal.App. 757, 209 P. 709; *Heidlebaugh v. Miller*, 126 Cal.App.2d 35, 271 P.2d 557.

While the client may have been concerned with possible forfeiture of his interest in the estate, certainly it may not be said that he sought moral or legal vindication in the form of a court decree. He wanted financial return, and was willing to yield 40 percent of it in the form of attorney's fees. It was the collection of money from the estate that was the ultimate conclusion desired, and it was this duty of collection that devolved upon the attorney.

If the attorney's work were considered to be complete upon signing of the decree of distribution, and if further proceedings were essential in order to translate the decree into tangible return in the hands of the client, the attorney's theory here would compel the client to be indebted to him for 40 percent and then engage him or other counsel at a cost of additional fees out of the remaining 60 percent. Such a result would be clearly inequitable. *Dalzell v. State Bar*, 6 Cal.2d 433, 57 P.2d 1300.

[5, 6] Appellant maintains the action demanded of him by the client was unmeritorious. Certainly, an attorney is under no obligation to undertake litigation which is devoid of merit. If he refuses to do so, he may not be divested arbitrarily of all his contractual rights with his client without cause. *Zurich General Accident & Liability Ins. Co. v. Kinsler*, 12 Cal.2d 98, 81 P.2d 913. However the client always has the right to control the objectives to be attained. *Salopek v. Schoemann*, 20 Cal.2d 150, 124 P.2d 21. In this instance we cannot construe the insistence upon an accounting and explanation from the trustee to be whimsical or capricious. On the contrary, under the circumstances related, the need for such proceeding would appear to be a reasonable correlative phase of the collecting process.

[7] The contention of the attorney that the contract cannot be terminated because of the impossibility of restoring the *status quo* is not tenable. He apparently considers this a rescission action. This was, however,

a suit to declare future rights under the contract. The court did not find or make an order based on invalidity of the instrument. On the contrary, finding XII reads in part: "That the Contingent Fee Contract, Exhibit A of plaintiff's Complaint remained in full force from its execution to the present time." The court's conclusion of law was that the contract "was breached by defendant Ford and is of no further force and effect". Having breached the contract, as found by the court, all future rights of the attorney thereunder are terminated. *De La Falaise v. Gaumont-British Picture Corp.*, 39 Cal.App.2d 461, 468, 103 P.2d 447. No evidence was presented at the trial that the attorney is unpaid for any sums collected pursuant to the contract, that is, that anything is due and owing for past services. Therefore judgment for the client was proper.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J.,
concur.



129 Cal.App.2d 413

MONOLITH PORTLAND CEMENT COMPANY, a corporation, Plaintiff and
Appellant,

v.

J. R. GILLEBERGH et al., Defendants
and Respondents.

Civ. 20138.

District Court of Appeal, Second District,
Division 1, California.

Dec. 7, 1954.

Action involving a conflict between a purported mining locator claiming rights under the general mining laws, and a lessee under the Mineral Lands Leasing Act of 1920, on lands legal title to which was vested in the United States. From a judgment of dismissal, entered following the sustaining of respondents' demurrers in the Su-

perior Court of Ventura County, Atwell Westwick, J., the plaintiff appealed. The District Court of Appeal, Mosk, J. pro tem., held that a decision of the land office holding that plaintiff's claims were invalid was final and conclusive and that the United States was a necessary party to the proceedings.

Judgment affirmed.

1. Evidence ⇨48

The court is required to take judicial knowledge of the official acts of the land office.

2. Mines and Minerals ⇨14(1)

The act of May 10, 1872, is the foundation of the existing system for acquiring rights in public mineral lands.

3. Mines and Minerals ⇨5

Where plaintiff filed locations on mining lands, legal title to which was vested in the United States, and pursuant to the Leasing Act of 1920 invoked the jurisdiction of the Land Office by challenging the defendants' petition for a lease on same lands, and by participating in protracted hearings and an appeal, asserting that the defendants' application would interfere with plaintiff's vested rights, decision of the Land Office invalidating plaintiff's claims was a final and conclusive adjudication. Mineral Land Leasing Act of 1920, § 1 et seq. as amended 30 U.S.C.A. § 181 et seq.; 30 U.S.C.A. § 22 et seq.

4. Constitutional Law ⇨309(1)

"Due process" implies a notice and hearing but the hearing must not of necessity be in the courts, and it may be before the appropriate administrative agency.

See publication Words and Phrases, for other judicial constructions and definitions of "Due Process".

5. Mines and Minerals ⇨5

The test to be applied, in determining whether a tract of land was known at a given time to be valuable for minerals named in the Mineral Leasing Act, so as to validate mining claims, is not whether an actual discovery of such minerals on the land has been made as of the significant date, but whether known conditions at time were such as would support belief that land

contained mineral in such quantities and quality as to make extraction profitable and to justify expenditures to that end. Mineral Leasing Act of 1920, § 1 et seq. as amended 30 U.S.C.A. § 181 et seq.

6. Mines and Minerals ⇨5

Whether requisite discovery of minerals has been made, so as to validate mining claims located on public land, or whether the necessary potential exists within the Mineral Lands Leasing Act, are questions of fact for the land department, and in absence of extrinsic fraud or mistake, its determination is a conclusive adjudication of such questions. Mineral Leasing Act of 1920, § 1 et seq. as amended 30 U.S.C.A. § 181 et seq.

7. Mines and Minerals ⇨5

In suit involving a conflict between purported mining locator claiming rights under the general mining laws and a lessee under the Mineral Leasing Act located on lands, title to which was vested in the United States, failure to name the United States as the party to the action was fatal. 30 U.S.C.A. § 22 et seq.; Mineral Lands Leasing Act of 1920, § 1 et seq. as amended 30 U.S.C.A. § 181 et seq.

8. Mines and Minerals ⇨5

In suit involving a conflict between purported mining locator, claiming rights under the general mining laws and a lessee under the Mineral Lands Leasing Act, on lands, title to which was vested in the United States, necessity of naming the United States as the party could not be circumvented by act of plaintiff in changing the cause of action from ejectment and quiet title to ejectment and declaratory relief. 30 U.S.C.A. § 22 et seq.; Mineral Lands Leasing Act of 1920, § 1 et seq. as amended 30 U.S.C.A. § 181 et seq.

9. Ejectment ⇨9(2)

The law generally requires legal title for an ejectment action.

Norman Elliott, Enright & Elliott, Los Angeles, for appellant.

Elden C. Friel, San Francisco, for respondents.

MOSK, Justice pro tem.

This appeal from a judgment of dismissal, entered following the sustaining of respondents' demurrers without leave to amend and the granting of respondents' motion to dismiss, involves a conflict between a purported mining locator claiming rights under the general mining laws, 30 U.S.C.A. § 22 et seq. and a lessee under the Mineral Lands Leasing Act of 1920, 30 U.S.C.A. § 181 et seq.

Appellant is a manufacturer of cement and uses the mineral gypsum in its manufacturing process. At various dates during the decade following September 1, 1938, appellant filed locations on seven mining claims in Ventura County, principally adjacent to certain proven gypsum mines in operation. Appellant alleged that it, and earlier its assignor, performed all necessary assessment and development work upon the lands in question required by the federal mining laws.

Legal title to this land is vested in the United States. On June 26, 1946, respondent J. R. Gillbergh filed an application with the Bureau of Land Management, Department of the Interior, for an oil and gas lease under the Mineral Leasing Act of 1920, asserting that such land was valuable for oil and gas. (The Bureau will be variously referred to herein and in cited cases as the Land Bureau, Land Department, Land Office and General Land Office.) The application was made under sections of the statute providing for the granting of exploration leases upon lands not within a known geologic structure.

Thereafter appellant filed with the Land Bureau a verified protest against the granting of the lease, pleading in its contest the seven mining claims involved herein, alleging that by virtue of the claims appellant had a vested right with which the United States could not interfere by the granting of the proposed oil and gas lease. The matter was heard in the Sacramento land office, and the assistant director of the Bureau of Land Management of the Department of Interior rendered his findings and decision on May 4, 1951, the holding being that the land was valuable for oil and gas and subject only to leasing under the Mineral Leas-

ing Act, and that appellant's seven mining claims were null and void upon the ground, among others, that there was a lack of requisite discovery of minerals. Appellant's protest was dismissed. Upon appellant's motion for a new trial and later its appeal, the Secretary of Interior took over the matter and affirmed the determination in a 15 page decision written by the department solicitor under date of July 22, 1952.

When the decision became final, the United States executed the oil and gas leases to respondents. Thereafter appellant commenced an action in the Superior Court of Ventura County for ejectment and quiet title. Subsequently in its amended complaint it sought possession of the land by way of ejectment and declaratory relief as against the oil and gas lessees and their assignees.

Respondents demurred to the amended complaint, asked the trial court to take judicial notice of the prior proceedings in the Department of the Interior, maintained they constituted a final and conclusive adjudication of appellant's claims, and also, that the United States, as owner and lessor of respondents, was a necessary and indispensable party to the action, without the joinder of which the court had no jurisdiction of the action. The trial court, after receiving briefs and taking the matter under submission, sustained the demurrer without leave to amend and granted respondents' motion to dismiss. This appeal resulted. By stipulation the records of the Bureau of Land Management and the transcript of the hearing before that agency were included in the clerk's transcript on appeal in this proceeding.

[1] It is clear that the law requires the court to take judicial knowledge of the official acts of the land office. *Livermore v. Beal*, 18 Cal.App.2d 535, 64 P.2d 987; *Jones v. United States*, 137 U.S. 202, 11 S.Ct. 80, 34 L.Ed. 691; *Leonard v. Lennox*, 8 Cir., 181 F. 760.

Two issues are raised by this appeal: (1) is the decision in the administrative proceeding in the Land Bureau a final and conclusive adjudication that appellant's mining claims are void; (2) is the United States a necessary and indispensable party

to the action? We conclude both questions must be answered in the affirmative.

[2,3] The act of May 10, 1872, is the foundation of the existing system for acquiring rights in public mineral lands, Reynolds v. Iron Silver Mining Co., 116 U.S. 687, 6 S.Ct. 601, 29 L.Ed. 774, and is the basis of appellant's assertion of rights herein, and its insistence that the Land Department had no jurisdiction to rule upon its mining claims.

Looking first to the Act of 1872, we find it provides that rights claimed thereunder are valid only insofar as not in conflict with laws of the United States. 30 U.S.C.A. §§ 22 and 26.¹ Since whatever rights obtained by appellant were acquired in 1938 and after, none were vested prior to enactment of the Leasing Act of 1920. Thus whatever course it pursued was with knowledge that the lands were subject under pertinent circumstances to disposition in accordance with the terms of the Leasing Act of 1920.

Appellant insists the Land Office had no jurisdiction over mining claims, and cites the case of Double Eagle Mining Co. v. Hubbard, 42 Cal.App. 39, 183 P. 282, as authority. That case, however, was decided in 1919, prior to the Leasing Act of 1920 which set up the mechanics for hearing contests. Pursuant to the latter act, the appellant itself invoked the jurisdiction of the Land Office by instituting its challenge to respondents' petition for a lease and by participating in protracted hearings and an appeal. Appellant put in issue in the administrative proceeding the validity of its claims by asserting that respondents' application would interfere with appellant's "vested right to the exclusive possession of each of said mining claims". In order to ascertain the merit of appellant's protest,

it was obviously necessary for the land department to decide the validity of the mining claims.

The controlling authority in this situation is Cameron v. United States, 252 U.S. 450, 459, 40 S.Ct. 410, 412, 64 L. Ed. 659, 662. In that case the Commissioner of the General Land Office held that the land involved was not mineral, that Cameron had not made the requisite discovery of minerals, and that his claim was invalid. The Secretary of the Interior affirmed the decision on appeal. On injunction proceedings brought by the government to oust Cameron and restrain his use of the land, he contended that the Land Department had no jurisdiction to rule upon the validity of his mining claims. The court disposed of that contention in the following manner:

"The second objection rests on the naked proposition that the Secretary was without power to determine whether the asserted lode claim, under which Cameron was occupying and using a part of the reserves to the exclusion of the public and the reserve officers, was a valid claim. We say 'naked proposition' because it is not objected that Cameron did not have a full and fair hearing, or that any fraud was practised against him, but only that the Secretary was without any power of decision in the matter. In our opinion the proposition is not tenable.

"By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the Land Department, as a special tribunal; and the Secretary of the Interior, as the head of the department is charged with seeing that this

1. Sec. 22 reads in part as follows:

" * * * all valuable mineral deposits in lands belonging to the United States, * * * shall be free and open to exploration * * * by citizens of the United States * * * according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Sec. 26 reads in part as follows: "The locators of all mining locations * * * so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations * * *." (Italics ours.)

authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. [Citing cases.]

"A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.

"Of course, the Land Department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void."

[4] There is no question that due process was observed here. Due process in this situation implies notice and a hearing. Such hearing must not of necessity be in the courts; it may be before the appropriate administrative agency. *Orchard v. Alexander*, 157 U.S. 372, 383, 15 S.Ct. 635, 39 L.Ed. 737, 741; *Michigan Land & Lumber Co. v. Rust*, 168 U.S. 589, 593, 18 S.Ct. 208, 42 L.Ed. 591, 593.

[5] Appellant devotes considerable effort to attacking the decision of the Secretary of the Interior and particularly his finding that the evidence was insufficient "to show that discoveries of valuable mineral deposits had been made". We believe the department's opinion to be generally sound. "The test to be applied", states the opinion, "in determining whether a particular tract of land was known at a given time to be valuable for one of the minerals named in the Mineral Leasing Act is not whether an actual discovery of such mineral on the land had been made as of the

significant date, but rather whether the known conditions at the time were such as would have supported the belief that the land contained the mineral in such quantities and of such quality as to make its extraction profitable and to justify expenditures to that end." This is consistent with the law, as stated in *Montana Cent. Ry. Co. v. Migeon, C.C.*, 68 F. 811, 814: "The vein or lode which the statute directs must be discovered before the location of a claim must be one that, from all its indications, has a present or prospective commercial value, for only 'lands valuable for minerals' are subject to appropriation as mining claims."

[6] It is fundamental that whether the requisite discovery of minerals has been made, or whether the necessary potential exists within the intent of the law, are questions of fact for the Land Department. In the absence of extrinsic fraud or mistake, its determination is a final and conclusive adjudication of those questions. *Cameron v. United States*, supra. As stated in *Wetsel v. Superior Court*, 119 Cal.App.2d 703, at page 709, 260 P.2d 242, at page 245: "* * * the question of whether or not the land was mineral in character or whether there had been a sufficient discovery of mineral to characterize the land as mineral are questions of fact to be determined by the General Land Office [citing cases], and the final decision of General Land Office upon the mineral or non-mineral character of land is conclusive." In *Martin v. Bartmus*, 189 Cal. 87, 91, 207 P. 550, 551, the parties by their pleading "attempt to put in issue the same matters which were decided adversely to them by the Department of the Interior. This, under the foregoing authorities, they cannot be permitted to do." As stated in *Sullivan v. Mammoth Oil Co.*, 8 Cir., 22 F.2d 663, 665, "So long as the title to public lands is in the United States the courts will refuse to interfere with the Land Department in its administration."

[7] The second question raised on appeal must also be resolved in favor of the trial court's conclusion: the failure to name the United States as a party to the action is a fatal omission. Significantly, it

was a party to the proceeding in the Land Department in which appellant's protests were rejected.

Livermore v. Beal, supra, certiorari twice denied by the United States Supreme Court, 302 U.S. 712, 58 S.Ct. 32, 82 L.Ed. 550 and 302 U.S. 777, 58 S.Ct. 260, 82 L.Ed. 601, is persuasive authority to the effect that the United States is an indispensable party to the action. While it was a case involving claims to legal title rather than mere possessory rights, many of the authorities relied upon therein were concerned with leases and equitable title. In Wilson v. Elk Coal Co., 9 Cir., 7 F.2d 112, at page 113, the court said, "* * * we are clearly of opinion that the courts are without jurisdiction to grant relief in favor of one claiming only an equitable title, as against a party in possession under a lease from the United States, so long as the title remains in the United States." Peale v. Davis, 57 App.D.C. 221, 19 F.2d 695, involved a license; Skeen v. Lynch, 10 Cir., 48 F.2d 1044, was a proceeding by a patentee seeking oil and gas rights; Sullivan v. Mammoth Oil Co., supra, directly involved rights of locators of placer mining claims; Wood v. Phillips, 4 Cir., 50 F.2d 714, was concerned with possession and an injunction against trespass. In all of the foregoing cases, it was held that the United States was an indispensable party to the action.

[8,9] Appellant has here attempted to circumvent the requirement of naming the United States by changing his causes of action from ejectment and quiet title to ejectment and declaratory relief. This latter device, however, does not change the purpose sought by appellant: to acquire undisturbed possession as against the lessee of the holder of legal title. An attempt to use equity for the purpose of acquiring possession was made in Frost v. Spitley, 121 U.S. 552, 7 S.Ct. 1129, 1131, 30 L.Ed. 1010, 1012, but the court there held, "A person out of possession cannot maintain such a bill, whether his title is legal or equitable; for, if his title is legal, his remedy at law, by way of ejectment, is plain, adequate, and complete; and, if his title is equitable, he must acquire the legal title,

and then bring ejectment. [Citing cases.]" (Italics ours.) This case was cited with approval in Wood v. Phillips, supra, 50 F.2d at page 716. In California, the law generally requires legal title for an ejectment action, 17 Cal.Jur.2d 178.

Whatever the pleading nomenclature, the result of a decree for appellant would be a cloud on the title of the United States, a limitation on its rights of ownership, and the lessees would be subject to ouster if they continued to attorn to the United States. Skeen v. Lynch, supra, 48 F.2d at page 1046.

Appellant has cited only two cases in support of its position that the United States is not an indispensable party to these proceedings. In one, Brown v. Standard Oil Co. of Indiana, 96 Colo. 554, 45 P.2d 639, the issue was neither raised nor discussed. In the other, Graham v. Superior Court, 131 Cal.App. 579, 21 P.2d 621, the court merely maintained its authority to determine possessory rights pending the outcome of a contest in the general land office. "To say that no relief can be granted," said the court in 131 Cal.App. at page 583, 21 P.2d at page 622, "* * * pending the settlement of title in the land department, would * * * place a premium upon greed and the use of force, * * *." (Italics ours.) Every case cited within the Graham opinion limited the jurisdiction of the court to protection of one's right of possession until the government heard and ruled on the conflicting claims. The phraseology differed, but the conclusion in each was the same: "* * * until such time as the government, * * * puts forever at rest the title to the lands", Sproat v. Durland, 2 Okl. 24, 35 P. 682, 689; "* * * until the government parts with its title", Fulmele v. Camp, 20 Colo. 495, 39 P. 407, 408; "* * * until the Land Department hears and determines the question as to the character of the land", Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 P. 936, 939; "* * * until the controversy is finally determined by that department", 12 Am. & Eng. Ann. Cases 32.

There is a sound basis for the foregoing rule. Were courts reluctant to intervene

during the period of vacuity before disposition of claims by the government, a premium would be placed upon force, and in some instances violence and bloodshed might follow. But after the merit of conflicting claims has been determined, the courts have no jurisdiction unless the holder of legal title to the property, the United States, is made a party to the action.

We therefore conclude that the trial court properly ruled on the motions before it.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



129 Cal.App.2d 244

Refugio Hernandez HIDALGO, also known as Refugio Hernandez, Respondent,

v.

The MUNICIPAL COURT OF the SANTA BARBARA JUDICIAL DISTRICT, COUNTY OF SANTA BARBARA, State of California, Frank P. Kearney, Judge of said Municipal Court, John D. Hossack, Official Court Reporter of said Municipal Court, Appellants.

Civ. 20329.

District Court of Appeal, Second District, Division 1, California.

Nov. 30, 1954.

Hearing Denied Jan. 26, 1955.

Proceeding on petition by prisoner, convicted of misdemeanor, for peremptory writ of mandate commanding municipal court to prepare transcript at county expense for prisoner's use on appeal. The Superior Court, Santa Barbara County, Ernest D. Wagner, J., entered judgment directing issuance of writ and defendants appealed. The District Court of Appeal, White, P. J., passing on question for first time, held that discretion was conferred by statute on municipal court judge to order reporter to report proceedings and

to order preparation of transcript for a defendant's use and that exercise of discretion in ordering reporting of proceedings did not give convicted defendant automatic right to transcript on appeal at county expense.

Judgment reversed.

1. Criminal Law ⇐1077

A defendant appealing from superior court judgment of conviction for felony is entitled to reporter's transcript of evidence at expense of state. Const. art. 6, § 1a; Pen.Code § 1247k.

2. Criminal Law ⇐1077

Differences in rules applicable to superior court and those provided for municipal and inferior courts show that judicial council intended that in felony cases persons convicted should be entitled, as matter of right, to reporter's transcript on appeal at expense of state, while in misdemeanor cases county should not be charged with expense of such transcript unless so ordered by trial court. Const. art. 6, § 1a; Pen.Code, § 1247k; Code Civ.Proc. § 274c; Government Code, § 69952; Rules on Appeal, rules 3, 4, 7, 33(b) (3).

3. Constitutional Law ⇐70(1)

It is not within court's province, under guise of judicial interpretation, to write into statute or judicial council rule, right or privilege that would do violence to manifest intent of framers thereof.

4. Criminal Law ⇐1077

Discretion is conferred by statute on municipal court judge in ordering reporter to report proceeding and in ordering preparation of transcript for a defendant's use, and exercise of discretion in ordering reporting of proceedings does not give convicted defendant automatic right to transcript on appeal. Const. art. 6, § 1a; Pen.Code, § 1247k; Code Civ.Proc. § 274c; Government Code, § 69952; Rules on Appeal, rules 3, 4, 7, 33(b) (3).

Vern B. Thomas, Dist. Atty., Albert W. Meloling, Deputy Dist. Atty., Santa Barbara, for appellants.

W. P. Butcher, James M. DeLoreto, Santa Barbara, for respondent.

WHITE, Presiding Justice.

This is an appeal from a judgment of the Superior Court of Santa Barbara County, directing the issuance of a peremptory writ of mandate commanding the Municipal Court of Santa Barbara Judicial District, Honorable Frank P. Kearney, Judge of said court, and John D. Hossack, official reporter thereof, to prepare a clerk's and reporter's transcript on appeal in a certain action entitled, "People of the State of California, Plaintiff vs. Refugio Hernandez Hidalgo, also known as Refugio Hernandez, Defendant."

The question presented is whether, under the law, a defendant appealing from a judgment of conviction in the municipal court is entitled to the clerk's and reporter's transcript at the expense of the county in which said court is situated.

On January 21, 1954, in the above-named municipal court, respondent herein was found guilty on three counts of petty theft, a misdemeanor. At the commencement of the trial the judge of said court duly appointed appellant John D. Hossack to take down in shorthand the proceedings, evidence, arguments and testimony received at said trial.

From the aforesaid judgment of conviction respondent duly perfected her appeal to the Superior Court of Santa Barbara County and with her notice of appeal, requested a clerk's and reporter's transcript of the proceedings. Such request was denied by the judge of the municipal court on the ground that the appellant in said action should bear the costs of said transcripts on appeal. Thereupon, appellant sought and secured from the Superior Court in and for the County of Santa Barbara a peremptory writ of mandate. From the judgment directing the issuance of said writ this appeal was taken.

[1] Had respondent herein been convicted in the Superior Court of a felony there is no doubt of her right to a transcript of the evidence at the expense of the state, *People v. Smith*, 34 Cal.2d 449, 211 P.2d 561. Appellants herein earnestly con-

tend that the statutes and rules on appeal applicable to appeals in felony cases are not controlling in appeals taken from a misdemeanor conviction in a municipal or other inferior court. The question here presented is one of first impression and must depend for solution upon a construction of the statutes and rules on appeal promulgated by the Judicial Council pursuant to the rule-making power vested in it by the Constitution in 1927, Const. Art. VI, § 1a, adopted in 1926, Stats. 1927, p. 1048.

Section 1247k of the Penal Code confers upon the Judicial Council: "* * * the power to prescribe by rules for the practice and procedure on appeal, and for the time and manner in which the records on such appeals shall be made up and filed, in all criminal cases in all courts of this State. * * *

Section 274c of the Code of Civil Procedure provides for the appointment of reporters in municipal courts and with reference to their duties the section provides in part that, "Such reporters, or any one of them, must, at the request of either party or of the court in a civil proceeding, *or on the order of the court in a criminal action or proceeding*, take down in shorthand all the testimony, the objections made, the rulings of the court, the exceptions taken, all arraignments, pleas and sentences of defendants in criminal cases, the arguments of the prosecuting attorney to the jury, and all statements and remarks made and oral instructions given by the judge; *and if directed by the court, or requested by either party, must, within such reasonable time after the trial of such case as the court may designate, write out the same, or such specific portions thereof as may be requested*, in plain and legible longhand, or by typewriter, or other printing machine, and certify to the same as being correctly reported and transcribed, and when directed by the court, file the same with the clerk of the court." (Emphasis added.)

With reference to the payment of reporter's fees we find in Government Code, section 69952, the following language: "In criminal cases *in which the court specifically so directs*, the fee for reporting and for a transcript ordered by the court to be made

shall be paid out of the county treasury on the order of the court, * * *." (Emphasis added.)

From a reading of section 274c of the Code of Civil Procedure, it is manifest that the presence of an official court reporter in a criminal proceeding in the municipal court is dependent upon the discretion of the judge thereof. And should the judge order the presence of a reporter, the matter of transcribing the proceedings had during such a proceeding is dependent upon the request of the court or of either party to the action. With reference to payment of the reporter for such transcription, Government Code section 69952 would seem to indicate a legislative intent to make such payment a charge against the county only in cases where the court specifically so directs that such transcript be made.

In the cases of *People v. Smith*, supra, and *In re Paiva*, 31 Cal.2d 503, 190 P.2d 604, cited by both appellants and respondent herein, the Supreme Court was concerned with appeals from felony convictions which involved an interpretation of section 274 of the Code of Civil Procedure. That this section is applicable to appeals from the superior court is made manifest by the fact that the legislature adopted section 274c of the same code governing the appointment, duties and fees for reporters in municipal courts, and the answer to the question here presented to us must depend, among other considerations, upon a construction of the last-named code section. From a reading thereof it would appear that whether a reporter be present in a criminal proceeding rests in the discretion of the court, that whether a transcription of a duly appointed reporter's notes be made is also committed to the discretion of the municipal court judge, and, that the preparation of such transcript becomes a charge against the county only when an order for its preparation is made by the judge.

Insofar as the Judicial Council Rules on Appeal are concerned, it is evident that in the *Smith* and *Paiva* cases, supra, the Supreme Court had under consideration rules 33a, 33b, and 35b of Rules on Appeal. That these rules apply to appeals in criminal proceedings originating in the superior court

would seem to be indicated by the fact that the Judicial Council in the exercise of its authority has adopted specific rules on appeal for the municipal and inferior courts (26 Cal.2d 25, as amended and reported in 29 Cal.2d 1). An examination of the rules applicable to the superior courts and the rules applicable to appeals from the municipal and inferior courts reveal basic differences therein. For example, Rule 33(b), which formed one of the grounds for the decision in *People v. Smith*, supra, provides as follows:

"Rule 33(b) (3). To be transmitted as originals: Any exhibits admitted in evidence or rejected.

"If the appellant desires such additional record he shall file with his notice of appeal an application describing the material which he desires to have included and the points on which he intends to rely which make it proper to include it. *The clerk shall immediately present the request to the judge and notify the reporter.* Except as to instructions given, which shall be included in the record if the defendant urges error as hereinabove provided, the judge, within 3 days after the filing of such application, shall make an order directing the inclusion in the record of as much of the additional material as, in his opinion, may be proper to present fairly and fully the points relied on by appellant in his application. *If the judge fails to make any order within 3 days after the application is filed, the material requested, with the exception of exhibits, shall be included in the clerk's and reporter's transcripts without such order.*" (Emphasis added.)

An examination of the Rules on Appeal from the municipal courts reveals that there is no provision for the preparation of the transcript by the reporter if the judge fails to make an order therefor, as provided in Rule 33(b) of the Rules on Appeal, supra.

The rules on appeal from the municipal and inferior courts do not provide for notice to the reporter; they do not provide that the reporter's transcript must be a part of the normal record on appeal (Rule 3); they do not provide that the reporter shall file his transcript within a certain time.

Furthermore, in the municipal courts an accused is afforded an alternative to an appeal on the reporter's transcript, and that is by way of a settled statement (Rules 4 and 7, Rules on Appeal in Municipal Courts and Inferior Courts in Criminal Cases). Under these rules the appellant in a municipal court proceeding may prepare a statement setting forth the grounds of his appeal and so much of the evidence and other proceedings as are necessary for a decision upon the grounds so advanced.

[2] The existing differences in the rules applicable to superior courts and those provided for municipal and inferior courts immediately suggests that the Judicial Council intended that in felony cases persons convicted should be entitled, as a matter of right, to a reporter's transcript on appeal at the expense of the state, while in misdemeanor cases the county should not be charged with the expense of such a transcript unless so ordered by the trial court as evidenced by section 274c of the Code of Civil Procedure.

[3] We do not regard it as within our province, under the guise of judicial interpretation, to write into a statute or Judicial Council rule, a right or privilege that would do violence to the manifest intent of the framers thereof. Had the legislature or the Judicial Council intended to give to an appellant in the municipal court the same rights to a transcript as are given to an appellant in a felony case in the superior court, there would have been no sound reason for establishing a different procedure and rules in that regard affecting appeals taken from such respective courts.

[4] Respondent's contention that once the municipal court judge has exercised his discretion and ordered a reporter to report the proceedings, the right of a convicted defendant to a transcript on appeal is automatic, cannot be sustained. The same discretion that makes the presence of a reporter in a municipal court proceeding subject to a court order, is conferred upon the judge in relation to the preparation of a transcript. While, as respondent contends, the Judicial Council has not established any rule which denies an appellant in a municipal

court this right, neither has it by rule, conferred this right upon him as it has done in felony cases, wherein an appellant has no alternative method of appeal by filing a statement on appeal as he has when convicted of a misdemeanor in the municipal court.

For the foregoing reasons, the judgment from which this appeal was taken is reversed.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; CARTER, J., dissenting.



129 Cal.App.2d 429

The PEOPLE of the State of California,
Plaintiff-Respondent,

v.

Garry K. CAPPS. Defendant-Appellant.
Cr. 5236.

District Court of Appeal, Second District,
Division 1, California.

Dec. 7, 1954.

Rehearing Denied Dec. 13, 1954.

Hearing Denied Jan. 5, 1955.

Defendant was convicted of burglary, attempted burglary, attempted rape and robbery. The Superior Court, Los Angeles County, Mildred L. Lillie, J., entered judgment and defendant appealed. The District Court of Appeal, Doran, J., held that evidence was sufficient to support verdict.

Affirmed.

1. Criminal Law Ⓒ693

The only time that an objection to an impeaching question on the grounds that no foundation has been laid is proper is when impeaching witness is on stand, and to make such an objection during the cross-examination of a witness is an unwarranted interference with the cross-examination.

2. Criminal Law Ⓒ1170½(5)

Witnesses Ⓒ388(5)

In prosecution for burglary, attempted burglary, attempted rape and robbery, foreclosure of cross-examination as to what

witness had testified to at preliminary hearing, on ground that no foundation had been laid for impeachment purposes, was improper, but it was not prejudicially erroneous where error was of such nature that it could not have influenced jury and conviction was amply supported by evidence.

John J. Bradley, Max Solomon, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgments and orders denying motions for a new trial.

Appellant was charged by information filed July 29, 1953 with burglary, attempted rape and robbery in three counts. The trial was continued from time to time at the request of defendant. On November 24, 1953, appellant was charged in another information with two counts of attempted burglary alleged to have been committed on October 27, 1953. On motion of the District Attorney the two cases were consolidated for trial. On December 17, 1953 the jury returned a verdict of guilty on all counts.

The first information above mentioned charged burglary, attempted rape and robbery. Briefly, as the record reveals, defendant about midnight, entered the house by prying open a window, committed the offense of attempted rape on the woman occupying the house and stole nine dollars from the victim. Defendant was arrested a few hours later at the residence of the family about nine blocks from the victim's residence. Defendant's mother and father were home at the time of the arrest.

The second information alleged two counts of attempted burglary. The offenses were committed about 9 p. m. The record reveals that defendant attempted to enter two homes. They were adjoining. The attempt was discovered and as a result defendant was shot while fleeing from the scene by the two men who occupied these houses. They were family residences.

It is contended on appeal that, as to the first information, "The verdict is contrary

to the law". As to the second information, appellant contends that, "The verdict is contrary to the evidence". It is also argued that the granting of the motion for a consolidation of the offenses for trial, "amounted to abuse of discretion".

[1, 2] Without relating the details it is sufficient to note that the record does not support appellant's contentions. There is one exception however which is worthy of mention. Counsel's cross-examination of the witness Mrs. Evans relating to what the witness testified to at the preliminary hearing was foreclosed by the trial judge's rulings and objections. It resulted from an apparent misunderstanding as to the law of evidence relating to impeachment and cross-examination. The only time that an objection to an impeaching question on the grounds that no foundation has been laid is proper is when the impeaching witness is on the stand. To make such an objection during the cross-examination of a witness is an unwarranted interference with the cross-examination. Lawyers familiar with the law applicable thereto lay the foundation for impeachment after the cross-examination is completed. Very often the witness in reply to the foundation question will reply, "Well, now that you remind me—", etc., and then admits what theretofore had been denied. Such an incident obviously affects the weight of the witness' testimony as a whole. During the trial of an action nothing is more important than cross-examination. To force counsel to inform the witness during such cross-examination of the likelihood of impeachment defeats one of the important phases of cross-examination, namely the veracity of the witness. The court's rulings and attitude relating to this were error.

In *Diller v. Northern Cal. Power Co.*, 162 Cal. 531, at page 538, 123 P. 359, at page 362, the court commented on this subject as follows: "Declarations or admissions against interest by a party, or his authorized agent, may be given in evidence, and it is not necessary to lay a foundation for such declarations by asking the preliminary questions appropriate to an attempt to impeach a witness by proof of

contradictory statements made at another time. So far as these matters were gone into in questioning Thomas himself, they were legitimate cross-examination." See also *People v. Neighbors*, 79 Cal.App.2d 202, at page 207, 179 P.2d 647. However, it does not appear that such error was of such a nature that the jury was influenced thereby. The evidence, taken as a whole, was sufficient to support the verdict and there are no prejudicial errors.

The judgments and orders are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



129 Cal.App.2d 432

Lawrence Neil McLAUGHLIN, Thelma McLaughlin; and Leslie McLaughlin, Gerald McLaughlin and Sandra McLaughlin, minors, by their Guardian ad litem, Lawrence Neil McLaughlin, Plaintiffs and Appellants,

v.

Marjorie May LASATER and George Lasater, Defendants and Respondents.

Civ. 20500.

District Court of Appeal, Second District,
Division 2, California.

Dec. 7, 1954.

Action for damages growing out of automobile accident. The Superior Court of Los Angeles County, Robert H. Scott, J., rendered judgment of nonsuit on plaintiffs' opening statement, and they appealed. The District Court of Appeal, Fox, J., held that where left front wheel of defendants' automobile became detached while one of defendants was driving along highway, and crashed into windshield of plaintiffs' oncoming automobile, doctrine of *res ipsa loquitur* was applicable, and an inference of defendants' negligence could be drawn.

Judgment reversed.

277 P.2d—3½

1. Negligence ⇨121(2)

Doctrine of *res ipsa loquitur* applies if the accident in question would not ordinarily have happened in the absence of negligence and if defendant had exclusive control over the instrumentality causing the injury.

2. Automobiles ⇨242(2)

Where left front wheel of defendants' automobile became detached while one of defendants was driving along highway, and crashed into windshield of plaintiffs' oncoming automobile, doctrine of *res ipsa loquitur* was applicable and an inference of defendants' negligence could be drawn.

3. Automobiles ⇨245(38)

In action for damages sustained when left front wheel of defendants' automobile became detached and crashed into windshield of plaintiffs' oncoming automobile, whether defendants' employee, who had been authorized to interchange positions of wheels on their automobile, had failed to exercise due care in replacing the nuts on the lugs was question for jury.

Bridges & Peters and Glenn R. Seavey, Los Angeles, for appellants.

Murchison & Cumming, Los Angeles, for respondents.

FOX, Justice.

This is an appeal from a judgment of nonsuit, granted on plaintiffs' opening statement.

The action is for damages growing out of an automobile accident. Plaintiffs alleged negligence, in general terms, in both the operation and maintenance of defendants' vehicle.

Plaintiffs' opening statement was as follows:

"Plaintiffs expect the evidence in this case to show, in reference to the issue of liability, that on November 30, 1951, at or about the hour of 7:30 o'clock p.m., the plaintiff Lawrence Neil McLaughlin was driving his 1947 Studebaker 2-door sedan automobile in a general easterly direction on Highway No. 99, about four miles east

of Redlands, California, at a speed of 35 or 40 miles an hour. In the car with him were his minor sons, the plaintiff Gerald who sat next to him in the front seat, the plaintiff Leslie who sat at Gerald's right in the front seat, and in the back seat the plaintiff Thelma McLaughlin, his wife, and the plaintiff Sandra McLaughlin, his minor daughter. That the highway was paved and dry. That night had fallen. That Highway 99, at the point in question, is a divided lane highway, the eastbound and westbound lanes being separated by an unpaved dirt areaway 20 feet wide, or thereabouts. That Highway 99, at that point, curves slightly and declines toward the west and inclines toward the east.

"That the defendant Marjorie May Lasater, at the time and place in question, was operating a 1948 Crosley automobile in a general westerly direction on Highway 99. That the said 1948 Crosley automobile was owned by the defendant Marjorie May Lasater and her husband, the defendant George Lasater, and that the latter was the registered owner thereof. That Marjorie May Lasater was driving the said car with the consent, permission and authority of the defendant George Lasater.

"That during the time that they had owned the 1948 Crosley and in August, 1951, defendants had authorized and directed their agent and employee, one Spohn, to remove the running wheels of the Crosley automobile and to change their positions so that the right rear wheel was installed as the left front wheel of the said automobile. This was done in order to equalize the wear on the tires. At all times thereafter the said Crosley automobile was in the possession and under the control of the defendants and used by them in the operation of their service station and garage business as well as for private use.

"That at the time of the accident, as Mrs. Lasater drove west on Highway 99, the left front wheel of her Crosley automobile became detached from the car and crashed into and struck the windshield of the McLaughlin car, damaging the latter automobile and causing injury to the occupants, Leslie, Gerald and Sandra Mc-

Laughlin, and their mother, Thelma McLaughlin.

"That none of the plaintiffs saw the wheel become detached from Mrs. Lasater's automobile, or saw it before it crashed into their car.

"That after the accident the wheel was found to be in good condition. That four lug bolts existed on the Crosley car for attaching the wheel to the axle. That after the accident examination showed them to be undamaged and the threads in good condition. That no lug nuts for these bolts were found."

[1,2] Defendants' position is that, assuming every item in the foregoing offer is proved, no *prima facie* case of liability is thereby made out because no inference of negligence may reasonably be drawn from the facts thus established. Plaintiffs contend, however, that an inference of negligence may reasonably be drawn from such facts on either of two theories. Plaintiffs' first theory is based on the doctrine of *res ipsa loquitur*. "That doctrine applies if the accident in question would not ordinarily have happened in the absence of negligence and if defendant had exclusive control over the instrumentality causing the injury." *Rose v. Melody Lane*, 39 Cal.2d 481, 486, 247 P.2d 335, 338. Defendants, of course, had exclusive control of their car since Mrs. Lasater was driving. A wheel does not ordinarily become detached from an automobile in the absence of negligence in either its operation or maintenance. Hence the second requisite for the application of the doctrine is present. When *res ipsa loquitur* is applicable, as it is here, "an inference of defendant's negligence may be drawn." *Rose v. Melody Lane*, *supra*, 39 Cal.2d at page 487, 247 P.2d at page 338.

Our conclusion that this is a *res ipsa loquitur* case is fortified by *Ross v. Tynes*, La.App., 14 So.2d 80 (certiorari denied). In that case a pedestrian, while walking on the sidewalk, was killed by a wheel which became detached from a passing truck. The court said in 14 So.2d at page 81, "the facts of this case * * * present a classic example of the proper application of the doctrine of *res ipsa loquitur*" and

that it "follows that there is an inference, or presumption of negligence on the part of defendants. In other words, when an injury is caused by an instrumentality under the exclusive control of the defendant, as in this case, and it is such as would not ordinarily happen if the party having control of the instrumentality had used proper care, there arises an inference or presumption of negligence." *Gates v. Crane Co.*, 107 Conn. 201, 139 A. 782, is another case where a pedestrian on the sidewalk was hit by a wheel which suddenly became detached from a truck owned and operated by the defendant. The doctrine of *res ipsa loquitur* was applied. This doctrine has been applied in two comparable California cases. The first is *Brown v. Davis*, 84 Cal. App. 180, 257 P. 877, which involved a situation where a passenger lost his life when the car overturned as a result of a wheel's breaking off at the hub. *Fenstermacher v. Johnson*, 138 Cal.App. 691, 32 P. 2d 1106, also applied the doctrine where the left front wheel twisted or buckled and the tire either blew out or the wheel collapsed causing the frame to drop and the car to turn over fatally injuring one of the occupants.

[3] There is also a reasonable basis for an inference of negligence from the accepted facts apart from the doctrine of *res ipsa loquitur*. Defendants had caused their employee to remove and change the positions of the wheels on their car. This included the wheel that came off and collided with plaintiffs' car. After the accident the wheel was found to be in good condition and the lug bolts by which it had been attached were undamaged and their threads in good condition. But the lug nuts for these bolts were not found. From these facts a jury would have reasonably inferred that defendants' employee, who switched the tires, had failed to exercise due care in replacing the nuts on the lugs—that they had not been firmly screwed down or tightened, and that in the course of the use of the car the nuts had gradually become looser and had finally dropped off. This would explain the lapse of time between the transfer of the wheels and the accident. The factual situation here is very similar

to that in *Facteau v. Gould*, 310 Mass. 105, 37 N.E.2d 124. There, while seated on a lawn near a public highway, plaintiff was struck by the left front wheel from defendant's car. The wheel had been attached to the brake drum by five stud bolts which projected from the drum. The wheel was held on these bolts by nuts screwed on the bolts. The wheels could not come off the stud bolts until all five nuts had come off. The nuts were outside the hubcap and were visible. After the accident the stud bolts were still in position. "Nothing was missing except the five nuts. The wheel 'had simply come off of' the five stud bolts. The missing nuts could not be found 'around the car.'" The court held that an inference of negligence could reasonably be drawn from this evidence. It pertinently remarked that the jury could think it probable that the nuts "had come off gradually one at a time." 37 N.E.2d at page 125.

The judgment is reversed.

MOORE, P. J., and McCOMB, J., concur.



129 Cal.App.2d 339

James HALSTEAD, Plaintiff and Appellant,
v.

Leroy Frank PAUL, Defendant and
Respondent.
Civ. 16021.

District Court of Appeal, First District,
Division 2, California.
Dec. 3, 1954.

Action by guest passenger against automobile driver for personal injuries sustained when automobile left highway after driver had fallen asleep. The Superior Court, County of San Mateo, A. R. Cotton, J., granted defendant's motion for nonsuit. Plaintiff appealed. The District Court of Appeal, Dooling, J., held that question of whether driver had also fallen asleep when.

automobile had previously crossed center of highway and had, therefore, been guilty of willful misconduct in continuing to drive, was for jury.

Judgment reversed.

1. Automobiles ⇨245(24)

In action for personal injuries sustained by guest passenger when automobile left highway after driver had fallen asleep, question of whether driver had also fallen asleep when automobile had previously crossed center of highway and had, therefore, been guilty of willful misconduct in continuing to drive, was for jury. Vehicle Code, § 403.

2. Trial ⇨142

Inferences to be drawn from circumstantial evidence are for jury's determination and if conflicting inferences may reasonably be drawn from evidence, which inference is to be drawn lies in jury's discretion.

3. Evidence ⇨595

A reasonable inference drawn from circumstantial evidence may be believed as against direct evidence to the contrary.

Taheny & Taheny, San Francisco, for appellant.

Healy & Walcom, San Francisco, for respondent.

DOOLING, Justice.

This is an appeal from a judgment of nonsuit in a personal injury action based on Vehicle Code, § 403, guest statute.

Appellant Halstead, a metal worker living in Redwood City at the time of the accident, arranged to go sea fishing with a Mr. Merryman, a Mr. Abbott and Mr. Paul, the respondent. They set off for Princeton from Redwood City in Paul's automobile at 5 a. m. and boarded a fishing boat about 6:30 a. m. They remained aboard until approximately 3 p. m. Paul became seasick but upon returning to shore felt sufficiently recovered to drive home even though the others offered to drive.

Merryman sat next to Paul, the driver, and Abbott and Halstead sat in the back seat. Abbott went to sleep immediately and after a few miles so did Merryman. They apparently did not awaken until after the accident. The accident occurred on a very straight portion of the road, and it had been so for at least a mile prior to the accident.

The first unusual thing to occur was that the car gradually began veering across the white line to the lefthand side of the road. The left side of the car was approximately 2½ feet to the left of the white line. The automobile remained in this position relative to the sides of the highway for approximately 750 or 800 feet. The speed remained the same during this time.

As the automobile gradually veered back into the proper lane Halstead, sitting on the right side in back, leaned forward to determine if Paul was awake. His right eye was open and looking straight ahead so he leaned back in his seat again. He then asked him if he was getting sleepy, but received no answer from Paul.

The automobile proceeded another 420 feet in the proper lane and then abruptly turned to the left. Halstead just had time to shout "look out" and immediately thereafter the automobile went over the bank next to the lefthand side of the road and Halstead was injured.

The driver, Paul, testified that he had gone to a party the night before and did not get to bed until 3 a. m. He arose one hour later and drove to Redwood City in order to pick up Halstead and the others. That was all the sleep he had from Saturday morning until the time of the accident Sunday afternoon. He was unable to explain the cause of the accident and admitted that he must have dozed just before he went over the bank. However he denied having dozed at the wheel at any time prior to the accident.

At the conclusion of the presentation of the plaintiff's case defendant moved for and the trial court granted a nonsuit.

It has been held in *Erickson v. Vogt*, 27 Cal.App.2d 77, 80 P.2d 533 and *Pennix v.*

Winton, 61 Cal.App.2d 761, 764-765, 143 P.2d 940, 145 P.2d 561, that where a driver goes to sleep at the wheel of an automobile and after awaking continues to drive and has an accident because of falling asleep a second time it is a question of fact for the jury whether the driver was guilty of wilful misconduct in continuing to drive after once having fallen asleep.

The only question presented on this appeal is whether the circumstantial evidence was such that the jury might reasonably have drawn the inference therefrom that when respondent's car passed over the center of the road the first time he had fallen asleep.

[1] Here, to review the facts, we have a driver who after only one hour's sleep arises at 4 a. m., drives his car to the coast, goes fishing on the sea from 6:30 a. m. to 3 p. m., becomes seasick, and while driving his car thereafter on a straight, open road goes across the center line and continues in that position for 750 to 800 feet. From these facts plus the additional fact that only a short time thereafter he admittedly fell asleep and drove off the highway we are satisfied that the jury might reasonably have drawn the inference that when he previously crossed the center of the highway he had also fallen asleep.

[2,3] The inferences to be drawn from circumstantial evidence are for the jury's determination and if conflicting inferences may reasonably be drawn from the evidence which inference is to be drawn lies in the jury's discretion. *Hamilton v. Pacific Elec. Ry. Co.*, 12 Cal.2d 598, 602-603, 86 P.2d 829; *Mah See v. North American Acc. Ins. Co.*, 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123; *Sanders v. MacFarlane's Candies*, 119 Cal.App.2d 497, 500, 259 P.2d 1010; *Spolter v. Four-Wheel Brake Service Co.*, 99 Cal.App.2d 690, 694, 222 P.2d 307. It is equally true that a reasonable inference drawn from circumstantial evidence may be believed as against direct evidence to the contrary. *Scott v. Burke*, 39 Cal.2d 388, 398, 247 P.2d 313; *Gray v. Southern Pacific Co.*, 23 Cal.2d 632, 640-641, 145 P.2d 561; *Barham v. Widing*, 210 Cal. 206, 215, 291 P. 173.

We conclude that the trial court erred in taking the case from the jury.

Judgment reversed.

NOURSE, P. J., and KAUFMAN, J., concur.



129 Cal.App.2d 1

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Vernon JOHNSON, Defendant and
Appellant.

Clv. 4787.

District Court of Appeal, Fourth District,
California.

Nov. 18, 1954.

Hearing Denied Jan. 12, 1955.

Action by a county, in the name of the People of the State, to enjoin violation of a county zoning ordinance declaring the keeping and maintenance of more than five hogs on land in a limited manufacturing district or zone a public nuisance. From a judgment of the Superior Court of San Bernardino County, Archie D. Mitchell, J., for plaintiff, defendant appealed. The District Court of Appeal, Griffin, J., held that the ordinance was a valid exercise of the county's legislative power, under the State constitution, to make all local, police, sanitary and other regulations not in conflict with general laws, and was not in conflict with the statute providing that no commercial or manufacturing use expressly permitted shall be deemed a nuisance without evidence of employment of unnecessary and injurious methods of operation.

Judgment affirmed.

1. Municipal Corporations \S 601(1, 7)

Zoning is inherent in police power, and comprehensive zoning is valid.

2. Counties \S 21½

The police power granted counties by constitutional provision that county may

make and enforce therein all local, police, sanitary and other regulations not in conflict with general laws includes power to zone. Const. art. 11, § 11.

3. Counties ⇨21½

A county zoning ordinance declaring the keeping and maintenance of more than five hogs on land in limited manufacturing district or zone a public nuisance was a valid exercise of county's legislative power under section of Constitution authorizing counties to make and enforce therein all local, police, sanitary and other regulations not in conflict with general laws. Government Code, §§ 65090 et seq., 65300, 65301, 65464; Const. art. 11, § 11.

4. Counties ⇨21½

A county has power to enact zoning ordinances, where its charter expressly confers on its legislative body all police powers vested in municipalities by Constitution.

5. Municipal Corporations ⇨601(3)

The police power, as evidenced by zoning regulations, acts not only negatively to suppress offensive uses of property, but affirmatively to promote public welfare.

6. Municipal Corporations ⇨601(4)

The power to zone is not limited to protection of established districts, but extends to aid in development of new districts.

7. Municipal Corporations ⇨601(4)

The power to zone extends to regulation of property uses which do not actually amount to nuisances.

8. Nuisance ⇨82

A final arbitrary definition of public nuisances which can be neither modified nor supplemented by further legislation is not intended in section of Code of Civil Procedure authorizing civil action in name of People of State to abate public nuisance, as defined in specified Civil Code section, by district attorney of any county in which such nuisance exists. Code Civ.Proc. § 731.

9. Municipal Corporations ⇨605

A city has power to pass general police regulations to prevent nuisances, and

such power is not limited to suppression of things which are nuisances per se within meaning of Penal Code and Civil Code sections. Civ.Code, §§ 3479, 3480; Pen. Code, § 370.

10. Nuisance ⇨80

Generally, where legislature has not enacted statutes specifying that an activity contrary to public policy constitutes a public nuisance which may be enjoined in action on State's behalf, courts will not ordain such jurisdiction for themselves.

11. Municipal Corporations ⇨605

When a thing or act is of such nature that it may become a nuisance or injurious to public health, if not suppressed or regulated, legislative body, in exercise of its police powers, may make and enforce ordinances to regulate or prohibit such act or thing, though it was never offensive or injurious in the past.

12. Counties ⇨21½

Health ⇨23

The power of county board of supervisors to regulate or prohibit an act or thing which may become a nuisance or injurious to public health, if not suppressed or regulated, not only includes nuisances, but extends to everything expedient for preservation of public health and prevention of contagious diseases.

13. Municipal Corporations ⇨63(1)

Determination of when and what police regulations are essential is primarily for city's legislative body, clothed with police power by direct grant from Constitution, and its determination will not be disturbed by courts, unless regulation plainly has no relation to protection of health, safety, comfort or well being of community, but clearly invades personal or property rights under guise of police regulation.

14. Municipal Corporations ⇨604

The keeping of animals may be proper subject of municipal regulation, which may limit number of animals which may be kept.

15. Constitutional Law ⇨70(1)

Criminal Law ⇨5

Nuisance ⇨60, 84

The legislature, within constitutional limits of its powers, may declare any act criminal and make repetition or continuance thereof a public nuisance or vest in equity court power to abate such nuisances by injunction, but it is not courts' province to ordain such jurisdiction for themselves.

16. Injunction ⇨114(2)

Where personal welfare and property rights of large number of inhabitants of city, town or county will be detrimentally affected by violation of police or sanitary regulation in ordinance, city, town or county may itself appeal to equity court by writ of injunction to restrain such violation or cause removal of wrongful effect thereof, whether ordinance provides other means for its enforcement or not.

17. Counties ⇨21½

A county zoning ordinance, declaring the keeping and maintenance of more than five hogs on land in limited manufacturing district or zone a public nuisance, is not invalid, if construed to support injunction against such use of land, as in conflict with statute providing that no commercial or manufacturing use expressly permitted shall be deemed a nuisance without evidence of employment of unnecessary and injurious methods of operation. Code Civ. Proc. § 731a.

18. Municipal Corporations ⇨601(23)

Generally, a continued use of land, not in conformity with zoning ordinance, must be similar to use thereof when ordinance became effective, to be permitted, and whether nonconforming use was same before and after passage of ordinance is usually a fact question for trial court.

19. Nuisance ⇨84

In action to enjoin violation of county zoning ordinance declaring the keeping and maintenance of more than five hogs on land in limited manufacturing district a public nuisance, evidence supported trial court's finding that defendant's premises were not used for keeping and maintenance of more than five hogs at any time

before effective date of ordinance, notwithstanding defendant's statement that he intended at some time in future to use premises for purpose of temporarily keeping thereon more than five hogs.

20. Municipal Corporations ⇨122(2)

All presumptions are in favor of validity of ordinance relating to matter within legislative power of municipality, and burden is on party alleging its invalidity to establish such fact.

21. Constitutional Law ⇨278(4)

Eminent Domain ⇨2(5)

An ordinance fixing limits within which a disagreeable business may be exercised is not objectionable as depriving owner thereof of his property without due process of law or without compensation, if it has some relation to public health and is appropriate and adapted to that end.

22. Municipal Corporations ⇨601(1)

The right of municipal legislative body to pass zoning ordinance is not limited by fact that value of investments made in business prohibited thereby before any legislative action will be greatly diminished, as business which was entirely unobjectionable when established may become, by growth of population in vicinity, a source of danger to health and comfort of occupants of surrounding territory.

23. Counties ⇨21½

One keeping more than five hogs on his land in light manufacturing zone of county for periods of three or four days violated county ordinance declaring the keeping and maintenance of more than such number of hogs in such a district a public nuisance, though he dealt with them in resale only and hogs on land were not the same ones at all times.

24. Animals ⇨22

The word "keep," as applied to animals, means to tend, feed, pasture, board, maintain, and supply with necessities of life.

See publication Words and Phrases, for other judicial constructions and definitions of "Keep".

25. Nuisance \S 81

A judgment enjoining landowner's continued violation of county zoning ordinance declaring the keeping of more than five hogs on his land in light manufacturing district a public nuisance was not erroneous because of amendment of ordinance, referring only to adoption of additional land use district maps as part of official land use plan, though such maps included defendant's land, as such amendment made no change in original ordinance with reference to subject-matter of judgment.

King & Mussell, San Bernardino, for appellants.

Lowell E. Lathrop, Dist. Atty., Edward F. Taylor, Deputy Dist. Atty., San Bernardino, for respondent.

GRIFFIN, Justice.

As the result of an action to enjoin a claimed continuing violation of zoning ordinance number 678, of San Bernardino County, brought by said county on February 16, 1953, in the name of the People of the State of California, against defendant and appellant Vernon Johnson, the trial court, on August 5, 1953, rendered judgment in favor of plaintiff and respondent.

Zoning ordinance number 678 was enacted on July 9, 1951, and became effective on August 8, 1951. It provided a general scheme for zoning the unincorporated area of San Bernardino County to "promote, protect and secure the public health, safety and general welfare" of said county.

On April 14, 1950, defendant, who was a licensed dealer in hogs and cattle, purchased eight acres of land near Colton for \$1,750. A new school house had been erected in the neighborhood, and some of the adjoining land had been opened up for subdivision purposes and homes were built thereon. Defendant claims that at the time he purchased the property he intended to use it for the purpose of temporarily placing thereon cattle and hogs during the interval between purchase and sale of such livestock. He testified that thereafter he constructed a barbed wire

fence around it and put in a few "hog lots" costing about \$150, and piped the land for water; that due to road conditions only cattle were kept there, but in February, 1952, hogs were brought to the property. The *modus operandi* of defendant was to purchase hogs in small lots from surrounding territory, keep them on the property three or four days until he had enough to fill a truck, and they were then carted to the market in Los Angeles.

Ordinance number 678 declares that, in addition to criminal penalties, the keeping and maintenance of more than five hogs in an M-1 (limited manufacturing) district or zone, constitutes a public nuisance. This M-1 district was established prior to the time when defendant used the land for the keeping of hogs. Defendant admitted he thereafter kept up to 40 hogs on the property, but claims there were a few days, on occasions, when there were no hogs on the premises. He stated that he intended to continue the same operation of his premises unless restrained from so doing.

After hearing, the trial court issued a peremptory injunction restraining defendant from keeping or maintaining more than five hogs on the premises, and adjudged the condition a public nuisance.

Defendant appealed and contends first, that no cause of action under Code of Civil Procedure, section 731 was alleged or proved, and since a court of equity has no authority to abate a public nuisance except in specific cases where authority has been granted by the legislature, a civil action to enjoin a nuisance in the name of the people must find its sanction in that section; that it is immaterial that the ordinance, by its terms, declares such violations to be public nuisances; that no legislative body can, by its mere assertion, make that a nuisance which is not in fact a nuisance; that the California Constitution limits the power of counties to make and enforce within their limits only such local police, sanitary and other regulations as are not in conflict with general laws; that if a county ordinance purports to extend and enlarge the definition of public nuisances it is to that extent in conflict with the general law; that otherwise the ordi-

nance is an unreasonable and unjustifiable exercise of the police power; and that injunction will not lie to enforce a penal law except in case of nuisances or unfair competition, citing such authority as *People v. Robin*, 56 Cal.App.2d 885, 133 P.2d 436; *People v. Lim*, 18 Cal.2d 872, 118 P.2d 472; *Kreling v. Superior Court*, 18 Cal.2d 884, 118 P.2d 470; Civil Code, secs. 3479 and 3480; *People v. Oliver*, 86 Cal.App.2d 885, 195 P.2d 926; Civil Code, sec. 3494; Government Code, sec. 26528; *Board of Supervisors of Los Angeles v. Simpson*, 36 Cal.2d 671, 227 P.2d 14; *Laurel Hill Cemetery v. City and County of San Francisco*, 152 Cal. 464, 93 P. 70, 27 L.R.A.,N.S., 260; California Constitution, Art. XI, sec. 11; 7 Cal.Jur. p. 534, sec. 102; *Jones v. City of Los Angeles*, 211 Cal. 304, 295 P. 14; and Civil Code, sec. 3369.

The power of cities and counties to zone is derived from section 11, of Article XI of the California Constitution, which provides:

"Any county * * * may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

[1,2] Zoning is inherent in the police power, and the concept of comprehensive zoning has been sustained by the Supreme Court of California in *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479. The police power granted to the counties includes the power to zone. *Smith v. Collison*, 119 Cal.App. 180, 186, 6 P.2d 277; *Acker v. Baldwin*, 18 Cal.2d 341, 115 P.2d 455. The Conservation and Planning Act of 1947, Stats.1947, chap. 807, sec. 77, p. 1922, subsequently placed in the Government Code in 1951, Sec. 65090 et seq., authorizes a master plan which may comprise any, all, or any combination of plans specified, including "Land use plan. * * * an inventory and classification of natural land types and of existing land cover and uses, and comprehensive plans for the most desirable utilization of land." Sec. 65464. Sections 65300-01 not only authorize planning commissions for counties but direct that they *shall* be created by ordinance.

[3-7] It is apparent then, that the ordinance, as enacted under such legislative authority, is a valid exercise of the County's legislative power, as authorized by the section of the Constitution enacted. It follows that a county has power to enact zoning ordinances where its charter expressly confers upon the legislative body all the police powers that are vested in municipalities by the Constitution. *Brougher v. Board of Public Works*, 205 Cal. 426, 271 P. 487. The police power, as evidenced by zoning regulations, has a much wider scope than the mere suppression of offensive uses of property. It acts not only negatively, but affirmatively, for the promotion of the public welfare. The power to zone is not limited to the protection of established districts. On the contrary, zoning looks not only backward to protect districts already established, but forward to aid in the development of new districts. It is established that the power to zone extends to the regulation of uses of property which do not actually amount to nuisances. 12 Cal.Jur. Ten-Year Supp. p. 142, sec. 2 et seq.

[8-10] A final arbitrary definition of public nuisances that can be neither modified nor supplemented by further legislation is not intended in Code of Civil Procedure, sec. 731. A city has the power to pass general police regulations to prevent nuisances, and such power is not limited to the suppression of those things which are nuisances *per se* within the meaning of section 370 of the Penal Code and sections 3479 and 3480 of the Civil Code. In re Mathews, 191 Cal. 35, 214 P. 981. Public nuisances, declared under the Red Light Abatement Act, is one of these exceptions. *Board of Supervisors of Los Angeles County v. Simpson*, 36 Cal.2d 671, 227 P.2d 14. The general rule is that where the legislature has not enacted statutes specifying that an activity contrary to public policy constitutes a public nuisance which may be enjoined in an action on behalf of the State, the courts will not ordain such jurisdiction for themselves. *Monterey Club v. Superior Court*, 48 Cal.App. 2d 131, 119 P.2d 349. In the instant case the County of San Bernardino is a char-

tered county and its charter was approved by legislative act. Stats.1913, chap. 33, p. 1652. It gave to the officers of that county such "powers and duties as are or shall be provided for in this charter."

[11-14] In the case of *In re Mathews*, 191 Cal. 35, 214 P. 981, 983, where a city ordinance declared it to be a nuisance and unlawful for any person to keep or maintain any goat within a described area in the city, the same contention was made, i. e., that the ordinance conflicted with the state law. It was contended that by section 370 of the Penal Code and sections 3479 and 3480 of the Civil Code certain things had been declared public nuisances; that a municipality is without authority to determine that a specific act is within the code definitions and that the city, by providing regulations on the subject of keeping goats, recognized that when so kept they are not a nuisance, and that by the ordinance they attempted to bring the keeping of goats within the definition of a nuisance. It was there said that a city clearly has power to pass general police regulations to prevent nuisances, and such power is not limited to the suppression of those things which are nuisances *per se* within the meaning of the code sections, citing *Odd Fellows' Cemetery Ass'n v. City & County of San Francisco*, 140 Cal. 226, 231, 73 P. 987, where it is said:

"Whenever a thing or act is of such a nature that it may become a nuisance, or may be injurious to the public health, if not suppressed or regulated, the legislative body may, in the exercise of its police powers, make and enforce ordinances to regulate or prohibit such act or thing, although it may never have been offensive or injurious in the past."

Also cited in the *Mathews* case was *Ex parte Shrader*, 33 Cal. 279, 284, where it is said:

"The power to regulate or prohibit conferred upon the board of supervisors not only includes nuisances, but extends to everything "expedient for the preservation of the public health, and the prevention of contagious diseases."'"

After quoting from these cases the court in the *Mathews* case then said:

"The mere fact that in the ordinance the subject-matter is referred to as a nuisance cannot invalidate the enactment if the city had the power to pass it", and held that "the keeping of goats at any point within the city limits is inimical to the public welfare unless the sanitary regulations provided are complied with * * *." *Boyd v. City of Sierra Madre*, 41 Cal.App. 520, 527, 183 P. 230, is cited in respect to the power of a city to pass police regulations, where it is declared: "Primarily, it is for the city's legislative body, clothed with police power by direct grant from the Constitution, to determine when and what regulations are essential; and its determination in this regard, in view of its better knowledge of all the circumstances and the presumption that it is acting with due regard for the rights of all parties, will not be disturbed by the courts, unless it plainly can be seen that the regulation has no relation to the protection of health, safety, comfort or well-being of the community, but is a clear invasion of personal or property rights under the guise of police regulation."

It was then said that the keeping of animals may be a proper subject of municipal regulation, and that by such regulation the number of animals which may be kept may be limited. See also *Laurel Hill Cemetery v. City and County of San Francisco*, 152 Cal. 464, 93 P. 70, 27 L.R.A.,N.S., 260.

The ordinance here involved provides that any use of property contrary to its provisions is declared "to be unlawful and a public nuisance", and it authorizes the district attorney to commence an action to abate, restrain or enjoin any person from using such property contrary to the provisions of the ordinance.

In addition to the finding that the provisions of the ordinance had been breached, as indicated, the court also found, upon substantial evidence, that since March, 1952, defendant "kept, maintained, and

used" said premises for the keeping and maintaining of more than five hogs, in violation of the ordinance; that at no time prior to March, 1952, were the premises used for keeping or maintaining more than five hogs; that such use constituted a public nuisance under the ordinance and that such keeping and maintaining of more than five hogs thereon causes odors and dust to be emitted from said premises over and upon the adjacent streets and property and are injurious to the health and offensive to the senses so as to interfere with the enjoyment of life and property of a considerable number of persons living in the community and in the immediate neighborhood.

[15] In *People v. Lim*, 18 Cal.2d 872, 118 P.2d 472, 476, the rule in relation to injunctive relief rather than criminal prosecution, is stated to be, quoting from *State v. Ehrlick*, 65 W.Va. 700, 64 S.E. 935, 23 L.R.A.,N.S., 691:

"It is also competent for the Legislature, within the constitutional limits of its powers, to declare any act criminal and make the repetition or continuance thereof a public nuisance * * * or to vest in courts of equity the power to abate them by injunction; but it is not the province of the courts to ordain such jurisdiction for themselves."

[16] In *City of Stockton v. Frisbie & Latta*, 93 Cal.App. 277, 270 P. 270, it was held that where the personal welfare and the property rights of a large number of the inhabitants of a city or town would be detrimentally affected by the violation of a police or sanitary regulation, whether the ordinance provides other means for its enforcement or not, such city or town may itself appeal to a court of equity by means of the forceful and singularly effective writ of injunction to restrain such violation or to cause the wrongful effect thereof to be removed. To the same effect is *City of Yuba City v. Cherniavsky*, 117 Cal.App. 568, 4 P.2d 299; *County of San Diego v. McClurken*, 37 Cal.2d 683, 234 P.2d 972; and 62 C.J.S., *Municipal Corporations*, § 281, p. 631. It therefore appears that the contentions above made

are sufficiently disposed of by the cited cases.

[17] The second claim is that ordinance No. 678, if construed to support the injunction in the present case, conflicts with Code of Civil Procedure, sec. 731a, which section provides that, with respect to commercial and manufacturing uses, where certain uses are expressly permitted, no such use would be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation, and since there is no such evidence the judgment entered was erroneous.

This question was raised in *In re Jones*, 56 Cal.App.2d 658, 133 P.2d 418, but was not decided because it was not material to a determination of the question there presented. It appears that the ordinance here involved did permit a use to the extent of keeping and maintaining not exceeding five hogs, but when that number was exceeded, such additional use was prohibited. Therein lies the main distinction from the cases relied upon by defendant. If defendant limited the number of hogs to be kept to five there would be merit to this contention. The section itself provides for an exception in an action to abate a public nuisance brought in the name of the People of the State of California.

[18,19] The next contention is that the evidence did not support the finding that defendant "kept and maintained" more than five hogs on the premises, within the commonly accepted meaning of those terms, or within the definitions contained in the ordinance, since the evidence shows they were not permanently maintained there but the premises were only used as a trucking terminal, and that since the ordinance provides (sec. 12.3) that uses permitted in M-1 zone are for "distribution plants",—"feed and fuel storage yards", "trucking yard or terminal", defendant's activities are expressly permitted, and since defendant's intention to use the property for hogs and the expenditure of money in the amounts and for the purposes indicated established a nonconforming use existing prior to the

date the ordinance became effective, such nonconforming use was permitted in the terms of the ordinance itself, citing sec. 15.5, subdivisions b, c, e, f and g thereof; and *County of San Diego v. McClurken*, 37 Cal.2d 683, 234 P.2d 972.

It is a general rule that a continued nonconforming use must be similar to the use existing at the time the zoning ordinance exempting it became effective, and in determining whether the nonconforming use was the same before and after the passage of a zoning ordinance, each case must stand on its own facts, and it is usually a question of fact for the trial court, notwithstanding the majority holding in the *McClurken* case. *Edmonds v. County of Los Angeles*, 40 Cal.2d 642, 255 P.2d 772. The finding of the trial court that at no time prior to March, 1952, were said premises used for the *keeping and maintaining* of more than five hogs is supported by the evidence notwithstanding defendant's statement that he did intend, sometime in the future, to use it for the purpose of temporarily keeping thereon more than five hogs.

In *O'Rourke v. Teeters*, 63 Cal.App.2d 349, 146 P.2d 983, 985, it was said:

"The fact that a party makes a large investment in a city lot, which at the time it is purchased is free of restrictions, with intent to use it for business purposes does not invalidate a zoning ordinance subsequently adopted restricting the use of the property to residential purposes." (Citing cases.)

[20-22] It is well settled that when an ordinance is passed relating to a matter which is within the legislative power of the municipality, all presumptions are in favor of its validity, and when it is attacked the burden is upon the party alleging its invalidity to establish that fact. *City of Yuba City v. Cherniavsky*, 117 Cal.App. 568, 4 P.2d 299. The general rule in this respect is stated in 18 Cal.Jur. p. 858, sec. 158, as follows:

"* * * An ordinance fixing limits within which a disagreeable business may be exercised which has in fact some relation to the public health,

and is appropriate and adapted to that end, is not objectionable as depriving the owner of his property without due process of law or without compensation. * * * The right of the legislative body to pass zoning ordinances is not limited by the fact that the value of investments made in the business prior to any legislative action will be greatly diminished, for a business which when established was entirely unobjectionable may, by the growth of population in the vicinity, become a source of danger to the health and comfort of those who have come to be occupants of the surrounding territory."

There is no showing in the instant case that the zoning ordinance in reference to the matter here under discussion is unreasonable in any particular or in violation of defendant's constitutional rights, as claimed.

[23, 24] The contention that defendant was not, under the evidence produced, *occupying and maintaining* hogs on his premises in violation of the ordinance because he was dealing with them in resale only, is untenable. Locating a prohibited number of hogs on the premises for the times indicated, over a period of months, even though they were not at all times the same hogs, would be "keeping and maintaining" hogs on the premises within the meaning of that section. If the stench was still perceptible to the olfactory senses of the adjoining neighbors, the identity of the individual offending hogs would become unimportant. *Ex parte Glass*, 49 Tex.Cr.R. 87, 90 S.W. 1108. See 23 Words and Phrases, *Keep*, p. 498, wherein it is said:

"The word 'keep,' as applied to animals, has a peculiar signification." It means "to tend; to feed; to pasture; to board; to maintain; to supply with necessities of life."

[25] The last claim is that ordinance number 678 was amended by ordinance number 688, effective 30 days after February 25, 1952, and that since defendant had actually placed nine hogs on the

premises by that time, the judgment herein was erroneous. The original ordinance prohibited more than five hogs to be kept on the premises, and defendant's property was classified as being in M-1 district at the time. The claimed amendment referred only to the matter of adopting additional land use district maps as a part of the official land use plan. Although these maps did include defendant's property, there was no change in the original ordinance in reference to the subject matter herein discussed. There is no merit to this contention.

Judgment affirmed.

BARNARD, P. J., concurs.

Hearing denied; CARTER, J., dissenting.



129 Cal.App.2d 427

In the Matter of the ESTATE of Herbert W. WARD, Deceased.

**R. E. ALLEN, Petitioner and Respondent,
Raymond G. Garner, Respondent,**

v.

**Jean H. COLEMAN, Contestant and
Appellant.**

Civ. 20302.

District Court of Appeal, Second District,
Division 1, California.

Dec. 7, 1954.

Proceeding on petition by administrator of estate for approval of contested agreement entered into by such administrator in compromise of pending litigation and claims against estate. The Superior Court, Los Angeles County, Thurmond Clarke, J., entered order approving agreement and contestant appealed. The District Court of Appeal, Doran, J., held that evidence on issue whether administrator made sufficient investigation to verify assumptions on which compromise was predicated was sufficient to support court order granting approval.

Order affirmed.

Executors and Administrators ¶269

In proceeding by administrator of estate for approval of contested agreement entered into by such administrator in compromise of pending litigation and claims against estate, evidence on issue whether administrator made sufficient investigation to verify assumptions on which compromise was predicated was sufficient to support court order granting approval. Probate Code, § 718.5.

Spiegel, Turner & Wolfson, Albert A. Spiegel, Santa Monica, for appellant.

Carl B. Sturzenacker, Hollywood, for respondents.

DORAN, Justice.

As recited in appellant's brief, "This is an appeal from an order of the court below approving an agreement entered into by R. E. Allen, administrator of the estate of Herbert W. Ward, Raymond G. Garner and Ward Enterprises, Inc., a California corporation, in compromise of pending litigation and claims against the estate. The factual background of the agreement and order is as follows:

"Herbert W. Ward died on May 14, 1949. Since that time, respondent Raymond G. Garner has contended that he was an equal partner of decedent 'in all business enterprises in which the decedent was engaged and that the decedent recognized him as such.' Among the enterprises encompassed within that claim and in which Garner claims a half interest are the following: (1) a restaurant and tavern known as the 'Charcoal Broiler', located at 219 West Grand Avenue, El Segundo, California, and (2) a California corporation known as 'Ward Enterprises, Inc.' On July 28, 1949, the then administratrix of the estate (petitioner herein), declaring that the said claims of Garner were without foundation, filed a suit for declaratory relief in the Superior Court to test the validity of those claims.

"Shortly thereafter, Ward Enterprises, Inc., filed a creditor's claim in said estate for the sum of \$84,949.15 supposedly 'for loans and advances to decedent and to

Rounders and Charcoal Broiler, two enterprises in which decedent was interested, totalling \$146,747.67, which sum was offset by loans and advances to the corporation by decedent in the sum of \$61,798.52.'

"Respondent R. E. Allen, who was appointed administrator to succeed petitioner in the spring of 1950, neither allowed nor disallowed the claim. On July 31, 1952, he entered into an agreement with Ward Enterprises, Inc., and with Garner disposing of their respective claims."

Allen then petitioned the court for approval of the agreement. Appellant Coleman filed objections to the petition. After a hearing the compromise was approved by the court. The appeal herein is from this order.

It is contended by appellant that "The Order of the court below should be reversed since (1) petitioner made no investigation whatsoever to verify the assumptions on which the compromise is predicated, (2) petitioner was completely ignorant of the true status of the accounts between the parties, (3) the facts were not as represented by petitioner, and (4) petitioner, contrary to the provisions of section 718.5 of the Probate Code, failed to show 'the advantage of the compromise' to the estate."

Respondent, on the other hand, argues that "In the approving of an order it is presumed that the court investigated the entire transaction, and if any transaction was ever investigated to an extreme, this one was. I would say we were in court six days, of which five and a half days were taken up by Mr. Spiegel's investigation of the books, income tax statements and every conceivable angle was presented to the court; the court took the matter under consideration and approved the settlement. A careful investigation of the transcript will certainly reveal that the court did not rely upon the testimony altogether of Mr. Allen, Mr. Walker, Mr. Garner or of counsel for this respondent, but the court took into consideration the accumulation of documentary evidence and the testimony of the respective parties. The contestant presented no testimony only in support of her contest."

Obviously the issue presents a question of fact. It would serve no useful purpose to recite the details relating to the transaction. It is sufficient to note that a review of the record reveals that the evidence was sufficient to support the court's order and judgment, moreover, there was no abuse of discretion.

The order is affirmed.

WHITE, P. J., and DRAPEAU, J.,
concur.



Bertha Ziv PINSKY and Solly Ziv,
Plaintiffs and Appellants,

v.

Helen SLOAT and Marlan Wright, Defend-
ants and Respondents *

Civ. 20301.

District Court of Appeal, Second District,
Division 3, California.

Dec. 7, 1954.

Rehearing Granted Dec. 29, 1954.

Subsequent Opinion 279 P.2d 584.

Suit to determine title to parcel of realty. The Superior Court, Los Angeles County, Clarence L. Kincaid, J., found title in defendants, and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that where plaintiffs foreclosed deed of trust of parcels on each side of a parcel that had once been a public road, but had been abandoned by the county, before making of deed of trust, and deed of trust had described encumbered parcels according to map in county recorder's office which still showed parcel as a public road, plaintiffs did not acquire title to lands to the center of such abandoned road.

Judgment affirmed.

1. Highways ⇐81

When county board of supervisors made order of abandonment of parcel of land laid out as a road, all rights of county

* Subsequent opinion 279 P.2d 584.

ceased, and title to lands reverted to previous owner. Streets and Highways Code, § 960.

2. Boundaries ⇐20(1)

Where plaintiffs, by foreclosure of deed of trust, took title to land adjacent to parcel that had once been roadway, but had been abandoned by county before making of deed of trust, they could not invoke rule that owner of land bounded by highway is presumed to own to center line of highway as to adjacent parcel. Civ.Code, § 831.

3. Boundaries ⇐20(1)

Where deed of trust did not expressly include adjacent parcel that had been abandoned as a roadway, fact that deed of trust described parcels encumbered as per map in county recorder's office, which map described such adjacent parcel as a roadway, did not operate to convey to center of such parcel, when it was not in fact a public road. Civ.Code, § 831.

Paul D. Holland, Beverly Hills, for appellants.

Fred W. Chase, Glendale, for respondents.

VALLÉE, Justice.

This suit involves the rights in and the title to a parcel of realty in the county of Los Angeles which was formerly a public highway.

On July 2, 1948, defendant Sloat by grant deed acquired title to three parcels of property. Parcel one consisted of lot 1 and a part of lot 2; parcel two consisted of lots 24, 25, and part of lot 26; parcel three consisted of a part of Scherzinger Lane. Parcel three is the property in controversy. Scherzinger Lane was formerly a dead-end street. Later Sloat executed a deed of trust which described parcels one and two by reference to a map in the office of the county recorder, but did not describe parcel three. The map in the recorder's office showed parcel three surrounded on three sides by parcels one and two. Plaintiffs were named as beneficiaries in the deed of trust. On March

7, 1952, plaintiffs acquired title to parcels one and two on foreclosure of the deed of trust.

On February 2, 1937, prior to the execution of the deed of trust, the board of supervisors of the County of Los Angeles abandoned that part of Scherzinger Lane surrounded by parcels one and two. The part abandoned had never been "improved as a street for public use." A strip about 14 or 15 feet wide had been black-topped and paved by Sloat for convenience in getting to the house on parcels one and two. Since parcel three was abandoned it has been assessed and taxed separately, and the taxes have been paid by Sloat since she acquired title.

The court found that Sloat did not by the deed of trust convey parcel three, nor did she intend to do so; that a strip 11 feet wide in parcel three has been used as a roadway by plaintiffs for access to their home since they acquired title to parcels one and two; and that defendants have interfered with and threaten to prevent plaintiffs' use of the 11-foot roadway. The judgment decreed that plaintiffs have an easement over the 11-foot roadway which is appurtenant to parcels one and two; and enjoined defendants from plaintiffs' use of the easement. Plaintiffs appeal.

[1-3] Plaintiffs' contention is that the conveyance of parcels one and two to the trustee extended to the center line of Scherzinger Lane, parcel three, on which each parcel fronted, and that the abandonment of Scherzinger Lane did not affect that title. The contention cannot be upheld. Scherzinger Lane was abandoned on February 2, 1937. On the making of the order of abandonment by the board of supervisors all rights of the county ceased, and the title to the land previously subject to such rights reverted to the owner thereof. Sts. & Hy.Code, § 960. The evidence was undisputed that the predecessor in interest of defendant Sloat was the owner of Scherzinger Lane at the time it was abandoned as a public highway. When plaintiffs acquired title to parcels one and two a public highway did not exist; and the rule, urged by

plaintiffs, that an owner of land bounded by a highway is presumed to own to the center of the way, Civ.Code, § 831, does not apply. The presumption created by section 831 is rebuttable and the contrary may be shown. The deed of trust did not expressly include parcel three, and the mere fact that it described parcels one and two as per a map recorded in the office of the county recorder, which map showed parcel three as a public highway, did not operate to convey to the center of parcel three when it was not in fact a public highway.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



129 Cal.App.2d 389

Isabelle F. STEELE, Plaintiff and Respondent,

v.

Ralph STEELE, Defendant and Appellant.

Civ. 20533.

District Court of Appeal, Second District,
Division 1, California.

Dec. 6, 1954.

Divorce proceeding. The Superior Court, County of Los Angeles, Kurtz Kauffman, J., entered interlocutory decree of divorce for wife awarding wife realty to the extent that it was community property upon condition of payment of stated sum to husband in monthly installments. Husband appealed, and wife moved to dismiss appeal on ground that husband had accepted eight monthly installments under the decree. The District Court of Appeal, Drapeau, J., held that voluntary acceptance of benefit of decree did not bar appeal therefrom.

Motion denied.

Divorce 281

Where interlocutory divorce decree awarded wife realty to the extent that it was community property upon condition of payment to husband of stated sum in monthly installments, fact that husband had accepted several monthly installments under the decree did not bar his appealing therefrom.

Noren Eaton, Sierra Madre, for appellant.

Frank S. Whiting, Pasadena, for respondent

DRAPEAU, Justice.

Plaintiff wife was awarded an interlocutory decree of divorce from defendant husband. The decree gave to the wife an undivided one-half interest in a nine unit furnished court in Sierra Madre. It was stipulated at the trial that this property belonged one-half to the wife as her separate property and that the other one-half belonged to the husband and wife as community property.

The decree gave the community one-half to the wife, and provided that she pay her husband \$10,000, at the rate of \$100 per month with interest.

The husband has appealed from the judgment and has filed his opening brief.

The wife now moves to dismiss the appeal for the reason that the husband has accepted eight monthly payments of \$100 each under the terms of the decree.

Voluntary acceptance of the benefit of a judgment or order does not always bar the prosecution of an appeal therefrom.

When there has been payment of a judgment by an appellant he does not lose his right of appeal if it is compulsory, such as under execution or other coercion. *Reitano v. Yankwich*, 38 Cal.2d 1, 237 P.2d 6.

A wife who accepted certain items of property shortly after the conclusion of the divorce trial but before the judgment was signed was not estopped from prosecuting her appeal. *Stice v. Stice*, 81 Cal.App.2d 792, 185 P.2d 402.

In *Daroux v. Daroux*, 53 Cal.App. 223, 199 P. 1112, in deciding a motion to dismiss the appeal, it was said that the settlement of property rights of the parties to an action for divorce, being a mere incident of the main purpose of the action, it should be the policy of appellate courts to hear and determine such actions upon their merits.

The motion is denied.

WHITE, P. J., and DORAN, J., concur.



129 Cal.App.2d 268

Herbert F. QUISENBERRY, Plaintiff and Appellant,

v.

Alice Eva RULISON et al., Defendants and Respondents.

Civ. 15979.

District Court of Appeal, First District,

Division 2, California.

Dec. 1, 1954.

After employee had obtained judgment against tort-feasor who had injured him, the Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered order denying employee's motion for counsel fees to be paid from portion of judgment awarded to compensation carrier and employee appealed. The District Court of Appeal, Dooling, J., held that, where only after action by employee against tort-feasor who had injured him was actually being tried did compensation carrier receive notice that case was in litigation or actually proceeding to trial, such notice was not timely, since it was not "before trial on the facts", and, therefore, compensation carrier would not be required to pay an attorney's fee to employee's attorneys.

Order affirmed

277 P.2d—4½

1. Workmen's Compensation

☞2188, 2224, 2252

Where tort-feasor injures an employee, employer or compensation carrier has claim against tort-feasor for amount of compensation paid employee as a result of such tortious injury, and such claim may be asserted by employer or carrier by bringing an independent action, by joining in action brought by employee, or by abstaining from suit and claiming a lien against judgment recovered by employee. Labor Code, §§ 3852-3855.

2. Workmen's Compensation ☞2215

Where employee is injured by tort-feasor, employee has statutory duty to give written notice to compensation carrier of commencement of his action against tort-feasor. Labor Code, § 3850(b).

3. Workmen's Compensation ☞2198, 2215

Purpose of Labor Code provision providing that, if either employee or employer brings action against tort-feasor who has injured employee, employer or employee should give to the other written notice of such action is to enable employer or compensation carrier to make choice whether to join in the action and employ his own attorneys or to permit employee, through employee's attorneys, to proceed without employer or carrier intervening. Labor Code, § 3853.

4. Workmen's Compensation ☞2248

Where notice is not given to employer or compensation carrier of employee's commencement of action against tort-feasor who has injured him in time for employer or compensation carrier to make choice whether to join in action, compensation carrier is not to be required to pay an attorney's fee to employee's attorney. Labor Code, § 3856.

5. Workmen's Compensation ☞2248

Where only after action by employee against tort-feasor who had injured him was actually on trial did compensation carrier receive notice that case was in litigation or actually proceeding to trial, such notice was not timely, since it was not "before trial on the facts", and, there-

fore, compensation carrier would not be required to pay an attorney's fee to employee's attorneys. Labor Code, §§ 3853, 3856.

6. Workmen's Compensation §2242

In proceeding arising from action by employee against tort-feasor who had injured employee, it was for trial court to construe evidence upon issue whether compensation carrier had sufficient notice of the action so that it would be liable for fees of employee's attorneys, and any reasonable construction of effect of such evidence which would support trial court's order on such issue adverse to employee would be binding upon the district court of appeal. Labor Code, §§ 3853, 3856.

Barrett & Harkleroad, San Francisco,
Healy & Walcom, San Francisco, for ap-
pellant.

Boyd, Taylor & Reynolds, San Fran-
cisco, for respondent.

DOOLING, Justice.

This is an appeal from an order made after final judgment denying the motion of appellant's attorneys for counsel fees to be paid out of the portion of the judgment awarded to the compensation carrier of appellant's employer pursuant to Labor Code section 3856.

Plaintiff-appellant Quisenberry while in the course of his employment by Yellow Cab Co. was injured by an automobile driven by defendant Rulison. On February 6, 1953 a verdict of \$10,000 was awarded him for personal injuries against Rulison. Against this judgment respondent Pacific Indemnity Company had a lien of \$2690.31 for workmen's compensation payments made to appellant.

[1] An employer, or his compensation carrier, has a claim against a tort feasor who injures an employee, for the amount of compensation paid to the employee as a result of such tortious injury. Lab. Code, sec. 3852. This claim may be asserted either by the employer or his compensation carrier bringing an independent action, Lab. Code, secs. 3852, 3854, join-

ing in an action brought by the employee, Lab. Code, sec. 3853, or abstaining from suit and claiming a lien against the judgment recovered by the employee, Lab. Code, sec. 3856. *Burum v. State Compensation Ins. Fund*, 30 Cal.2d 875, 580-581, 184 P.2d 505.

In order to protect these rights Lab. Code sec. 3853 provides: "If either the employee or the employer brings an action against such third person, he shall forthwith give to the other written notice of the action, and of the name of the court in which the action is brought by personal service or registered mail. Proof of such service shall be filed in such action. If the action is brought by either the employer or employee, the other may, at any time before trial on the facts, join as party plaintiff or shall consolidate his action, if brought independently." "'Employer' includes insurer as defined in this division." Lab. Code, sec. 3850(b).

[2] Thus the statutory duty was cast on appellant in this case to give written notice of the commencement of his action against Rulison to the compensation carrier. This admittedly was never done. Instead on the next to the last day of the trial counsel for the appellant telephoned to an employee of the carrier and asked him (quoting from the affidavit of J. K. Kirby, claims superintendent of the carrier, filed in opposition to the motion for attorney's fees) "to give him the total amount of expenditures made by the Pacific Indemnity Company in accordance with the terms of their Workmens Compensation policy so that he could introduce the same in evidence in said case; that said telephone conversation * * * was the first notice that Pacific Indemnity Company had received that said case was in litigation or actually proceeding to trial * * *"

The affidavit further recites that on that day affiant requested the carrier's attorneys to file a notice of lien in this action which was done on the same day.

Lab. Code, sec. 3856 provides, so far as material to the question here presented: "If the employer has not joined in the action or has not brought action, or if his

action has not been consolidated, the court, on his application shall allow, as a first lien against * * * any judgment * * * recovered by the employee, the amount of the employer's expenditures for compensation; provided * * * that where the employer has failed to join in said action and to be represented * * * by his own attorney, or * * * has not made arrangements with the employee's attorney to represent him in said action, the court shall fix a reasonable attorney's fee * * * to be paid to the employee's attorney * * *."

[3,4] The evident and only purpose of the requirement for the notice of commencing an action in Lab. Code, sec. 3853 is to enable the employer or his compensation carrier to make his choice whether to join in the action and employ his own attorneys or to permit the employee through his attorneys to proceed without the employer or carrier intervening. Where the notice is not given in time for him to exercise this election it would be manifestly unfair, and an unreasonable construction of sec. 3856, to require him to pay an attorney's fee to the employee's attorneys. The fee is not payable unless he "has failed to join in said action and to be represented therein by his own attorney"; and sec. 3853 puts the duty on the employee to give him timely notice of the pendency of the action so that he may do this if he sees fit. Under sec. 3853 he can intervene "at any time before trial on the facts".

[5] We must assume in favor of the court's order denying counsel fees that it believed the statement in the affidavit opposing the motion that it was only after the case was actually on trial that the carrier received the first notice "that said case was in litigation or actually proceeding to trial." This was too late, since it was not "before trial on the facts", for the

carrier to intervene or employ its own attorney for that purpose.

Appellant relies on three letters from the compensation carrier to appellant's attorneys to show that the carrier had actual notice of the pendency of the action in plenty of time to intervene if it saw fit. In the first of these letters the carrier advised the attorneys that they were the insurers carrying workmen's compensation for Yellow Cab Co., that they had paid compensation to appellant Quisenberry, that they would expect reimbursement from any settlement by Rulison with Quisenberry and "(i)n the event of litigation" requesting "Statutory Notice under the Labor Code, section 3853 in ample time to permit referral * * * to our subrogation attorneys to represent our interests."

The second letter states: "It is our understanding that you contemplate taking, or have already taken, action on behalf of your client." It suggested that if counsel preferred they would not intervene in any such action if counsel would agree not to deduct any amount for their attorneys' fees from the carrier's share of any settlement or judgment. In the third letter the carrier referred to the second and asked for an answer to its proposal therein made.

There is nothing necessarily in conflict in any of these letters with the statement in the affidavit above quoted that the telephone call during the course of trial "was the first notice that Pacific Indemnity Company had received that said case was in litigation and actually proceeding to trial."

[6] It was for the trial court to construe the evidence and any reasonable construction of the effect of the evidence which will support the order is binding on us.

Order affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

129 Cal.App.2d 421

Leslie A. LEWIS and Winefred Lewis,
Plaintiffs, Cross-Defendants and
Respondents,

v.

Charles Chester WITCHER, and George
Smith Mann, Defendants,

George Smith Mann, Cross-Complainant and
Appellant.
 Civ. 20299.

District Court of Appeal, Second District,
 Division 1, California.

Dec. 7, 1954.

Action for breach of contract and for money had and received. Defendant was permitted five months after original answer had been filed to file amended answer, and cross-complaint with allegations which were substantially same as allegations of counterclaim filed at time cross-complaint was filed. No notice of entry of default or time of hearing on cross-complaint was given to attorney for defaulting party, and defendant was awarded a default judgment on his cross-complaint. Within two months after award of default judgment defaulting party filed motion to set aside default and file answer to cross-complaint. The Superior Court, Los Angeles County, Thurmond Clarke, J., granted motion to set aside default judgment and defendant appealed. The District Court of Appeal, White, P. J., held that under the circumstances granting of motion to vacate default was not abuse of discretion.

Order affirmed.

1. Pleading *Code Civ. Proc.* § 167, 168

Where defendant in action for breach of contract for money had and received filed both counterclaim and cross-complaint, all allegations of counterclaim must "be deemed controverted" while allegations of same matters in cross-complaint must "be taken as true". *Code Civ. Proc.* § 462.

2. Appeal and Error *Code Civ. Proc.* § 708

Where record failed to show what time elapsed between discovery of default judgment on cross-complaint and filing of notice of motion to set aside default by defaulting party, court could not hold appli-

cation for relief was not made within reasonable time.

3. Appeal and Error *Code Civ. Proc.* § 957(1)**Judgment** *Code Civ. Proc.* § 139

An application to vacate default is addressed to sound discretion of court and will not be disturbed except in case of manifest abuse of discretion. *Code Civ. Proc.* § 473.

4. Judgment *Code Civ. Proc.* § 139

Where allegations in cross-complaint, which defendant had been permitted to file some five months after his answer had been filed, were substantially same as allegations of counterclaim filed at same time, no notice of entry of default or time of hearing on cross-complaint had been given to attorney for defaulting party, and motion to set aside default was timely filed, granting of motion to vacate default was not abuse of discretion. *Code Civ. Proc.* § 473.

Braeme E. Gigas, South Pasadena, for appellant.

Brand & Cooper, Ralph A. Fields, Leon M. Cooper, Beverly Hills, for respondents.

WHITE, Presiding Justice.

This appeal was taken by defendant George Smith Mann, for himself alone, from an order granting motion to set aside a default judgment in favor of said appellant alone upon his cross-complaint, and to file respondents' answer to cross-complaint, copy of which was attached to their notice of motion.

The instant action is against appellant and defendant Witcher, both of whom were licensed real estate agents, for breach of contract and for money had and received. Defendants filed their joint answer on August 25, 1952. October 2, 1952, appellant for himself alone filed a substitution of attorneys and on December 26, 1952, he filed notice of motion for leave to file an amended answer, counterclaim and cross-complaint. The hearing on that motion was continued from the date first set, because of the absence from the city of respondents' counsel. After his return, on or about January 15, 1953, he telephoned appellant's

counsel and told him he would stipulate that the amended answer, counterclaim and cross-complaint might be filed. In the same conversation counsel discussed the fact that respondents were in Siam and their agent was in New York, that "there was a good chance that the plaintiffs would dismiss their complaint", and appellant's counsel "agreed that the matter of obtaining a dismissal be pursued, that no further proceedings would or need be taken in this matter until the question of the granting of a voluntary dismissal was determined".

[1] January 16, 1953, appellant's motion was granted, notice of ruling on motion was mailed to respondents' attorneys, and on January 23, 1953, appellant's amended answer, counterclaim and cross-complaint were served by mail and filed. The counterclaim seeks to recover: (1) \$4,484.13, real estate commission; (2) \$4,484.13 for services, work and labor performed; and (3) \$5,000, the reasonable value of services performed. The cross-complaint seeks to recover: (1) \$4,484.13, fee for services rendered in the sale of real estate; (2) \$5,000, the reasonable value of services performed; and (3) \$5,000 due under an exclusive listing agreement with appellant as a real estate broker. All allegations of the counterclaim must "be deemed controverted", while allegations of the same matters in the cross-complaint must "be taken as true". Section 462, Code of Civil Procedure.

February 9, 1953, request for entry of respondents' default for their failure to answer the cross-complaint was filed, and on February 18, 1953, respondents' default was duly entered. Respondents' counsel was not informed of appellant's intention to request default, that he had filed such request, or that default had been entered.

March 12, 1953, appellant's notice of motion for transfer of the cause to the Pasadena Department was served and filed. Respondents' counsel appeared in court on March 17th in opposition to appellant's motion for transfer. The following is quoted from the affidavit of appellant's counsel which was filed in opposition to the motion for the order from which this appeal was taken: "Judge Barnes, in open

court, severely rebuked Mr. Fields for not having filed an answer to the cross-complaint and suggested he get busy and do so. * * * He was rebuked by Judge Barnes on March 17th." (Emphasis added.) From the record, it does not appear that, even at the hearing on March 17, 1953, when Judge Barnes "suggested he get busy" and file an answer to the cross-complaint, respondents' counsel was informed, either by Judge Barnes or by appellant's counsel, that default had been requested or entered, or that counsel intended to take a default judgment on his cross-complaint. The trial of the action had been set for September 23, 1953. March 31, 1953, appellant was awarded a default judgment on his cross-complaint for: (1) \$4,484.13 on the first cause of action; and (2) \$2,000 on the second cause of action.

While the record shows prompt service upon respondents' counsel of formal notice of the rulings upon appellant's motions for permission to file his own amended answer and cross-complaint and for transfer of the action to the Pasadena Department, one of which rulings was made upon consent and the other in the presence of respondents' counsel, no notice of the entry of default or the time of the hearing on the cross-complaint was given.

From the record before us, counsel's first knowledge that default was contemplated may have been May 13, 1953, the date of his Notice of Motion to Set Aside a Default and to File An Answer.

Section 473 of the Code of Civil Procedure provides in part that "The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken. * * *

Respondents' application for relief was accompanied by a copy of their answer to

the cross-complaint, and a good defense to the cross-complaint was pleaded by the proposed answer. The application was made well within six months. Nevertheless, appellant urges that the order was an abuse of the trial court's discretion and that it should be reversed for two reasons: (1) Respondents' mistake, inadvertence, surprise or neglect was not excusable; and (2) The application for the relief granted was not made within a reasonable time.

[2] Since the record before us fails to show what, if any, time elapsed between respondents' discovery that a default judgment had been taken and the filing of the notice of motion to set aside the default and permit the filing of their answer to the cross-complaint, it cannot be held that the application for the relief granted was not made within a reasonable time.

As authority for his contention that respondents' mistake, inadvertence, surprise or neglect was not excusable, appellant relies upon the following decisions, in each of which the order of the trial court setting aside a default judgment was reversed on appeal and held to have been an abuse of discretion.

Benjamin v. Dalmo Mfg. Co., 31 Cal.2d 523, 527-528, 190 P.2d 593, 595, where a secretary, misunderstanding her instructions, filed the complaint and summons in defendant's office instead of sending them to defendant's attorney, and "the day following the president's receipt of notice from defendant's attorney regarding the taking of the default judgment, the papers served upon defendant's respective officers were forwarded to the attorney in prompt correction of the prior oversight." On motion to set aside the default, the trial court held that the delay until receipt of the notice of default was "satisfactorily explained", but there was "an unexplained delay" of almost three months "after full knowledge of the entry of the default."

Bailey v. Taaffe, 29 Cal. 422, 423-425, from which the following excerpts are quoted: "It is true * * * that orders like the present, in legal parlance, rest very much in the discretion of the Court below, and will not be disturbed by this Court unless we are satisfied that the order

is so plainly erroneous as to amount to an abuse of discretion. (Citation.) * * * If, on the contrary, we are satisfied beyond a reasonable doubt that the Court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other. * * * There is no pretense of mistake, inadvertence, or surprise in the affidavit in this case. * * * no reason is given why, if more time was required, either an account of the complications suggested, or on account of the necessary absence of counsel, an application to opposite counsel, or if denied by him, to the Court, for an extension of time was not made. * * * There is, therefore, no pretense but that an extension of time could have been readily obtained from one source or the other had an application been made, and there is no pretense that an opportunity to make the application was, from any cause, not afforded."

Shearman v. Jorgensen, 106 Cal. 483, 485, 39 P. 863, 864, where the court said: "The reasons and the causes and the excuses for the inadvertence are the matters which concern the court, and these are not stated. Inadvertence in the abstract is no plea upon which to set aside a default. The court must be made acquainted with the reasons for the inadvertence, and, if satisfactory, will act upon them, and relieve from burdens caused by them; but, if the inadvertence is wholly inexcusable, as if it arises from gross negligence, the court will not look upon it kindly, and will have none of it." The "mistake" in that case was the attorney's belief that, because service upon him was by mail, he was not required to pay any attention to a notice that his demurrer had been overruled and he had ten days within which to answer.

Weinberger v. Manning, 50 Cal.App.2d 494, 498, 123 P.2d 531, 533, where appellant's "neglect turned into contempt of judicial process by her inaction". Appellant was advised by a friend, by the county clerk, and by two attorneys separately consulted by her that she must employ counsel and file a proper answer, unless she knew how to take care of it for herself. She

deliberately did nothing about her defense until execution had been levied upon her bank deposit.

Elms v. Elms, 72 Cal.App.2d 508, 164 P.2d 936, where an order vacating a judgment annulling defendant's marriage was reversed. Defendant, after eight days' deliberation, had verified and returned to his wife an answer, together with a writing signed by him authorizing a certain attorney to file the answer and "to stipulate with opposing counsel that the matter may be set down for trial in my absence and that the same may be heard as a default case." Notwithstanding defendant's said agreement, he was promptly advised of the date of the trial and could have been present but was not. The appellate court, 72 Cal.App.2d at page 513, 164 P.2d at page 939, said that to vacate the default in this case "would be to grant a new trial at the capricious demand of a defendant who was either grossly negligent or had changed his mind after the judgment."

None of the cases cited by appellant is analogous to the one now engaging our attention on this appeal. In none of them had the defaulting party filed any verified pleading in the action. In none of them were the allegations of a cross-complaint, upon which judgment had been given by default, substantially the same as the allegations of a counterclaim filed at the same time and automatically deemed denied. In none of them had the court set a future time for the trial of the same issues raised by the complaint, answer and counterclaim. In none of them had the pleading upon which default was taken been served upon an attorney whose clients were in Siam. In none of them had the party who took the default been permitted to file an amended answer, counterclaim and cross-complaint some five months after his answer had been filed. In none of them was there a telephone agreement between counsel "that no further proceedings would or need be taken in this matter until the question of the granting of a voluntary dismissal was determined". And, in none of the cited cases did counsel for the party awarded the default judgment serve notice of proceedings which took place before and

after the default proceedings and maintain silence as to his intention to take a default.

[3] "It is a rule as familiar as any to be found in the books that an application to vacate a default under section 473, Code of Civil Procedure, is addressed to the sound discretion of the court and will not be disturbed except in a case of manifest abuse of discretion. Such long established rules should be consistently and impartially respected." *Gudarov v. Hadjieff*, 38 Cal.2d 412, 418, 240 P.2d 621, 624.

[4] Under the circumstances of this case, the granting of the motion to vacate the default was not an abuse of discretion.

The order is affirmed.

DORAN and DRAPEAU, JJ., concur.



**SIGNAL OIL AND GAS COMPANY, a
corporation, Plaintiff and Appellant,**

v.

COUNTY OF ORANGE and City of Huntington Beach et al., Defendants and Respondents.*

**SOUTHWEST EXPLORATION COMPANY,
a California corporation, Plaintiff and Appellant,**

v.

COUNTY OF ORANGE and City of Huntington Beach et al., Defendants and Respondents.

Civ. 5007, 5006.

District Court of Appeal, Fourth District,
California.

Dec. 10, 1954.

Rehearing Denied Jan. 5, 1955.

Hearing Granted Feb. 2, 1955.

Actions to recover city taxes, levied on plaintiffs' leasehold interests in tide and submerged lands after timely action in nature of quo warranto had been commenced to test validity of purported annexation of such lands by city, were con-

* Opinion vacated 283 P.2d 257.

solidated for trial. The Superior Court of Orange County, Raymond Thompson, J., entered judgments of dismissal after demurrers to complaints had been sustained without leave to amend, and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that complaints were not subject to demurrer without leave to amend, particularly since quo warranto action to test validity of annexation proceedings was still pending.

Judgments reversed.

1. Pleading Ⓒ243

Unless it is clear that complaint does not state a cause of action and cannot be so amended as to obviate the objections thereto, it is error to refuse permission to amend.

2. Pleading Ⓒ218(4)

If any count or cause of action is sufficiently pleaded, a judgment of dismissal, entered after demurrer to complaint has been sustained without leave to amend, cannot be sustained.

3. Pleading Ⓒ214(1)

On demurrer to complaint, all allegations of complaint must be accepted as true.

4. Pleading Ⓒ204(2)

Complaint is sufficient as against general demurrer, if it pleads facts entitling plaintiff to some relief, even if such facts are not clearly stated or are intermingled with other facts irrelevant to the cause of action shown, or even if plaintiff demands relief to which he is not entitled under the facts alleged.

5. Pleading Ⓒ225(1)

In action to recover city taxes levied on plaintiff's leasehold interests in state-owned tide and submerged lands after timely action in nature of quo warranto had been commenced to test validity of purported annexation of such lands by city, complaint alleging facts required by statute for recovery and refund of taxes, specific grounds of claimed invalidity of assessment, and steps taken by plaintiff in pursuit of administrative remedies and showing that quo warranto proceedings to test validity of annexation were still pending,

was not subject to demurrer without leave to amend. Code Civ.Proc. § 349½; Government Code §§ 35300-35325; Revenue and Taxation Code §§ 4831, 4986(b), 5103, 5138.

6. Municipal Corporations Ⓒ977

Where action in nature of quo warranto to test validity of proceedings for annexation of tide and submerged lands by city was commenced within three months after completion of such proceedings and action for refund and recovery of city taxes thereafter levied on plaintiff's leasehold interests in such lands was commenced within six months after rejection of claims for refund by county board of supervisors, action for refund and recovery of taxes was not barred by limitations. Code Civ. Proc. § 349½; Government Code §§ 35300-35325; Revenue and Taxation Code §§ 5103, 5138.

C. LaV. Larzelere, H. F. Clary, Paul S. Ottoson, A. E. Stebbings, Sheppard, Mullin, Richter & Balthis, James C. Sheppard, and Cameron W. Cecil, Los Angeles, for appellants.

C. A. Bauer, City Attorney, Huntington Beach, Joel E. Ogle, County Counsel Orange County, and Stephen K. Tamura, Deputy County Counsel, Santa Ana, for respondents.

MUSSELL, Justice.

These actions were consolidated for trial and were brought by appellants against the county of Orange and the City of Huntington Beach to recover 1951-1952 city taxes levied on appellants' leasehold interests in state-owned tide and submerged lands purportedly annexed to the city of Huntington Beach in 1950. The complaint in each case contains two causes of action, one for refund of taxes paid after rejection of a claim for refund under section 5103 of the Revenue and Taxation Code and the other for recovery of taxes paid under protest under the provisions of section 5138 of the same code.

The controversy here revolves around annexation proceedings of the city of Huntington Beach whereby the city sought

to annex approximately 9 square miles of ocean area lying northwest of the city's boundaries and the validity of its tax assessments on plaintiffs' leasehold interests. The annexation proceedings were conducted under the provisions of the Annexation of Uninhabited Territory Act of 1939 as amended, Government Code sections 35300-35325, and were purportedly completed on April 5, 1950. On July 3, 1950, an action in the nature of quo warranto was filed in the superior court of Orange county to test the validity of that annexation. The trial of that action was held in February, 1953, and the court rendered judgment for the defendant city and on the same day sustained the demurrer of the defendants city and county to the complaints herein without leave to amend. Judgments of dismissal were rendered, from which these appeals are taken. A new trial was granted in the quo warranto proceedings and the defendant city appealed from the order granting it. On appeal this court affirmed the order in an opinion filed October 28, 1954, in *People ex rel. Southwest Exploration Company v. City of Huntington Beach*, 128 Cal.App.2d 452, 275 P.2d 601.

[1-4] The demurrers herein are both general and special, and unless it is clear that the complaints do not state a cause of action and cannot be so amended as to obviate the objections thereto, it is error to refuse permission to amend. *Hillman v. Hillman Land Co.*, 81 Cal.App.2d 174, 181, 183 P.2d 730; *Compas v. Escondido Mutual Water Co.*, 86 Cal.App.2d 407, 412, 194 P.2d 785, and if any count or cause of action is sufficiently pleaded, a judgment of dismissal cannot be sustained. *Dalzell v. Kelly*, 104 Cal.App.2d 66, 68, 230 P.2d 830; *Shook v. Pearson*, 99 Cal.App.2d 348, 351, 221 P.2d 757. It is also the rule that in considering the rulings on the demurrers, all the allegations of the complaints must be accepted as true, *Carruth v. Fritch*, 36 Cal.2d 426, 429, 224 P.2d 702, 24 A.L.R.2d 1403; *Haggerty v. County of Kings*, 117 Cal.App.2d 470, 478, 256 P.2d 393, and all that is necessary as against a general demurrer is to plead facts entitling plaintiff to some relief. *Toney v. Security First Nat. Bank*, 108 Cal.App.2d 161, 167, 238

P.2d 645. As was said in *Matteson v. Wagoner*, 147 Cal. 739, 742, 82 P. 436, 438:

"In determining whether or not the complaint is sufficient, as against the demurrer upon the ground that it does not state facts sufficient to constitute a cause of action, the rule is that if, upon a consideration of all the facts stated, it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint will be held good, although the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged."

[5] Applying these rules to the complaints before us, we conclude that it was error to sustain the demurrers without leave to amend, particularly since the quo warranto proceedings testing the validity of annexation are pending. In this connection respondents argue that the validity of the annexation proceedings cannot be attacked by taxpayers in actions to recover taxes paid under protest on property in the annexed area, and that no remedy but quo warranto lies. Citing *Coe v. City of Los Angeles*, 42 Cal.App. 479, 183 P. 822, 823. This case cites with approval the following quotation from *People ex rel. Warren v. York*, 247 Ill. 591, 93 N.E. 400:

"The legality of proceedings by which additional territory is added to a municipality cannot be inquired into, except upon a direct proceeding by quo warranto, and not upon a bill in equity or upon objections to a tax."

However, this court held in *City of Anaheim v. City of Fullerton*, 102 Cal.App.2d 395, 227 P.2d 494, that certiorari is a proper remedy by which to test the validity of annexation proceedings under the Annexation of Uninhabited Territory Act of 1939 at any time prior to completion of the proceedings. If the annexation proceedings herein are held to be defective and void in the quo warranto proceedings, which were instituted before the taxes involved were levied, and have been diligently prose-

cuted, plaintiffs' action to obtain a refund of such taxes paid under protest is proper and plaintiffs should be protected in their rights to the tax refunds until the quo warranto proceedings are concluded. As was said in *McPhee v. Reclamation District*, 161 Cal. 566, 570, 119 P. 1077, 1079, in an action where plaintiff was seeking to free her lands from the lien of assessments levied by the defendant reclamation district and a proceeding in quo warranto had been instituted to test its right to corporate existence: "If the only opportunity of the landowner to raise this question is in quo warranto, and he diligently proceeds to seek this remedy, he must be protected in the possession of his land until the quo warranto proceedings can be brought to a determination."

The complaints herein set forth the facts required to be alleged by the Revenue and Taxation Code for refund and recovery of taxes and the specific grounds of the claimed invalidity of the assessments here in question, as well as all of the steps taken by appellants in pursuing each of the administrative remedies. It is alleged that the city of Huntington Beach taxing or assessment levying authority having failed to file the statement, map or plat required by sections 54900-54903 of the Government Code with the Orange county assessor before February 1, 1951, the assessment was and is invalid for the fiscal years 1951-1952; that the assessment of the city of Huntington Beach taxes without extending any municipal benefits or services to the area annexed and taxed violated both the due process clause and the equal protection clause of the state and federal constitutions; that the purported annexation of the northwest extension was and is invalid as being in violation of the "ocean boundaries rule", which provides that a city may only extend its boundaries perpendicular to the shore line; that the purported annexation of the northwest extension was and is invalid because the property annexed is not "contiguous territory" in that it is not being and cannot be used for any legitimate municipal purposes; that the city of Huntington Beach failed to comply with the mandatory procedural re-

quirements of state law for the annexation of uninhabited territory, in that (a) the notice of hearing was not published for the two weeks prior to the hearing as required by Government Code section 35311; (b) the ordinance of annexation was prematurely sealed and prematurely certified, and it was not forwarded to or filed by the Secretary of State of the State of California after its effective date as required by Government Code sections 35316-35318; and (c) the city of Huntington Beach failed to comply with the city charter requirement that every ordinance introduced shall be read upon its introduction and read a second time upon its final passage or adoption; that the notice of hearing of the proposed annexation was not in accordance with the constitutional requirements of due process; and that the purported annexation by the city of Huntington Beach of non-contiguous ocean area was and is a fraud on the law. It is further alleged that appellants, on June 29, 1951, and again on July 2, 1951, filed petitions for equalization with the Orange county board of supervisors sitting as a board of equalization and that these petitions were rejected; that appellants then filed with the Orange county board of supervisors petitions for cancellation or correction of assessment and levy of taxes under section 4831 and 4986(b) of the Revenue and Taxation Code and that these petitions were also rejected by that board; that appellants then paid the taxes under protest; that thereafter appellants presented claims for refund to the city council of defendant city and to the board of supervisors of defendant county; that these claims were rejected by both said city council and said board of supervisors; that thereafter, on May 27, 1952, appellants filed these actions for refund and recovery of taxes.

[6] Respondents argue that these actions are barred by the provisions of section 349½ of the Code of Civil Procedure, which provides that the validity of any proceedings for the annexation of territory to a municipal corporation * * * shall not be contested in any action unless such action shall have been brought within three months after the completion of such pro-

ceedings. However, the statute applicable to actions for refund of taxes, Revenue and Taxation Code, section 5103, provides that such actions may be commenced within six months after rejection of claims for refund by the board of supervisors, and these actions were filed within the time therein prescribed.

In view of the pending proceedings in quo warranto and the facts alleged in the complaints herein, we conclude it was error to sustain the demurrers without leave to amend.

Judgments reversed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



129 Cal.App.2d 448

Charles LINN and Mrs. Readell Linn,
Plaintiffs and Respondents,
v.

Benjamin C. ROBY, Defendant and
Appellant.
Civ. 5002.

District Court of Appeal, Fourth District,
California.
Dec. 7, 1954.

Action to recover for injuries suffered by plaintiffs as driver and passenger in automobile which collided with defendant's truck, which had been approaching from opposite direction in four-lane divided highway, when defendant turned his truck into plaintiffs' lane in order to make left turn at intersection. The jury returned verdict for plaintiffs and the Superior Court of Orange County, Samuel P. Finley, Judge Assigned, entered order granting plaintiffs' motion for new trial limited to issue of damages, and defendant appealed. The District Court of Appeal, Mussell, J., held in deciding sole question, as to whether new trial should have been limited to issue of damages, that record established that ver-

dict was not result of compromise of liability issue.

Order affirmed.

1. Appeal and Error ⇨977(3)
New Trial ⇨6

Granting of motion for new trial rests within discretion of trial court, and its determination will not be disturbed unless manifest and unmistakable abuse of discretion clearly appears.

2. New Trial ⇨9

Granting of new trial limited to issue of damages appropriately rests in discretion of trial court, but abuse of discretion is shown when record discloses that issue of liability is close, damages are inadequate, and there are other circumstances that indicate that verdict was probably result of compromise of liability.

3. New Trial ⇨9

A new trial limited to damages issue may be ordered by trial court when it reasonably can be said that liability issue has been determined by jury.

4. New Trial ⇨9

On defendant's appeal from granting of plaintiffs' motion for new trial limited to issue of damages, in action to recover for injuries suffered by plaintiffs as driver and passenger of automobile which collided with truck which had been approaching on divided highway when truck made left turn and entered plaintiffs' lane, record established that plaintiffs' verdict was not result of compromise of liability issue, and that trial court had not, therefore, erred in limiting new trial to issue of damages.

Head, Jacobs, Corfman & Jacobs, Santa Ana, for appellant.

George Cohn, Los Angeles, for respondents.

MUSSELL, Justice.

This action for damages arose out of an automobile collision which occurred on August 18, 1952, at about 11:30 A.M. on United States highway 101 approximately 8 miles south of Laguna Beach. A jury trial resulted in a verdict in favor of plaintiff

Charles Linn in the amount of \$1,370.91 and in favor of his wife, Readell Linn, for the sum of \$2,278.31, all against the defendant Benjamin C. Roby. Thereafter plaintiffs moved for a new trial on the issue of damages. This motion was granted on the ground of insufficiency of the evidence to support the verdict and judgment. Defendant Benjamin C. Roby appeals from the order granting the limited new trial and the sole issue here is whether the trial court abused its discretion in so limiting the new trial to the issue of damages.

Evidence: Plaintiff Charles Linn was driving his 1947 DeSoto automobile south on highway 101, which, at and near the point where the accident occurred, is a four-lane, north and south highway and the north and south traffic lanes are separated by a four-foot, marked island in the center. Salt Creek road runs in a northeasterly direction into the highway and there is a 48 foot gap in the island to permit northbound traffic on the highway to cross it and turn left to enter Salt Creek Road. Highway 101 has a downgrade of two and two-thirds per cent. from the top of a hill or rise approximately 700 feet north of the break in the island and there is a clear view of cars approaching from the north for at least 700 feet to one crossing the highway through the gap. Defendant Roby was driving his Dodge pickup truck north on highway 101 and attempting to turn left into Salt Creek Road when the collision occurred.

Linn testified that he first saw the Roby truck approximately 1,000 feet away in the inner northbound lane of the highway; that he could not estimate its speed; that it did not stop and that when the two vehicles were very close, the Roby truck made a sudden lefthand turn without a signal, directly in front of him across the divided highway, approximately 40 to 50 feet south of the crossover at Salt Creek Road; that he, Linn, was traveling approximately 45 to 50 miles per hour and immediately applied his brakes "as hard as he could" and turned to the right; that the front part of his car struck the right side of the truck toward the front as the truck was coming toward him and turning to the left.

A traffic officer who arrived at the scene within a few minutes after the accident happened testified that the point of impact of the two vehicles was approximately 40 feet south of the opening in the divider strip and in the southbound traffic lane; that he determined the point of impact by a skid mark leading to the point of impact and by brush marks and debris on the highway; that he found no evidence that the accident happened farther north than 40 feet south of the opening in the island; that he talked to defendant Roby who stated "That he had come up there with the intention of making a left turn and lost control of his vehicle."

Defendant Roby testified that he was 69 years of age; that he was the owner of the Dodge pickup truck and that his niece, Catherine Kemp, was riding with him as they traveled north on highway 101; that the weather was clear; that he stopped his truck at the crossover and was facing southwest while stopped; that he could see southbound traffic approximately 400 yards or more away; that there was nothing at all to stop him from seeing clearly to the north to the top of the hill; that he was stopped for approximately a minute and a half; that he gave an arm signal for a stop signal but did not make any other signal after he stopped; that two southbound cars passed while he was stopped and that after these cars passed, he saw no further southbound traffic and proceeded to make a left-hand turn; that he did not at any time see the Linn car, either before or after he put his car in motion; that he heard a screech of brakes and then stepped on the gas to go faster; that he made no attempt to stop his truck after starting his turn; that he was going at slow speed, approximately 3 miles per hour, and his truck was struck a little north of the southerly end of the crossover.

Mrs. Kemp testified that she saw the Linn car for the first time when it was between 300 and 400 feet away and estimated its speed at 70 miles per hour and that she observed the car for about a second and a half. However, on cross-examination, she testified that the Linn car was 150 to 200 feet away when she first saw it and that she

did not see it until she heard the screech of the brakes and in a statement to an investigator she said her uncle had started his turn to the left and was across the double line and into the left lane of oncoming traffic about the time the car crashed into them; that just before the crash she was looking ahead and to the left at the scenery and did not see the car that hit them.

Damages: Plaintiff Charles Linn claimed special damages in the sum of \$1,377.91, which sum included doctor bills, hospital bill, towing and damage to his car, which he stated was reasonably worth \$1,300 before the accident and was sold thereafter for \$250. He testified that he suffered lacerations on the forehead and bruises; that he remained in the hospital four days and was still bothered to some extent by the scar on his forehead. The jury awarded him \$1,370.91. If the testimony of Eddie Martin, a used car dealer who testified for the defendant, is accepted as true, the special damages awarded Linn would amount to \$1,127.91 to \$1,177.91 or an award of general damages of between \$193 and \$243. Mrs. Linn's undisputed special damages amounted to the sum of \$1,278.81 and there was a dispute as to further dental care. If based on the testimony of one of the doctors who testified for the defendant, her special damages were between \$1,653.31 and \$1,713.31, leaving a balance of \$565 to \$625 as general damages, since the verdict returned in her favor was for the sum of \$2,278.31. The evidence as to her personal injuries was that she was unconscious for 15 hours, suffered amnesia, had headaches, nausea, lacerations, and a cut on her chin, bruises, loss of lower bicuspid; that she also suffered damage to other teeth, and was confined to the hospital for a period of 10 days. She was then at home under the care of a nurse for a period of two weeks and thereafter employed a housekeeper for two months. At the time of the trial she testified that she still had trouble with her arm and suffered headaches and dizziness.

[1] The granting of a motion for a new trial rests within the discretion of a trial court and its determination will not be disturbed by an appellate court unless a manifest and unmistakable abuse of discretion

clearly appears. *Patterson v. Rowe*, 113 Cal.App.2d 119, 122, 247 P.2d 949. In the instant case it is not contended that a new trial was improperly granted on the issue of damages but appellant argues that the new trial should not be limited to that issue. We are not in accord with this argument. In *Leipert v. Honold*, 39 Cal.2d 462, 466-467, 247 P.2d 324, 29 A.L.R.2d 1185, it is held that the power of a trial or appellate court to order a new trial on fewer than all the issues is generally recognized; that the purpose of limited retrial is to expedite the administration of justice by avoiding costly repetition; that such retrials should be granted only if it is clear that no injustice will result; that a request for such a trial should be considered with the utmost caution; that the decision on limiting the new trial appropriately rests in the discretion of the trial judge; that it is presumed that in passing upon the motion he has weighed the evidence and the possibility of prejudice to the defendant and that his decision on appeal will not be reversed on appeal unless an abuse of discretion is shown.

[2] In *Rose v. Melody Lane*, 39 Cal.2d 481, 488, 247 P.2d 335, the rule is stated that the granting of a new trial limited to the issue of damages appropriately rests in the discretion of the trial court, but an abuse of that discretion is shown when the record discloses that the issue of liability is close, the damages are inadequate, and there are other circumstances that indicate that the verdict was probably the result of a compromise of liability. We cannot here hold that the issue of liability was close under the evidence adduced. If we accept the testimony of defendant Roby as true, it is apparent therefrom that he was negligent; that he looked but did not see the Linn car, although he had a clear view to the north for several hundred feet and that he turned in front of plaintiffs' car. His testimony that the point of impact was in the break of the center island is not borne out by the physical evidence, which was that the impact occurred 40 to 50 feet south of the break, corroborating the testimony of plaintiff Linn that Roby cut across the center island directly into his path.

[3,4] The record shows that after deliberating about six hours, the jury returned into court for further instructions on the question of contributory negligence and after the court had again instructed it as to the law applicable, a verdict was reached. Apparently the jury did not have any difficulty with the question of the negligence of the defendant and it can be reasonably said that the question of contributory negligence was determined by it. As was said in *Hamasaki v. Flotho*, 39 Cal.2d 602, 606, 248 P.2d 910, 912: "A new trial limited to the damages issue may be ordered by the trial court when it can reasonably be said that the liability issue has been determined by the jury." It does not here appear from the record that there were circumstances indicating that the verdict was probably the result of a compromise of the liability issue.

Order affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



129 Cal.App.2d 476

**CALIFORNIA-WESTERN STATES LIFE
INSURANCE COMPANY**, a California
corporation, Plaintiff,

v.

Valerie Rae KESTER, a minor, and **Nellie
Mae Kester**, Defendants,

Nellie Mae Kester, Defendant and Appellant,
Valerie Rae Kester, a minor, by **Opal Kester**,
Guardian, Defendant and Respondent.

Civ. 20096.

District Court of Appeal, Second District,
Division 3, California.

Dec. 10, 1954.

Hearing Denied Feb. 2, 1955.

Action by group life insurer for judgment declaring party entitled to proceeds of policy. The Superior Court, Los Angeles, County, Louis H. Burke, J., rendered judgment for insured's daughter, and insured's mother appealed. The District Court of Appeal, Parker Wood, J., held that where

new group life insurer issued policy to group of which insured was a member, insured could name his daughter as beneficiary in new policy, even though mother had been named in policy of old insurer, without complying with new insurer's requirements for change of beneficiary.

Judgment affirmed.

1. Declaratory Judgment \S 347

In action by group life insurer for judgment declaring party entitled to proceeds of policy, evidence supported findings that certificate had been delivered to insured, that designation of insured's daughter rather than his mother as beneficiary had not been due to mistake, and that insured had intended that his daughter should be beneficiary.

2. Insurance \S 587

Where new group life insurer issued policy to group of which insured was a member, insured could name his daughter as beneficiary in new policy, even though mother had been named in policy of old insurer, without complying with new insurer's requirements for change of beneficiary.

3. Insurance \S 586

Beneficiary named in group life insurance policy had no vested interest in the contract or in policy which superseded policy whereunder she was named beneficiary and which was issued by new insurer.

Krag & Sweet, Donald R. Krag, and David T. Sweet, Alhambra, for appellant.

Mindlin & Levy and J. D. Gluecksmann, Los Angeles, for respondent.

PARKER WOOD, Justice.

In this action for declaratory relief, it was alleged in the complaint that a controversy existed in the complaint that a controversy existed between plaintiff and defendants as to which of the defendants was the beneficiary under a certain certificate that was issued in connection with a group policy of insurance. Plaintiff deposited in court, for payment to the beneficiary as determined by the court, the amount of the proceeds then due under the certificate; and plaintiff asked that the court determine which defendant was the beneficiary. Judgment was in favor of defendant Valerie Rae Kester,

the daughter of the insured. Defendant Nellie Mae Kester, the mother of the insured, appeals from the judgment.

L. Ray Kester, the insured, was an employee of C. O. Sparks, Inc., and Mundo Engineering Company (herein referred to as employer). He died on October 29, 1951.

Prior to January 4, 1951, Bankers Life Insurance Company issued its group policy of life insurance to the employer, covering the employees. In connection with the policy, that insurance company issued to L. Ray Kester its certificate which provided that the beneficiary was "Nellie M. Kester, mother, if living, otherwise to Valerie R. Kester, daughter."

On January 4, 1951, the plaintiff California-Western Life Insurance Company became the carrier of group insurance for the employer in place of Bankers Life. On said date, plaintiff California-Western issued its group policy of insurance to the employer; and in connection with the policy California-Western issued to L. Ray Kester its certificate which provided that the beneficiary was "Valerie Kester, Daughter if living."

Plaintiff California-Western, in preparing its certificates of insurance for the various employees, did not obtain new applications from the employees but did prepare the certificates from "dummy" applications which its employee, Mr. Biles, made from record cards of Bankers Life, which cards were in the office of the employer (Sparks-Mundo).

Mr. Biles, called as a witness by defendant Nellie Mae Kester, testified in part as follows: He is the supervisor of plaintiff's Los Angeles group office. In December, 1950, he went to the office of the employer and looked at record cards in that office and at that time prepared records or new cards for California-Western. One of the cards of Bankers Life which he saw in the employer's office showed the name of employee L. Ray Kester, and that card indicated: "Beneficiary, Nellie Mae if living, otherwise Valerie, daughter." In filling out the new card of L. Ray Kester on the California-Western form, he inserted as beneficiary the name "Nellie Mae Kester," and then next to the word "relationship" on the form

he wrote the word "wife." He did not talk to L. Ray Kester. On the same day that he made the new card and after he had had a discussion with the employer's representative who was handling the group insurance, he changed some of the words on the new card that he had made. He crossed out the name "Nellie Mae" (leaving the last name "Kester") and inserted the name "Valerie," and changed the word "wife" to the word "daughter." He did not have any written authorization from L. Ray Kester to so change the card. He made the change in the name of the beneficiary on the California-Western application on the basis of information furnished by an employee of Sparks-Mundo. The application cards which he completed at the employer's office were sent to the home office of California-Western for issuance of the certificates.

The court found that the certificate issued by California-Western was delivered to Sparks-Mundo and was in turn delivered to L. Ray Kester; that on the date of death of L. Ray Kester the defendant Valerie Rae Kester was living; that the designation of the beneficiary, "Valerie Rae Kester, daughter, if living," on said certificate issued by California-Western was not due to any mistake; that L. Ray Kester intended that his daughter Valerie Rae Kester be named as beneficiary.

The judgment was that Valerie Rae Kester is the beneficiary of the proceeds of the policy issued by California-Western; and she is entitled to receive said proceeds.

Appellant (Nellie Mae Kester) contends that the evidence was not sufficient to support the findings; that the finding that the designation of Valerie Rae Kester as beneficiary was not due to any mistake is not supported by any evidence; that the finding that L. Ray Kester intended that his daughter be named as beneficiary is not supported by any evidence; and that the judgment is contrary to law.

Mr. Wievers, the superintendent of Sparks-Mundo, called as a witness by Valerie, testified that as a part of his duties he handled the certificates issued by California-Western. He first saw them in January, 1951, when they came over with the payroll checks, and at that time he handed a cer-

tificate of California-Western to Mr. Kester, and Mr. Kester took it and did not hand it back to him at any time. He (witness) had a discussion with Mr. Kester about beneficiaries in December, 1950, when Sparks-Mundo had decided to change the insurance to California-Western (about ten days before the certificate was delivered). Mr. George was also present at the conversation. Mr. Kester said, in that conversation, that he did not want to give his former wife (Opal) any money. Mr. Wievers (witness) replied that Mr. Kester did not have to worry about that because she (former wife) would be guardian and would have to report to the court "any money that's left to Valerie." Mr. Kester said, "Well, in that case I think I'll change it." About ten days later Mr. Kester told him that he was going to leave the proceeds of the policy to Valerie Rae Kester, his daughter.

Mr. George, the plant foreman who was called as a witness by Valerie, testified that "around 1950" or "it might have been 1951" he saw Mr. Wievers hand an insurance certificate to Mr. Kester. At that same time he (witness) received his certificate. He was present at a conversation between Mr. Wievers and Mr. Kester. About the time "we got our Cal-Western policies," he (witness) understood Mr. Kester to say that he was going to change his policy to his daughter Valerie. On another occasion, not too long after the first conversation, Mr. Kester told him he was going to change his policy to his daughter Valerie. About two weeks thereafter Mr. Kester told him that he had changed his policy. On cross-examination he said that the conversations occurred after they received their policies.

Mr. Weller, called as a witness by Nellie, testified that he became the paymaster for Sparks-Mundo in February, 1951. He succeeded Mr. Reese as paymaster, and he used the desk that was formerly used by Mr. Reese. Mr. Reese left the company in August, 1951. In February, 1952 (about three months after the death of Mr. Kester), Mr. Weller (witness) found the California-Western policy of Mr. Kester in a drawer in his (witness') desk—in the back of the drawer with a lot of other papers.

[1] The evidence was legally sufficient to support the findings. The finding that the certificate was delivered to Mr. Kester is supported by the testimony of Mr. Wievers and Mr. George—Mr. Wievers said he delivered the certificate, and Mr. George said that he saw Mr. Wievers deliver it. In support of the findings that the designation of Valerie as beneficiary was not due to a mistake, and that Mr. Kester intended that Valerie should be the beneficiary, there was testimony as follows: that Mr. Biles inserted Valerie's name after he had had a discussion with the employer's representative who was handling the group insurance; that the certificate showing Valerie as the beneficiary was delivered to Mr. Kester about nine months before his death; that Mr. Kester told Mr. Wievers and Mr. George that he was going to change his policy to Valerie; and that he told Mr. George that he had changed the policy to Valerie. Even if a mistake had been made by Mr. Biles in preparing the dummy application, the court could have inferred that Mr. Kester observed that the certificate, as finally written and delivered to him, stated that Valerie was the beneficiary; and, in view of the fact that several months elapsed after the delivery of the certificate and prior to Mr. Kester's death, the court could have inferred that Mr. Kester intended that Valerie should be the beneficiary.

[2,3] As to the appellant's contention that the judgment is contrary to law, appellant argues that there was no evidence that Mr. Kester complied with the requirement of the California-Western policy regarding a change of beneficiary. The policy provided in part as follows: "An Employee insured under the Group Life Policy may designate a beneficiary, or change his designation of beneficiary thereunder by written request filed at the Home Office of the Company. Such designation or change shall take effect only upon receipt of such written request at the Home Office of the Company and after the Company has endorsed the Employee's certificate of insurance with the change, and not before, and thereupon all rights of the former beneficiary shall cease."

The new certificate as written and delivered to Mr. Kester stated that Valerie was the beneficiary. It does not appear that Mr. Kester contemplated any change of beneficiary as stated in that certificate. The question here is whether Mr. Kester intended that the new policy should name the same beneficiary as named in the Bankers Life policy, that is, his mother Nellie, or whether the new policy should name his daughter Valerie as beneficiary. The question was one of fact for the trial court. It does not appear that Nellie Mae Kester had a vested right by reason of a contract with the insured or otherwise to be beneficiary in the Bankers Life policy or in a policy that superseded the Bankers Life policy. In *Phoenix Mutual Life Ins. Co. v. Birkelund*, 29 Cal.2d 352, at page 360, 175 P.2d 5, at page 9, it was said: "An ordinary beneficiary of a life policy has merely an expectancy of an incomplete and inchoate gift which is revocable at the will of the insured [citation] while a contract beneficiary has a vested right *in the proceeds of the policy*." It cannot be said the judgment is contrary to law.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



129 Cal.App.2d 327

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Thomas J. WALSH, Defendant and
Appellant.

Cr. 3040.

District Court of Appeal, First District,
Division 1, California.

Dec. 3, 1954.

Proceeding on petition coram nobis by prisoner previously convicted of felony to vacate judgment of conviction. The Superior Court, San Francisco County, Twain Michelsen, J., denied petition and

petitioner appealed. The District Court of Appeal, Fred B. Wood, J., held that petition coram nobis to vacate judgment of criminal conviction could not properly raise questions of insufficiency of evidence to support judgment, prejudicial error of court in allowing prosecution to cross-examine defendant upon matters not testified to upon his examination in chief, or deprivation of fair and impartial trial by prosecution withholding material part of case in chief and using it upon rebuttal under guise of impeachment, since such grounds of attacking judgment were known at time of trial and could have been presented upon motion for new trial or upon appeal from judgment.

Order affirmed.

1. Criminal Law §997(4)

Petition coram nobis to vacate judgment of criminal conviction could not properly raise questions of insufficiency of evidence to support judgment, prejudicial error of court in allowing prosecution to cross-examine defendant upon matters not testified to upon his examination in chief, or deprivation of fair and impartial trial by prosecution withholding material part of case in chief and using it upon rebuttal under guise of impeachment, since such grounds of attacking judgment were known at time of trial and could have been presented upon motion for new trial or upon appeal from judgment.

2. Criminal Law §997(1)

Office of "writ of coram nobis" is to bring attention of court to, and obtain relief from, errors of fact, such as valid defense existing in facts of case, but which, without negligence on part of defendant, was not made, either through duress or fraud or excusable mistake, where facts did not appear on face of record, and were such as, if known in season, would have prevented rendition of judgment questioned.

See publication Words and Phrases, for other judicial constructions and definitions of "Writ of Coram Nobis".

3. Criminal Law ⇨997(8)

Writ of *coram nobis* will not be granted for newly discovered evidence going to merits of issues tried, and issues once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial.

4. Criminal Law ⇨997(6)

Writ of *coram nobis* does not lie to correct errors of law.

5. Criminal Law ⇨997(1)

Purpose of writ of *coram nobis* is to secure relief, where no other remedy exists, from judgment rendered while there existed some fact which would have prevented its rendition if trial court had known it and which, through no negligence or fault of defendant, was not then known to court, but writ was not intended to authorize any court to review and revise its opinions.

6. Criminal Law ⇨997(11)

Applicant for writ of *coram nobis* must show that facts upon which he relies were not known to him and could not in exercise of due diligence have been discovered by him at any time substantially earlier than time of his motion for writ.

7. Criminal Law ⇨997(5)

Even if public defender appointed to defend accused in criminal action had, as alleged, given oral notice of appeal from judgment of conviction and assured accused that appeal would be taken and then failed to file written notice of appeal, accused would not be entitled to have judgment of conviction vacated on petition *coram nobis*.

8. Criminal Law ⇨997(17)

Fact that prisoner previously convicted of felony was denied privilege of representing himself in person at hearing on his petition *coram nobis* to vacate judgment of conviction, and that assistant public defender represented him at such hearing was not such denial of fair and impartial hearing as would require reversal, where it did not appear that his presence could have affected result.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

In January, 1950, Thomas J. Walsh was convicted of robbery and six assaults with a deadly weapon with intent to commit murder. He neither moved for new trial nor did he appeal.

In April, 1954, he filed in the superior court a petition *coram nobis* to vacate the judgment. The petition was denied and he has appealed.

As grounds for vacating the judgment, his petition alleged: (1) Insufficiency of the evidence to support the judgment; (2) prejudicial error of the court in allowing the prosecution to cross-examine the defendant upon matters not testified to upon his examination in chief; (3) deprivation of a fair and impartial trial by the prosecution withholding a material part of the People's case in chief and using it upon rebuttal under the guise of impeachment; and (4) deprivation of defendant's right to appeal from the judgment, by the appointment of counsel who assured defendant an appeal would be taken but none was taken.

[1-6] The first three of these grounds would not justify granting the writ applied for because they were known at the time and could have been presented and considered upon motion for a new trial or upon appeal from the judgment. *People v. Buzzie*, 123 Cal.App.2d 915, 267 P.2d 869; *People v. Paysen*, 123 Cal.App. 396, 402-403, 11 P.2d 431. "The office of the writ of *coram nobis* is to bring the attention of the court to, and obtain relief from, errors of fact, such as * * * a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake; these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned.' [Citations.] It is a general rule that the writ will not be granted for newly discovered evidence

going to the merits of the issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial. [Citations.] And the writ does not lie to correct errors of law; it 'is not intended to authorize any court to review and revise its opinions'. [Citations.]” *People v. Tutthill*, 32 Cal.2d 819, 821-822, 198 P.2d 505, 506. “In this state a motion to vacate a judgment in the nature of a petition for *coram nobis* is a remedy of narrow scope. [Citations.] Its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court. [Citations.] The applicant for the writ ‘must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief.’ (*People v. Shorts* (1948), 32 Cal.2d 502, 513, 197 P.2d 330, 336.)” *People v. Adamson*, 34 Cal.2d 320, 326-327, 210 P.2d 13, 15.

[7] Nor does defendant’s fourth point furnish a basis for issuance of the writ of *coram nobis*. He alleges that the assistant public defender assured him an appeal would be taken and gave oral notice of appeal but never filed a written notice of appeal. He claims he should not be charged with the neglect of the public defender, a court appointed attorney. This is indistinguishable from the factual situation presented in *People v. Cox*, 120 Cal. App.2d 246, 260 P.2d 1050. There the defendant was represented by the public defender who gave oral notice but no written notice of appeal. Discovering the lack, defendant gave written notice about one month after the expiration of the ten-day period prescribed by the Rules on Appeal. That was too late. Said the reviewing court: “The courts have recognized no excuse for the late filing of a notice of appeal, whatever the hardship or apparent injustice involved. *People v. Lewis*, 219 Cal.

410, 27 P.2d 73; *People v. Dawson*, 98 Cal.App.2d 517, 220 P.2d 587.” 120 Cal. App.2d at page 247, 260 P.2d at page 1051. The facts did not bring the *Cox* case within the rule of *People v. Slobodion*, 30 Cal.2d 362, 181 P.2d 868, because: “In the *Slobodion* case the written notice of appeal was actually placed in the hands of the prison authorities in ample time for transmission to the county clerk and the court held this to be a constructive filing. Here no written notice of appeal was filed actually or constructively within the time provided by the Rules on Appeal.” 120 Cal. App.2d at page 247, 260 P.2d at page 1051. See also *People v. Buzzie*, *supra*, 123 Cal. App.2d 915, 916-918, 267 P.2d 869.

[8] Petitioner also claims that he was denied a fair and impartial hearing of his petition in the court below because the trial court denied his application for an order requiring the state prison warden to produce him at the hearing (to enable him to present his case in person) and by allowing the assistant public defender to represent him at that hearing. We find in that no reversible error. The petition and the accompanying memorandum of points and authorities adequately presented defendant’s points. It does not appear that oral presentation could have added anything. And, as we have seen, the petition presented no basis for the issuance of the writ sought. It is not conceivable how defendant’s presence could have affected the result. Therefore, as held by this court in an opinion written by Mr. Justice Bray in *People v. Coyle*, 88 Cal.App.2d 967, 969-970, 200 P.2d 546, 549, we do not consider that the production of the petitioner was “‘reasonably necessary in the interest of justice’” nor “‘essential to the proper disposition of the case * * *,”” circumstances requisite to a finding of abuse of discretion for failure to order the production of a prisoner. See also *Price v. Johnston*, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356; *People v. Bailey*, 105 Cal.App.2d 150, 153, 232 P.2d 518; and *People v. Etter*, 116 Cal.App.2d 449, 451-452, 242 P.2d 899. Defendant inferentially criticizes the assistant public defender for having submitted the petition to the trial court without oral

argument. The fact was that at the attorney's request the matter was continued for several days that he might read the petition and memorandum of points and authorities. He then submitted it without oral argument. It does not appear that he could have added anything to petitioner's full and adequate presentation in writing.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



129 Cal.App.2d 453

Robert NEMEC and Elwood Cecil Martin, Fred Albert Nemec, Robert William Nemec, and Raymond Eugene Nemec, copartners, doing business as Nemec Combustion Engineers, a copartnership, Plaintiffs and Respondents,

v.

Hal G. POLLEY and Newport Bay Investment Company, a corporation, Defendants and Appellants, and

E. K. Davis, Sally Davis, and Nancy Davis, Defendants and Respondents.

Civ. 5016.

District Court of Appeal, Fourth District, California.

Dec. 7, 1954.

Action for damages arising out of motorboat's striking moored boat. The Superior Court, Orange County, Kenneth E. Morrison, J., gave judgment for owner of moored boat against owner of motorboat, and denied motion to set aside judgment. Owner of motorboat appealed. The District Court of Appeal, Mussell, J., held that evidence was sufficient to sustain the judgment, and that trial court did not abuse its discretion in denying motorboat owners' motion to set aside the judgment on the ground of mistake.

Judgment and order affirmed.

1. Appeal and Error \S 931(1, 3), 989, 1010(1)

On appeal, an appellate court will view the evidence in the light most favorable

to the respondent, will not weigh the evidence, will indulge all intendments and reasonable inferences which favor sustaining the findings of the trier of fact, and will not disturb the findings of the trier of fact if there is substantial evidence in support thereof.

2. Collision \S 74

In action for damages to moored boat struck by motorboat, evidence was sufficient to support court's findings that operator of motorboat was negligent and that operator of sailboat was not negligent.

3. Appeal and Error \S 717

Statements made by the trial court cannot be used to impeach the trial court's findings where there is substantial evidence to support them.

4. Collision \S 149

Statements of rules of right of way made by trial court at conclusion of trial showed he considered sections of state statute and federal law in dealing with right of way, under circumstances in the case, in determining whether sailboat or motorboat had right of way. Harbors and Navigation Code, \S 282; Inland Rules, art. 20, 33 U.S.C.A. \S 205.

5. Collision \S 74

In action for damages arising out of collision of motorboat with moored boat, evidence supported court's findings that sailboat did yield the right of way, that it did not cross the course of the motorboat, and that the accident was caused by failure of motorboat operator to observe where he was going. Harbors and Navigation Code, \S 282.

6. Collision \S 144

Under statute providing for apportionment of negligence between operators of boats involved in collision, where court found operator of one boat was not negligent, court did not err in not apportioning negligence, and entire loss was properly assessed against owner of boat whose operator was negligent. Harbors and Navigation Code, \S 292.

7. Appeal and Error \S 174

In action for damages arising out of motorboat's striking moored boat, where counsel for motorboat owner waived objection in trial court to partnership's bring-

ing action when title to moored boat was held by one partner, objection was not considered on appeal.

8. Appeal and Error Ⓒ982(1)

Judgment Ⓒ364

Motion for relief under statute allowing court to set aside judgment on ground of mistake, is addressed to the sound discretion of the trial court, and in absence of a clear showing of abuse of discretion, the determination of the trial court will not be disturbed on appeal. Code Civ.Proc. § 473.

9. Judgment Ⓒ364

In action for damages to moored boat struck by motorboat, where owner of motorboat mistakenly thought federal law providing for limitation of liability could be availed of after determination of liability, and he submitted himself to court's jurisdiction, and went to trial, trial court's refusal of his motion to set aside judgment on ground of mistake was not abuse of discretion. Code Civ.Proc. § 473.

Harry L. Blodgett, Newport Beach, for appellants.

Harwood, Heffernan & Soden, Newport Beach, for respondents.

MUSSELL, Justice.

This is an action for damages to the Barbara, a boat owned by plaintiff Robert Nemec, and to a pier and float owned by plaintiff copartnership occasioned when the Balboa, a boat owned by the defendant Newport Bay Investment Company and operated by defendant Hal G. Polley ran into and collided with the Barbara, then moored at the said pier and float on the south shore of Balboa Island, Newport Bay, Orange County.

The cause was tried by the court without a jury and judgment was rendered in favor of the individual plaintiff Robert Nemec in the sum of \$3,058.21, in favor of the partnership Nemec Combustion Engineers in the sum of \$335.32, and in favor of Robert Nemec and the partnership for their costs. Following the entry of the judgment, Newport Bay Investment Company and Hal G. Polley moved to set aside

said judgment on the ground of mistake and asked leave to amend their answer. Said defendants appeal from the judgment and the order denying their motion.

The collision occurred on July 24, 1951, at about 4:30 P.M. The Balboa, a passenger-carrying motorboat, 50 feet long, 10 feet wide, and weighing 11 tons, was proceeding westerly in the center of the channel between the south shore of Balboa Island and boats moored offshore, when it struck the moored Barbara and the float.

There is a conflict in the testimony relative to the cause of the collision. Defendant Hal G. Polley, who was operating the Balboa, testified that when approaching the Barbara, which was tied to the pier, he noticed a sailboat, the Falcon, sailing in a northwesterly direction toward Balboa Island; that he reduced the speed of his boat and permitted the Falcon to sail across his bow; that the Falcon sailed across to the shoreline, came about and sailed about in a westerly direction; that she had cleared the bow of the Balboa again with ample space when she turned downwind and headed directly toward the bow of the Balboa; that he reduced the speed of his engine, turned the wheel hard over to the right in order to give the sailboat as much clearance as possible; that before the Balboa had completely lost way, it collided with the Barbara, tied to the pier.

Defendant Nancy Davis, who was operating the Falcon, testified that she and her sister, with her sister's friend, Sarah, were sailing across the channel in a northwesterly direction; that she first saw the Balboa when she was about in the middle of the bay; that the wind was coming from the west; that she proceeded toward the buoys and the sailboats which were anchored off Balboa Island; that when she reached the north side of the pier and anchored boats, the Balboa was approximately 50 feet to the east; that if she had kept going in the same direction, the Falcon would have collided with the Balboa; that she came about and went back in the general direction she came from (south); that she was headed out in the channel and just about passed the buoys when the Balboa turned slowly into

the Barbara and collided with it; that when she came about, the operator of the Balboa had plenty of distance and time to continue his course and not strike the Barbara; that the Falcon did not at any time cross the bow of the Balboa; that the reason the Balboa went to the right and hit the Barbara was because Polley was looking at her and was not looking where he was going.

Sally Ann Davis testified that at the time the Falcon came about it was over 50 feet from the Balboa; that defendant Polley was not looking where he was going; that the Balboa "kept on going and did not reverse or slow down, it just smashed into the side of the Barbara."

Gary Shaumberg, a 15 year old boy who witnessed the accident, testified that the Falcon was coming across the bay in a northwesterly direction, across the course of the Balboa a safe distance ahead, came about, did not catch the wind as it should have, got off late and finally caught the wind; that the sailboat got a little to the left of the Balboa and that the Balboa had to turn into the Barbara to avoid hitting the Falcon.

The trial court found that appellant Polley was negligent and that the defendant Nancy Davis was not negligent, and appellants first argue that these findings are not supported by the evidence.

[1,2] The general rule is well established that on appeal an appellate court will view the evidence in the light most favorable to the respondent; will not weigh the evidence; will indulge all intendments and reasonable inferences which favor sustaining the findings of the trier of fact; and will not disturb the findings of the trier of fact if there is substantial evidence in support thereof. *Berniker v. Berniker*, 30 Cal.2d 439, 444, 182 P.2d 557. Here, the trial court evidently believed the testimony of the Davis sisters to the effect that the Falcon did not cross the bow of the Balboa; that defendant Polley was not looking where he was going; and that when the Falcon came about, Polley had plenty of time and distance to continue his course and avoid striking the Falcon.

This and other evidence furnishes substantial support for the criticized findings.

[3,4] It is next contended that the trial court erred in ruling that section 282 of the Harbors and Navigation Code of the State of California gave the right of way to the sailboat under the circumstances herein and further erred in disregarding section 240 of said Harbors and Navigation Code, thereby failing to apply federal law right of way to these circumstances. Apparently this contention is based on statements made by the trial court at the conclusion of the trial. However, as was said in *Herman v. Glasscock*, 68 Cal.App.2d 98, 102, 155 P.2d 912, 914:

"The reasoning of the judge in announcing his decision is not such part of the record as may be used for the purpose of establishing a fact in the case when findings are filed. *Union Sugar Co. v. Hollister Estate Co.*, 3 Cal.2d 740, 47 P.2d 273; *In re Lasker*, 51 Cal.App.2d 120, 122, 124 P.2d 72; *Goldner v. Spencer*, 163 Cal. 317, 320, 125 P. 347; *In re Estate of Felton*, 176 Cal. 663, 169 P. 392."

Statements made by the trial court cannot be used to impeach the findings where, as here, there is substantial evidence to support them. *Redsted v. Weiss*, 73 Cal. App.2d 889, 891, 167 P.2d 735. The trial court, in effect, stated the rule that is set forth in section 282 of the Harbors and Navigation Code, as follows:

"* * * Steam vessels shall be regarded as vessels navigating with a fair wind, and shall give way to sailing vessels on a wind of either tack."

Section 205, Volume 33, United States Code Annotated provides:

"Steam and sailing vessels meeting. Art. 20. When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel."

Section 240 of the Harbors and Navigation Code provides:

"Applicability of provisions to navigable waters of United States. The

provisions of this Division, in so far as they are not in conflict with the admiralty and maritime jurisdiction and laws of the United States, apply to navigation on the navigable waters of the United States, as well as to navigation on the navigable waters of this state."

The statement made by the trial court shows that he considered these sections in determining whether the Falcon or the Balboa had the right of way.

[5] Appellants argue that the trial court failed to consider and apply the "special circumstance" rule set forth in 33 United States Code Annotated, section 212, which provides:

"In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger";

and that if the trial court had consulted federal law on right of way, it would have decided that the Falcon sailboat was guilty of negligence in insisting upon its right of way given under section 282 of the Harbors and Navigation Code after the danger of collision with the Balboa had become so manifest as to show there was no proper choice of judgment other than of departing from the rules. However, in the instant case there is substantial evidence to support an inference and finding that the Falcon did in fact yield the right of way; that it did not cross the course of the Balboa; that the accident was caused by the failure of defendant Polley to observe where he was going and that if he had continued on this course, the accident would not have occurred.

[6] Appellants next argue that the court erred in not apportioning the negligence between the Falcon sailboat and the Balboa as provided in section 292 of the Harbors and Navigation Code. This argument is not tenable. The trial court found that the operator of the Balboa was negligent and that the operator of the sailboat was not negligent. Under section 292 of the

Harbors and Navigation Code the entire loss was properly assessed against the Balboa since the negligence of the operator of that boat was found to have caused the accident and that finding is supported by the record.

[7] It is further contended by appellants that the evidence does not support the finding that the individual plaintiff, Robert Nemic, was the owner of the Barbara. The record shows that Robert Nemic purchased this boat and that it was registered in his name; that he paid for it with his personal check but that the boat was used in the partnership business and that "there were adjustments made on the books and it was credited". At the conclusion of the trial when the question of the ownership of this boat was considered by the court, counsel for appellants made the following statement: "If our clients are going to be stuck with this judgment, I don't think it makes much difference to us whether it is a partnership or not." Counsel was not raising the question of ownership in the trial court and his remarks indicated a waiver of the objection. Questions waived in the trial court will not be considered on appeal. *MacKenzie v. Angle*, 82 Cal.App.2d 254, 263, 186 P.2d 30; *Nanny v. Ruby Lighting Corp.*, 108 Cal.App.2d 856, 859, 239 P.2d 885. Under the circumstances presented by the record, it does not appear that appellants were prejudiced by the finding made.

[8, 9] Finally it is argued that the trial court erred in denying appellants' motion to set aside said judgment on the ground of mistake, thereby denying appellant Newport Bay Investment Company the right to limit its liability under federal law. This motion recites "That there was mistake on the part of these defendants, and the belief of the attorneys for these defendants was that these defendants had the legal right, under the law of the United States of America, to have their liability, if any, limited to the value of the vessel, Balboa, after the same was determined in this action." The record shows that the original complaint was filed against the appellants on September 12, 1951, and that

the trial of the case was had on June 9 and 10, 1953. Appellants submitted themselves to the jurisdiction of the trial court and after a trial on the merits, made the motion involved. The motion for relief under section 473 of the Code of Civil Procedure is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse of discretion, the determination of the trial court will not be disturbed on appeal. *Vartanian v. Croll*, 117 Cal.App.2d 639, 644, 256 P.2d 1022. And as was said in *Security Truck Line v. City of Monterey*, 117 Cal.App.2d 441, 445, 256 P.2d 366, 369, 257 P.2d 755:

"Ignorance of the law, at least where coupled with negligence in failing to look it up, will not justify a trial court in granting relief, *Shearman v. Jorgensen*, 106 Cal. 483, 39 P. 863; *Penryn Land Co. v. Akahori*, 37 Cal.App. 14, 173 P. 612, and such facts will certainly sustain a finding denying relief." (Citing cases.)

We find no clear abuse of discretion in the denial of appellants' motion.

Judgment and order affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



129 Cal.App.2d 375

Pearl SHERMAN and Marty Sherman, husband and wife, Plaintiffs,
v.

Vivian PANNO and Carlo Panno, husband and wife, Defendants (two cases).

Pearl SHERMAN, Appellant,
v.

Vivian PANNO and Carlo Panno, husband and wife, Respondents.
Civ. 20313.

District Court of Appeal, Second District,
Division 1, California.
Dec. 6, 1954.

Rehearing Denied Jan. 3, 1955.

Hearing Denied Feb. 2, 1955.

Action to have the court declare and enforce a resulting trust over a parcel of

farm land. Judgment for plaintiff in the Superior Court of Los Angeles County, Arthur B. Coates and Frank G. Swain, JJ., and from an order granting defendants' motion for a new trial the plaintiff appealed and defendants cross-appealed from the judgment. The District Court of Appeal, White, P. J., held that the order granting a new trial was in excess of the jurisdiction of the trial court, and that the evidence sustained the judgment that the deed involved was in fact a mortgage.

Order granting a new trial reversed; judgment affirmed.

1. New Trial ⇐116(2)

Under the statute respecting new trial, it is left to the prevailing party to take the initiative, and insure the finality of the judgment, by serving upon the opposing party written notice of entry of the judgment, and when he does so the time within which a motion for new trial may be made and granted begins to run. Code Civ.Proc. § 660.

2. New Trial ⇐116(3)

Portion of the statute allowing an additional day after service by mail, in which a motion for new trial may be made and granted, was inapplicable, since the trial court which granted the motion for a new trial was not an "adverse party" within the statute. Code Civ.Proc. § 1013.

See publication Words and Phrases, for other judicial constructions and definitions of "Adverse Party".

3. Constitutional Law ⇐70(1)

Where the legislature has fixed the period within which a new trial may be granted at sixty days, it is not for the court to override the limitation. Code Civ.Proc. § 660.

4. Attorney and Client ⇐90

Service of papers on an attorney of record where service upon the attorney is proper binds the client until the attorney is discharged or substituted out of the case in the manner provided by law.

5. Attorney and Client ⇐75(1)

Under the statute providing for written notice of substitution of a new attorney, and that until then, the adverse party must recognize the former attorney, intent is that

the plaintiffs' attorneys are bound by law to recognize defendants' former attorney of record until they receive written notice of substitution of attorneys and such notice is not effective merely because it has been filed and mailed. Code Civ.Proc. § 285.

6. New Trial ⇨116(2)

Where written substitution of attorneys was filed on August 28 and notice thereof mailed to plaintiffs' attorneys, so that in the ordinary course of the mail it would be received by them on the 29th, the substitution was not completed as required by statute before notice of entry of judgment was served on August 28th upon defendants' former counsel, and 60-day period within which a new trial could be granted, began August 28, and ended October 27th, and order granting a new trial after that time was in excess of jurisdiction and must be reversed. Code Civ.Proc. §§ 285, 660, 1013.

7. Appeal and Error ⇨1010(1)

If there is any substantial evidence in record supporting judgment, it should not be reversed because of insufficient evidence.

8. Appeal and Error ⇨994(3)

Credibility of witnesses is a question primarily for the trial court, and on appeal, appellate court will not disturb the conclusion arrived at by the trial court, unless it can say as a matter of law that the testimony believed by the trial court is inherently improbable.

9. Mortgages ⇨38(1)

In action to declare and enforce a resulting trust over farm land on the ground that a deed was in fact a mortgage, evidence sustained judgment adjudging the deed to be a mortgage.

10. Mortgages ⇨32(1)

Payment by plaintiffs of a portion of the purchase price was not essential to establishing that a deed absolute on its face was in fact a mortgage. Civ.Code, § 853.

11. Mortgages ⇨37(2)

A deed absolute on its face may be shown by parol evidence to have been in fact a mortgage.

12. Mortgages ⇨37(1)

In order to determine the true character of a transaction whether an absolute

deed is in fact a mortgage, the trial court should consider all the facts and circumstances surrounding the transaction including the conduct of the parties before and after.

13. Mortgages ⇨37(1)

On issue whether a deed absolute in form was a mortgage, testimony concerning conduct of plaintiff and his declarations as to ownership long after the deal with the defendant had been made was admissible.

Hill & Attias, Henry Attias, Philip Glusker, Beverly Hills, for appellants.

Bernard C. Brennan, Edward W. Moses, Los Angeles, for respondents.

WHITE, Presiding Justice.

This is an appeal by plaintiff, Pearl Sherman, from an order granting defendants' motion for a new trial upon the ground of the insufficiency of the evidence. The defendants, Vivian Panno and Carlo Panno, husband and wife, have cross-appealed from the whole and each and every part of the judgment.

The action is one by Pearl Sherman and her husband, Marty Sherman, to have the court declare and enforce a resulting trust over a parcel of farm land in the Imperial Valley of California. At the conclusion of the trial, the judge announced that judgment would be for the plaintiff, Pearl Sherman. Findings and judgment were prepared and served on defendants on August 21, 1953. No objections having been filed, the judge signed the findings and judgment on August 27, 1953, and the judgment was duly entered on August 28, 1953.

On August 28, 1953, plaintiffs mailed notice of entry of judgment to defendants' attorney, who had acted throughout the litigation. On the same day, defendants' present counsel mailed to plaintiffs' attorneys a copy of a substitution of attorneys and filed the substitution and proof of mailing. August 31, 1953, said notice of entry of judgment and proof of mailing were filed.

On September 1, 1953, another notice of entry of judgment was mailed by plaintiffs to defendants' present counsel; and said notice and proof of mailing were filed September 2, 1953. A second substitution of attorneys for defendant, Vivian Panno, was mailed by defendants' present counsel to plaintiffs' counsel on September 10, 1953, and filed September 11, 1953.

September 8, 1953, defendants filed notice of intention to move for a new trial. The motion was heard and submitted on October 27, 1953, by a judge other than the one who had tried the case. By minute order dated October 28, 1953, defendants' motion for a new trial was granted on the ground of insufficiency of the evidence.

[1] It is now contended on this appeal that the motion for new trial was automatically denied by lapse of time on October 27, 1953; that the order granting the new trial herein was made on the 61st day after service upon defendants of notice of entry of judgment and is void.

"* * * the power of the court to pass on motion for a new trial shall expire sixty (60) days from and after service on the moving party of written notice of the entry of the judgment, * * *. If such motion is not determined within said period * * * the effect shall be a denial of the motion without further order of the court." Code of Civil Procedure, section 660.

"It is thus left to the prevailing party to take the initiative in insuring the finality of the judgment by serving upon the opposing party written notice of entry of the judgment. When he does so, the time within which a motion for new trial may be made (*Labarthe v. McRae*, 35 Cal.App. 2d 734, 97 P.2d 251) and granted (*Gross v. Hazeltine*, 206 Cal. 130, 273 P. 550) begins to run." *McCordic v. Crawford*, 23 Cal. 2d 1, 5, 142 P.2d 7, 9.

[2] The portion of Section 1013 of the Code of Civil Procedure allowing an additional day after service by mail is inapplicable to the facts now before the court, for the trial court which granted the motion for new trial is not an "adverse party".

Kahn v. Smith, 23 Cal.2d 12, 15, 142 P.2d 13.

[3] Since the Legislature has fixed the period within which a new trial may be granted at sixty days, it is not for this court to override the limitation. *McCordic v. Crawford*, 23 Cal.2d 1, 5-6, 142 P.2d 7; *Millsap v. Hooper*, 34 Cal.2d 192, 193, 208 P.2d 982. Therefore, it is apparent that, if the mailing of written notice of entry of judgment on August 28, 1953, to defendants' former attorney was "service on the moving party", the defendants' motion for new trial was denied by lapse of time on October 27, 1953. Code of Civil Procedure, section 660. "Notices must be in writing, * * * served upon the party or attorney in the manner prescribed * * *." Code of Civil Procedure, section 1010. The service was complete "at the time of the deposit". Code of Civil Procedure, section 1013.

Defendants make no claim that the content and form of the notice of entry was not in all respects proper, or that defendants were not cognizant of the first notice from the time of its service. Nevertheless, defendants contend that the notice of entry of judgment should have been served upon their substituted counsel instead of their former counsel, and that such notice was therefore ineffective to start the running of the period within which a new trial could be granted.

"When an attorney is changed * * * written notice of the change and of the substitution of a new attorney * * * must be given to the adverse party. *Until then he must recognize the former attorney.*" (Emphasis added.) Code of Civil Procedure, section 285.

In the case of *Grant v. White*, 1856, 6 Cal. 55, defendant moved for a new trial and employed other attorneys. Plaintiff's attorney was not given the required written notice of substitution, and notice of the time for argument on motion for new trial was served upon defendant's attorney of record, who then told plaintiff's attorney he had no further connection with the matter; plaintiff's attorney insisted upon serving him as attorney of record; and the at-

torney of record forgot to inform defendant's substituted attorneys. Defendant was not represented in court and the motion for new trial was denied. On appeal from the order denying a new trial, defendant sought reversal because notice had not been served upon her substituted counsel. The court said, at pages 55 and 56: "To avail the defendant of this objection, there should have been a regular substitution of counsel in the mode pointed out by the statute".

In *Morton v. Kohler & Chase*, 70 Cal. App. 458, 233 P. 415, defendant appealed from a judgment for plaintiff on the ground that no notice of the time of trial was served on him five days prior to the trial. The judgment was affirmed and the court, 70 Cal.App. at page 464, 233 P. at page 418, said: "* * * the attorneys for the plaintiff were bound by law to recognize Messrs. Roche and Ibos *until they received written notice of a substitution of attorneys.*" (Emphasis added.)

[4] To the same effect is the decision in *Reynolds v. Reynolds*, 21 Cal.2d 580, 584, 134 P.2d 251, 254, where it is said: "A client may of course discharge his attorney at any time (citing authority), but during the course of a proceeding service of papers on the attorney of record, where service upon the attorney is proper, binds the client *until the attorney is discharged or substituted out of the case in the manner provided by law*". (Emphasis added.)

[5] In the instant action, defendants' substituted attorneys, on the day of service of the notice of entry of judgment upon defendants' former attorney, filed and mailed notice of substitution. That notice had not been received, and in the regular course of the mail it could not have been received, by plaintiffs' counsel prior to the mailing of the notice of entry of judgment. However, in the appeal now engaging our attention, defendants contend that, because such notice of substitution had been filed and mailed, the notice of entry of judgment was invalid and of no effect. With this contention, we cannot agree. If such were the rule, before an attorney could give notice of entry of judgment, or any other notice, with any assurance of its effect, it would be necessary to check, not only the docket, but

also all papers filed in the clerk's office up to the moment of service. We believe the clear intention of the Legislature, as expressed in Section 285 of the Code of Civil Procedure, is that the plaintiffs' attorneys were bound by law to recognize defendants' former attorney of record *until they received written notice of a substitution of attorneys.*

[6] Where, as here, the written substitution was signed by the defendants' and the former and substituted attorneys on August 27th, filed on the 28th, and notice thereof mailed to plaintiffs' attorney so that, in the ordinary course of the mail, it would be received by plaintiffs' attorneys on the 29th, the substitution had not been completed in the manner required by the statute before the notice of entry of judgment was served on August 28th upon defendants' former counsel; and the sixty day period within which a new trial could be granted began August 28th and ended October 27th, 1953. The order granting a new trial was therefore in excess of the jurisdiction of the trial court and must be reversed.

We are not impressed by defendants' argument that, even if the notice of entry of judgment was given in accordance with the statute on August 28, 1953, plaintiffs, by serving upon defendants' substituted counsel another notice of entry of judgment on September 1, 1953, thereby waived, and were estopped from relying upon, any effect which the August 28th notice might have had. When the notice was given as required by statute on August 28, 1953, the period began, and the service of another notice did not extend that period.

Our decision that the order granting a new trial must be reversed for the reason that it was made after the expiration of the statutory time and was in excess of the jurisdiction of the trial court, makes it unnecessary to consider plaintiffs' contention that the order was an abuse of discretion. Therefore, we proceed to the consideration of the cross appeal of defendants which was taken from the whole of the judgment and each and every part thereof. That judgment provides, among other things, that the deed of two certain parcels of real property "dated April 18, 1951, from Pearl

Sherman, by Marty Sherman, her attorney in fact, to Carlo Panno and Vivian Panno, husband and wife, in form a deed absolute, be, and the same hereby is, declared to be, a mortgage, and the defendants Vivian Panno and Carlo Panno hold legal title to the real property hereinabove described as trustees for the benefit of Pearl Sherman".

Defendants urge that the evidence is insufficient to support the judgment, in that plaintiffs failed to prove: (1) that a friendly relationship existed between plaintiffs and defendants; (2) that the actual cash value of the land was in excess of the cash and credit paid and loaned by defendants for it; (3) that plaintiffs continued to act as owners would have acted; and (4) that the conduct of defendants was that of lenders and not of owners.

[7] As in most actions wherein deeds absolute in form have been determined to be in fact mortgages, the evidence is conflicting. If there is any substantial evidence in the record which supports the judgment, the judgment should not be reversed because of insufficient evidence. "All questions as to preponderance and conflict of evidence are for the trial court." *Beeler v. American Trust Co.*, 24 Cal.2d 1, 7, 147 P.2d 583, 587; *Viner v. Utrecht*, 26 Cal.2d 261, 271, 158 P.2d 3.

A review of the pertinent evidence found in the record follows. In 1945 the plaintiffs became lessees with an option to purchase the Westmoreland Ranch, hereafter referred to as "the ranch". In 1946, they exercised the option and purchased the ranch for \$54,000; and they organized National Growers and Shippers, Inc., a California corporation, hereafter referred to as "the corporation", to which they conveyed many of their assets, including the ranch. Plaintiff Marty Sherman bought and sold produce, and managed a partnership as well as the corporation. In 1947, because of losses not in any way connected with the ranch, and at a time when 100% of the corporation's stock was owned by the Sher-mans, the corporation assigned all of its assets to W. W. Gray, as assignee for the benefit of creditors, and, pursuant to such assignment, deeded the ranch to him. Farm-

ing operations on the ranch were at all times profitable, the 1946 profit being approximately \$23,000. The assignee and the creditors committee agreed orally with Sherman that they would sell the other properties before resorting to the ranch; that they would continue to operate the ranch and apply the profits in payment of the corporation's debts; that if the debts were not fully discharged in a reasonable time without selling the ranch, they would give plaintiff Marty Sherman the chance to meet any offer before selling the ranch.

Late in 1950, all the other assets of the corporation had been disposed of by the assignee and there remained some unpaid debts of the corporation. The ranch was then listed with several Imperial Valley real estate brokers, who were informed that any offer would be subject to Sherman's right to repurchase the ranch at the price offered.

In January of 1951, the assignee received an offer of \$46,000 cash for the ranch, subject to payment of a \$2,300 real estate commission. He then informed plaintiff Marty Sherman that pursuant to their agreement plaintiff could have the ranch for the net cash price of \$43,700, and plaintiff accepted the offer. The deal was put in escrow with Security Title Company on January 18, 1951, title to go to plaintiff Pearl Sherman as her separate property. On January 19, 1951 the Bank of America, using admittedly conservative values, appraised the ranch at \$54,000 and agreed to lend plaintiff Pearl Sherman \$25,000 on a first trust deed. At that time plaintiffs expected to provide the remaining \$19,000 from the sale of their lettuce crop, which "looked like it was going to make a lot of money", but turned out "a fizzle". Plaintiff Marty Sherman then tried to borrow from several sources, including defendant Carlo Panno. According to the testimony of plaintiff Marty Sherman, defendant Carlo Panno agreed to help plaintiffs finance the purchase. They had several conversations about it in Los Angeles and several in El Centro. As to one such conversation, which took place in Los Angeles in April 1951, plaintiff Marty Sherman testified as follows:

"Again, we always met in the market there and we would go and have coffee or a sandwich, and on our way to the restaurant we were discussing the ranch, and I told him, 'Carlo,' I said, 'Carlo, it is getting pretty late and the escrow is due to close in another week or so.' 'Well,' he said, 'don't worry about that, I told you I am going to loan you the money, I am going to do it, I will see you there on the 17th and everything is going to be all right'. About that time Mr. Gray walked by and said, 'Hello, Marty.'

"Q. You mean Mr. W. W. Gray? A. Mr. W. W. Gray walked by and he said, 'Hello, Marty'; I said, 'Hello.' He said, 'I see you have your angel with you. Will you let me know how you are getting along, because we have had several offers on that property and it isn't too far off for escrow time.' Mr. Carlo Panno broke in at that time and said, 'Don't you worry about that, I am going to take care of everything as I agreed.'"

As to one of their conversations, plaintiff Mary Sherman testified: "Q. Was anything said about the length of the pay-off of his loan? A. Yes, I told him he should have his money between two and three years, not to exceed three years. He says, 'Well, supposing I don't get my money back in three years?' I said, 'If you don't get your money back in three years, I think I will be in a position over that period of time to come up with any shortage of the amount due you.' He said, 'All right, that is fine'. He says, 'I will loan you the money, and when you pay me back I will give you back the ranch.'"

In his testimony as to Mr. Panno's statements, plaintiff Marty Sherman testified: "He said that if the—in view of my situation and some of the bank notes that I still had to take care of and the business the way it was going, why, I would be much better off with the ranch in his name, he could handle the payments and pay the taxes and whatever upkeep there might be and at the same time pay himself out, and

when he did so, why, he would give us back title to the ranch.

"Q. What, if anything, did you say, Mr. Sherman? A. I told him again, I says, 'It is all right with me.' I would trust you. You can go ahead on that basis, if you feel it is better for us, go ahead.'"

Plaintiff Marty Sherman and defendant Carlo Panno met in El Centro and went together to see the Escrow Holder. They had the Title Company change the escrow instructions to show the defendants as grantees. They then went together to the Bank of America and had plaintiff Pearl Sherman's application for a loan changed to show the defendants Carlo Panno and Vivian Panno as the borrowers. Both the escrow and the loan changes were made by interlining the papers in the existing files. A deed from W. W. Gray, the assignee, to plaintiff Pearl Sherman had already been deposited in the escrow; and one from Pearl Sherman, by Marty Sherman, her attorney in fact, to defendants (the deed adjudged by the trial court to be a mortgage) was then deposited.

Plaintiff Marty Sherman and defendant Carlo Panno had known each other for about twenty years, and each had done occasional business favors for the other. They often met for coffee in Los Angeles and in Imperial Valley. Panno had cosigned with Sherman for several bank loans. In connection with one of them, Sherman had left securities with Panno, upon the oral understanding that Panno would keep them and use them only in the event Panno should have to pay the note; and later, by their further oral agreement, Panno had sold the securities, paid off the note, and turned over to Sherman the balance of the money realized on the securities. Sherman trusted Panno.

Through the years, the Pannos and Sher-mans had occasionally entertained each other in their respective homes, and had celebrated a few anniversaries together at other places. The defendants denied any friendship between them, and described their relationship as a mere business acquaintance. When defendant Carlo Panno was asked if Mrs. Sherman had not given

Mrs. Panno her own handknitted dress, defendant Carlo Panno admitted that Mrs. Panno had received such a dress but he said it was security for a small loan. Plaintiff Pearl Sherman's testimony as to the dress follows:

"Q. By Mr. Hill: You have heard some talk here, Mrs. Sherman, about knit dress or knit dresses. Do you know any facts about a knit dress in connection with the Pannos? A. Yes.

"Q. Tell us about it. A. There was one knit dress involved, and that dress I made for myself.

"Q. You knit it yourself? A. Yes, I did.

"Q. Yes? A. And I must say it takes months of hard labor to make them. They came to our home one evening when we were going out to dinner and so forth, and while the men were having a drink and talking business, I said, 'Oh, Vivian, I must show you this dress I just finished', and I had just got it back from the blockers that day, and I showed it to her and she fell in love with it. She asked me if she could try it on. I said, 'Why certainly.' She went in and tried the dress on. I think she walked out. She showed it to Carlo. He fell in love with it. They pleaded with me to sell it to them. I told them I wouldn't sell it for any price. So since the Pannos have been very nice to us on numerous occasions I felt I wanted to give it to her as a gift.

"Q. Did you give it to her? A. Yes, I did."

During the time between Sherman's agreement to repurchase the ranch from the assignee and Panno's signing of the escrow instructions and deposit of his money, the ranch was listed for sale by Sherman with various real estate brokers for \$100,000; and offers up to \$65,000 cash were refused by him. The value of the ranch was estimated by the various brokers at from \$65,000 to \$100,000.

After the escrow was closed, in accordance with their oral understanding as testified to by Sherman (and denied by Panno),

Panno was to collect all income from the ranch, and apply it upon maintenance of the ranch, payment of principal and interest instalments to become due the Bank of America upon its loan, and to use the balance to repay his own loan. From time to time they discussed the management of the ranch. Together, they decided to cancel a crop lease and make a new lease for a flat cash rental. Plaintiff Marty Sherman helped defendant Carlo Panno to collect the owner's share under the crop lease and the payments due under the oil lease.

Some months after the Pannos had taken title to the place, Panno did not know the way to the ranch; asked the tenant, who farmed the ranch in 1950 and 1951, to show him; and for the first time asked about boundaries and acreage. The following is quoted from the testimony of the tenant farmer, Swerdfeger:

"Well, on the way out there in his car, why, I was curious, and so I asked him how come him to buy a piece of land he didn't know what it was. And he says, 'Well', he says, he says, 'I know Marty Sherman a long time and I loan him money many times, but', he says, 'This time I beat him.' He said, 'Why should I settle for a couple thousand dollars when I can get so much more?' So then I said, 'Well, how did you do that?' 'Well', he said, 'I was supposed to loan Marty the money but when it come time to get it out of escrow'—or put it in escrow, I forget how—I told him, 'No, Pearl Sherman name on there, Carlo Panno, that is all,' so I make him take Pearl Sherman name off and put it in Carlo Panno name only,' so he says, 'Now it is my ranch, and Marty Sherman don't get it back'. * * *

"Q. Did he mention receiving any offer for sale of the ranch? A. Oh, yes, he said that on the way out there. That is when he said he was going to beat Sherman because, 'Right after I got out of the escrow', he said, 'I was offered \$70,000 for it,' and he says, 'Now I can sell it for \$90,000'. That was in the car on the way out to the ranch."

There is not one reference to the above conversation in the ten pages of cross-examination; and when defendants' attorney repeated his questions as to another matter Mr. Panno volunteered, "He is honest", referring to the witness Swerdfeger.

While plaintiffs state that "Panno never sought to deny any part of this conversation after Swerdfeger's testimony concerning it had been given", we find that defendant Carlo Panno was examined by plaintiffs' counsel under Section 2055 of the Code of Civil Procedure before the above quoted testimony of Swerdfeger had been given, and the following is quoted from the record:

"Q. Do you remember telling Mr. Swerdfeger you had an offer to sell this ranch, could have sold it for \$70,000 the day you bought it? A. No.

"Q. Or that you later found out you could sell it for \$90,000? A. No.

"Q. Do you remember telling him about your arrangements to make Marty Sherman a loan on this ranch? A. No.

"Q. Nothing like that was said? A. Nothing like that."

[8] While the trial judge might have believed defendant Panno, it is apparent from the findings and judgment that he did not believe Carlo Panno's testimony as to his conversation with Swerdfeger, or his version of his agreement with plaintiff Marty Sherman. The credibility of witnesses is a question primarily for the trial court, and on appeal we are not authorized to disturb the conclusion arrived at by the duly constituted arbiter of the facts unless we can say as a matter of law that testimony believed by the trial court is inherently improbable. The testimony relied upon by the trial judge in the instant case cannot be so strictured.

[9] According to plaintiff Marty Sherman's testimony, when he believed there had been enough income from the ranch to pay off his entire indebtedness to defendant Carlo Panno, he asked for a statement and reconveyance, and for the first time learned that Panno claimed the ranch as his own and refused to perform

his promise to return the ranch to plaintiffs when the debt was paid.

From an accounting furnished by defendants at the close of the trial, August 13, 1953, defendants had received income from the ranch from April 30, 1951 to August 13, 1953, amounting to \$35,688. They had paid to the Bank of America, including principal and interest, the sum of \$7,322.95, and operating expenses of \$3,024.61. Plaintiffs' debt to defendants, principal and interest at 7%, amounted to \$20,935.17; and defendants were entitled to \$100 a month or \$2,800 as compensation for their efforts in managing the property during the time that they had held legal title. After deducting from the total income, the total amount of their credits, defendants then owed plaintiff Pearl Sherman \$1,605.27.

After adjudging the deed to be a mortgage, as hereinbefore set forth, the trial court decreed that defendants "are indebted to the plaintiff Pearl Sherman in the sum of \$1,605.27", and further ordered "that upon the delivery to the defendants Vivian Panno and Carlo Panno of a satisfaction of their note to the Bank of America dated April 17, 1951, in the original sum of \$25,000.00 and the deed of trust on the above described property given to secure said note, the defendants shall forthwith surrender unto the said Pearl Sherman the possession of said premises, and the said Vivian Panno and Carlo Panno shall make, execute and deliver unto said plaintiff Pearl Sherman, as her sole and separate property, a good and sufficient warranty deed to the said property * * *" and "assign * * * all leases and any other contract, agreements or rights * * * and have all income * * * becoming due and payable on and after August 13, 1953, paid to the plaintiff Pearl Sherman * * *."

Plaintiffs claim that they received no consideration whatever from defendants for their deed. This contention is not in accord with the fact that \$43,700 was paid through the escrow to the assignee for plaintiffs' corporation's creditors and used to discharge the debts of the corporation. There is no difference in principle between

the instant case and one where the cash loaned is paid directly to the mortgagors.

Defendants emphatically urge that plaintiffs can have no beneficial interest in the ranch because they furnished none of the stated purchase price of \$43,700. In view of the facts that no witness estimated the value of the property at less than \$54,000, during the period from 1945 to 1953, that real estate brokers estimated its 1951 value at from \$65,000 to \$100,000, that plaintiff Marty Sherman turned down a cash offer of \$65,000 just before completing his deal with defendants, and that it was solely because of Sherman's agreement with the committee of the corporation's creditors that he was given the opportunity to acquire the property for the price of \$43,700, it is manifest that his purchase agreement was equal to a deposit in escrow to apply upon the purchase price of cash amounting to at least \$10,000 and probably exceeding defendants' money used in connection with the purchase.

[10] Plaintiffs' payment of a portion of the purchase price, however, was not essential to the holding that the deed absolute on its face was in fact a mortgage. The following language is quoted from *Viner v. Untrecht*, 26 Cal.2d 261, 269-270, 158 P.2d 3, 7:

"In the ordinary case a resulting trust arises in favor of the payor of the purchase price of the property where the purchase price is paid by one person and the title is taken in the name of another. Civ.Code, § 853; 25 Cal.Jur. 178. It is not always necessary that the payment of the purchase price be made by the claimant of the beneficial interest. It may be made by the transferee when it constitutes a loan from the transferee to the claimant. (Citing cases.) Nor is a resulting trust prevented by an assumption by the transferee of an obligation to the vendor or transferor to pay the purchase price, where the claimant is obligated to reimburse the transferee. In such a case there is loan of credit by the transferee to the claimant. (Citing authorities.)

* * * Contrary to defendant's contention it is not necessary that there

be an express agreement by the claimant to repay the loan. An agreement to repay may be implied. (Citing cases.) Of course, the trustee of the resulting trust holds the legal title as security for the loan (citation). * * * Where the elements of a resulting trust are present, the fact that transferee and payor of the purchase price, and the claimant, made an oral agreement that the former was to hold the property in trust for the latter which was unenforceable under the statute of frauds or otherwise, does not prevent a resulting trust from arising. Indeed, such agreement supports the inference or presumption that the payor did not intend that the transferee should have the beneficial interest (citations)."

"Although this is a three-party rather than a two-party transaction, wherein the one who takes title to the property holds it as trustee for the party to whom he loaned the purchase money, and also holds a lien as mortgagee for repayment of the loan, the usual rules applying to a deed absolute-mortgage case apply here. 2 Bogert, Trusts and Trustees, sec. 455; 17 Cal.Jur., Mortgages, secs. 53, 54. The present case is what is termed 'a resulting trust by way of a mortgage.' 2 Bogert, Trusts and Trustees, sec. 455." *Wilcox v. Salomone*, 118 Cal.App.2d 704, 710, 258 P.2d 845, 849.

Under all the circumstances of this case, the evidence in the record before us is sufficient to support the judgment. *Beeler v. American Trust Company*, 24 Cal.2d 1, 147 P.2d 583.

[11-13] Defendants' contention that the trial court erred in admitting testimony over their objection concerning the conduct of plaintiff Marty Sherman and his declarations as to ownership long after the deal with defendant Carlo Panno had been made is untenable. It has long been the law of California that a deed absolute on its face may be shown by parol evidence to have been in fact a mortgage; and that, in order to determine the true character of the transaction, the trial court should consider all the facts and circumstances surrounding the

transaction, including the conduct of the parties before and after. *Montgomery v. Spect*, 55 Cal. 352, 353; *Beeler v. American Trust Co.*, 24 Cal.2d 1, 21-24, 147 P.2d 583.

The order granting a new trial is reversed, and the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



129 Cal.App.2d 395

Laboo SINGH, Plaintiff and Appellant,

v.

Clara BANES, B. S. Banes, Ernest C. Steadman, as Executor of the Estate of Amar Singh, Deceased, Defendants and Respondents.

Civ. 8012.

**District Court of Appeal, Third District,
California.**

Dec. 6, 1954.

Hearing Denied Feb. 2, 1955.

Suit to quiet title to undivided one-half interest in agricultural land and for an accounting, wherein grantee of plaintiff's former partner, since deceased, filed a cross-complaint to quiet her title to the land. The Superior Court, Butte County, Dudley G. McGregor, J., rendered judgment in favor of defendants quieting title to the land in cross-complainant, and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that the evidence, including deed and purchase money note and mortgage, supported findings that deed and mortgage were bona fide and not merely colorable for purpose of evading Alien Land Law, and that, as a result of payment of purchase price as reflected in note, deceased partner's grantee had become and was owner of the land.

Judgment affirmed.

1. Appeal and Error ⇐219(2)

Findings that since passage of deed from holder of title to realty grantee had been and still was the owner of and as such

rightfully in possession of the realty and that former partner of deceased grantor was not such owner or entitled to possession were findings of ultimate fact not subject to attack on appeal as insufficient, in absence of request for more specific findings.

2. Aliens ⇐16

In suit by surviving partner to quiet title to undivided one-half interest in agricultural land, wherein deceased partner's grantee filed cross-complaint to quiet her title to the land, evidence, including deed and purchase money note and mortgage prepared at request of grantor, supported findings that deed and mortgage were bona fide and not colorable only for purpose of evading Alien Land Law, and that, as a result of payment of purchase price as reflected in note, grantee had become and was the owner of such land. St.1921, p. lxxxvii.

3. Mortgages ⇐36

Purchase money note and mortgage were presumptively what they purported to be.

4. Deeds ⇐208(3)

Possession and production of deed by grantee named therein amounted to prima facie evidence of delivery of deed.

5. Evidence ⇐271(18), 318(1)

Where surviving partner in suit to quiet title to undivided one-half interest in agricultural land contended that transfer of land by deceased partner to defendant was merely colorable as a means of evading Alien Land Law, supplemental agreement which was executed by grantee and husband as part of same transaction and provided that growing crop should be harvested by grantor and net proceeds thereof applied on purchase money note was admissible in evidence to show intent of grantor in executing deed and accepting purchase money note and mortgage, over objection that such agreement constituted hearsay evidence and amounted to self-serving declarations.

6. Crops ⇐5

Growing crops, being unsevered at time of conveyance of agricultural land, pass with the land to grantee, in absence of agreement to the contrary.

7. Appeal and Error ⇨1050(1)

In suit to quiet title to land, wherein grantee of plaintiff's former partner, since deceased, filed a cross-complaint to quiet her title to the land, any error in admitting in evidence superior court's record of a quiet title suit brought by grantee against the state to establish that the land was not subject to escheat to the state was not prejudicial and did not constitute reversible error.

8. New Trial ⇨108(2)

Judge who tried suit to quiet title to undivided one-half interest in agricultural land as against grantee of plaintiff's former partner, since deceased, was the best judge of whether cumulative newly discovered evidence that grantee, as other witnesses had testified, had stated that she was not owner of the land but was holding it for the benefit of her grantor would probably result in a different decision, and denial of motion for new trial based on such newly discovered evidence was not abuse of discretion.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, San Francisco, for appellant.

Albert M. King & Wm. M. Savage, Oroville, for respondents.

VAN DYKE, Presiding Justice.

Laboo Singh, plaintiff and appellant, hereinafter called "Laboo", sued defendants and respondents to quiet title to an undivided one-half interest in certain real property and for an accounting of the rents, issues and profits therefrom. The defendants answered and Clara Banes, hereinafter called "Clara", cross-complained, seeking to have her title to the same real property quieted as against the claims of appellant. Judgment was rendered in favor of defendants and the decree quieted the title of Clara. Plaintiff appeals.

Laboo and one Amar Singh, hereinafter called "Amar", were members of the Hindu faith and natives of India. At all times material here they were ineligible to citizenship under the laws of the United States. The California Alien Land Law, St.1921, p.

lxxxvii, purported to prohibit such aliens from owning any interest in agricultural land within the State of California. The two had been associated as partners for a long time. In 1919 they acquired the real property involved in this action, which consisted of agricultural land located in Butte County. Amar, who seemed to have handled the business transactions of the partnership, took title to one parcel of the land and the other parcel was conveyed to both. Over a period of twenty years the two evaded the Alien Land Law by conveying the land from time to time to third persons, taking back fictitious notes, mortgages and deeds of trust, thus lending a semblance of validity to their possession, use and ownership of the land. The partners remained in possession and exercised the rights and privileges of owners. Nothing was ever paid on the notes and mortgages executed by them and from time the land would be reconveyed in lieu of foreclosure and a new series of transactions would be initiated sometime within the period of two years, during which the law permitted them, for purposes of sale, to hold title after foreclosure. In 1945, at which time the title stood in the name of Amar, having been deeded back to him by one who was then holding as purported owner, Amar conveyed the property to Clara, who is the occidental wife of another Hindu.

In the trial of this case, and in support of his allegations of ownership, appellant introduced evidence to the effect that the transfer to Clara was simply another in a series of transactions entered into in order that the Alien Land Law be evaded and that the State should not take proceedings in escheat. Clara, on the other hand, claimed that the transaction whereunder she took title was a bona fide sale to her by Amar and that she had fully paid the purchase price and owned the property free of any claims, equitable or otherwise, which appellant could assert. Stated as briefly as may be, the following evidence supports the findings of the trial court in favor of Clara: In the spring of 1945 Amar desired to sell the property, along with the farm machinery which he and appellant used in operating the farm. To this end he listed

the property with a broker for a price somewhat above \$50,000. The broker advertised the property for sale, but was unsuccessful in obtaining a buyer. Amar's health was bad. The prune orchard on the property was old and had become infected with disease. In April, 1945, Amar declined an offer of about \$45,000 for the farm and the equipment. The property remained unsold into June and during that month Amar suggested to Clara and her husband that they buy the land under arrangements whereby Amar would have the right to live on the property for the balance of his life or until he returned to India. He was to retain the equipment. On June 27, 1945, Clara's husband and Amar went to the office of an attorney. Amar told the attorney that he had agreed to sell the ranch to Clara and directed the attorney to prepare a deed conveying the property to her, and also to prepare for execution by her and her husband a promissory note and mortgage securing the same, the note, payable on or before three years, to be for the full agreed purchase price of \$33,000. He also instructed the attorney to prepare an additional agreement which would provide that the prune crop then growing on the property and approaching the time of harvest would be harvested by Amar and that from the proceeds of the crop there would be deducted the expense of growing and harvesting, the balance to be applied upon the indebtedness evidenced by the promissory note. The attorney prepared these papers. The deed was signed by Amar, the note and mortgage by Clara and her husband, and these two also signed the supplemental agreement concerning the right of Amar to harvest the crop and his obligation to apply the net proceeds thereof upon the note. The deed and the mortgage were recorded. Amar, as well as appellant, continued to reside on the property. The prune crop was harvested and netted nearly \$15,000, which was credited upon the note. Amar died during the year and his estate went into probate, respondent Steadman being appointed executor of Amar's will. Since the death of Amar, Clara and her husband have farmed the property and in the course of time paid the balance owing on the promissory note to

Amar's executor. Amar's estate inventoried at something over \$80,000 and during the course of probate and before the beginning of this action appellant filed a "claim" in the estate, wherein he asserted that all of the assets thereof were partnership assets of the former partnership between himself and Amar. Included in the inventory were the mortgage and the note which Amar had received from Clara and her husband. These were specifically described in the claim and formed a part of the assets which appellant contended were those of the former partnership. His contentions were rejected by the executor and he filed an action to establish the existence of the partnership and its ownership of the assets inventoried in the estate. He obtained a judgment in his favor and upon stipulation it was ordered that the assets be reduced to money and that one-half be paid over to appellant. Concerning appellant's contentions that the transfer of the real property to Clara was merely colorable and that what she took she took in trust for appellant and Amar, much evidence in addition to that recited was received. There was introduced in evidence the deed, the mortgage, the note and the supplemental agreement, this latter being introduced over the objections of appellant. Some witnesses testified that after the deed was executed Clara made to the witnesses admissions against interest by stating she was holding the title to the property in trust for Amar. Other witnesses testified that Amar during this period had declared the transaction to be merely colorable and undertaken to evade the Alien Land Law, while other witnesses testified that during the same period he made statements that he had sold the property to Clara. There was evidence taken as to the value of the property, when the deed was given; and the valuations given varied from \$35,000 to sums far above that. There was testimony that Amar had declared he would not take less than \$100,000 for it. Clara and her husband testified that the sale was bona fide and closely approximated in price the actual value of the property, particularly in view of the fact that the prune orchard, which occupied most of the property and the operation of which was the main use of the land, was old

and diseased. Clara testified further that, although she had agreed that Amar, as well as appellant, could remain on the property after the deed was given, nevertheless she took possession of the property in the sense that she and her husband operated the same, harvested the crops and sold them after Amar had cared for the harvesting of the crop of 1945. She further testified that she ordered appellant off the place.

[1] The trial court found the facts to be that Clara, since the passage of the deed from Amar on June 27, 1945, had been and still was the owner of and as such rightfully in possession of the real property involved and that appellant was not such owner nor entitled to possession. These were findings of ultimate fact, although attacked by appellant as being no more than conclusions of law. *Murphy v. Bennett*, 68 Cal. 528, 9 P. 738; *Gruwell v. Rocca*, 141 Cal. 417, 74 P. 1028; *Kompf v. Morrison*, 73 Cal.App.2d 284, 166 P.2d 350. The record does not disclose any request for more specific findings and under such circumstances the findings cannot be attacked as insufficient upon appeal. The court also found that appellant was estopped to deny the validity of the sale of the property by Amar to Clara by reason of the position taken and the things done by appellant in his claims against and in his action against the estate of his deceased partner. Also the court found that appellant had been guilty of laches in bringing this action. These findings as to estoppel and laches are also challenged as being unsupported by the evidence, but if the findings as to ownership support the judgment appealed from it is unnecessary to consider appellant's contentions with regard to the findings of estoppel and laches.

[2-4] Notwithstanding the long history of the title to the property involved and the prevailing custom in the general region in which the property is located under which custom Hindu farmers, believing themselves to be ineligible to own agricultural property, adopted means to evade the Alien Land Law; and notwithstanding that in view of these matters the trial court might have found that the deed and mortgage in

question were colorable only and executed for the purpose of evasion, yet we hold that the trial court was fully supported in its decision that the deed and mortgage were bona fide and that, as a result of her payment of the price for the property as reflected in the note, Clara had become and was the owner of the land. The note and mortgage were presumptively what they purported to be. The evidence of Amar's attorney was that he had been instructed to prepare them because Amar had sold the land to Clara. Although there is no specific evidence of a formal delivery of the documents, yet Clara possessed and introduced the deed in evidence and her possession and production amounted to prima facie evidence of delivery. *Rich v. Ervin*, 86 Cal.App.2d 386, 194 P.2d 809. The evidence furnished by the instruments themselves, with the other evidence that we have related, affords ample support for the trial court's findings as to the bona fides of the transaction and the resulting ownership of the land by Clara.

Appellant and his counsel strenuously attack the findings of the trial court by contending that they do not in reality reflect what the trial court believed to be the truth concerning the transfer to Clara. They point out that while these transactions were taking place the Alien Land Law was believed to be constitutional and to prohibit the ownership of agricultural land by appellant and Amar. They say the trial court so believed and, therefore, considered that it was confronted with a most difficult choice, that is, that it must either declare the sale to have been bona fide and not colorable only or must declare the acts of all participants to amount to a conspiracy to violate the Alien Land Law. Says appellant: The court believed if it adopted the last alternative it would be compelled to deny any relief to any party to the action and leave them in such position that the State of California could and would take the land through escheat. Assuming the premises, we do not consider that the trial court was confronted with such difficult alternatives. Believing the Alien Land Law to be valid, we think the trial court would have had no difficulty in

declaring the actions taken by the parties to the transaction to be in violation of that act if it believed the sale to be a mere evasion of the law. The court would then have considered that all of the parties knew the penalties declared by the law which they were deliberately violating and all richly deserved to be left exactly where their felonious activities placed them. We do not think the trial court would have hesitated to hold the transactions to be invalid if in fact from the evidence it believed them to be so. And, on the contrary, we think that, since it held the sale to be bona fide, it did so because from the facts it so believed. Appellant argues that when the situation as a whole is considered, the mistaken belief of the parties, their attorneys and the trial court that the Alien Land Law was valid, worked the result that appellant did not receive a fair trial and; that, therefore, this Court ought to reverse the judgment appealed from. But, as we have said, we see nothing in the situation competent to sway a trial court in its findings of fact and we think that the trial court simply believed from all of the evidence that Amar, as the active business head of the partnership and in whose name the property stood, conveyed the land to Clara for an agreed and adequate price, which the partnership has received and of which appellant will take his share.

[5,6] Appellant contends that the supplemental instrument prepared by the attorney and signed by Clara and her husband, and which covered the disposition of the growing crop on the land was erroneously admitted into evidence over objections that it was hearsay and amounted to self-serving declarations made by Clara and her husband who alone signed the instrument. The ruling of the trial court was proper. The testimony of the attorney had been that the document was one of a series which Amar had told him to prepare. Of course, if the deed were executed and delivered with intent to convey title, as Clara maintained, the title to the growing prune crop would have passed to Clara and she might or might not have applied the crop proceeds to the purchase money note. The crop was unsevered and would have passed with the land. 14 Cal.Jur.2d "Crops", Sec.

6. The supplemental document read as follows:

"We, the undersigned, agree that all crops now growing on the property which was this day deeded to the undersigned Clara N. Banes by Amar Singh, be and remain the property of Amar Singh. He shall have the right to harvest and sell said crops, and all sums of money which he receives over and above the cost of growing and harvesting said crops shall be credited on the note which we this day signed, payable to Amar Singh in the sum of \$33,000.00."

Appellant having placed in issue the intent of Amar in executing the deed and accepting the note and mortgage for the price, it was competent for Clara to show that he had by this instrument retained certain control over the crop and its proceeds which without it he would not have had. Amar, having had this document prepared and signed by Clara and her husband, thus furnished evidence affecting his intent. This act in requiring the document's execution would lend support to an inference that, by his deed he intended to convey title to the land. We find no error in the admission of this document into evidence.

[7] Over appellant's objection, the court received in evidence the Superior Court record of a quiet title suit brought by Clara against the State of California. The suit had been commenced a month after the instant suit was brought. Clara sought in that action to show that her purchase of the property was what it purported to be, was bona fide and involved no violation of the Alien Land Law. She prayed it be declared the property was not subject to escheat to the State. We are unable to perceive that the file was admissible in her behalf as in any material and permissible way proving or tending to prove any issue in the instant case. However, if error, it was clearly non-prejudicial and under the constitutional admonition would furnish no ground for reversal.

[8] Appellant contends further that the court abused its judicial discretion in denying his motion for new trial. In the main this motion was based upon affidavits as to

evidence not received during the trial and which appellant neither knew about nor could with reasonable diligence have discovered. After the decision had been made two persons told appellant that they had heard Clara admit she was not the owner of the property, but that she was holding the same for the benefit of Amar. The affidavits of these persons were submitted in support of the motion. Obviously, this testimony, had it been received, would have been cumulative only. Other testimony had been given to the same effect by other witnesses. Under such circumstances much must be left to the discretion of the judge who tried the case. He is the best judge as to whether or not the proffered testimony, had it been received, would have changed the decision, and as to whether or not had a new trial been granted, its receipt would probably result in a different termination of the litigation. We think this is a case wherein we must accept and should accept the decision of the trial court and we hold that in denying a new trial it did not, upon this record, abuse its judicial discretion.

We think further discussion is unnecessary.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.



129 Cal.App.2d 436

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Harry KOR and Bernard Kaufman,
Defendants,

Harry Kor, Defendant and Appellant.
Crim. 5125.

District Court of Appeal, Second District,
Division 3, California.

Dec. 7, 1954.

Hearing Denied Jan. 5, 1955.

Defendant-appellant was convicted in the Superior Court of Los Angeles County, Mildred L. Lillie, J., of the unlawful possession of heroin and he appealed. The

District Court of Appeal, Parker Wood, J., held that where a conversation was had between defendant and his attorney pertaining to the participation of both defendants in the offense charged, communications of each defendant to his attorney was privileged even though the other defendant was present when the communications were made and that the privilege was not waived.

Judgment reversed and cause remanded for a new trial.

1. Witnesses ⇐206

Where an attorney conferred in jail with both defendants while both were present and defendant made a written contract employing the attorney as such conversation between defendant and attorney pertaining to participation of both defendants in the offense charged was a privileged communication even though the co-defendant was present when the communications were made. Code Civ.Proc. § 1881, subd. 2.

2. Witnesses ⇐205

A conversation between defendant and his attorney pertaining to participation of defendants in the offense charged was privileged though the conversation embodied statements which the defendant had made to officers, where defendant regarded his conference with the attorney as confidential and did not intend that the attorney should be a witness against him, even to repeat any statements that the defendant had made to officers. Code Civ.Proc. § 1881, subd. 2.

3. Witnesses ⇐217

The right to have communications between attorney and client regarded as privileged is the right of the client. Code Civ. Proc. § 1881, subd. 2.

4. Witnesses ⇐219(3)

Attorney and client privilege respecting communications by defendant to attorney regarding his participation in the offense charged, was not waived by defendant's failure to object to the testimony of the co-defendant regarding the conversation, since such nonobjection did not constitute a consent by the defendant that the attorney might testify regarding the communications. Code Civ.Proc. § 1881, subd. 2.

5. Witnesses ⇨221

Direct examination of defendant disclosed no basis for claim that defendant had waived his right to object to his attorney testifying as to privileged communications. Code Civ.Proc. § 1881, subd. 2.

6. Witnesses ⇨221

Record did not indicate that defendant by answering questions on cross-examination of co-defendant's counsel and deputy district attorney intended to consent that his attorney might be examined as to communications made in confidence by the defendant to his attorney. Code Civ.Proc. § 1881, subd. 2.

7. Witnesses ⇨219(3)

Communications between an attorney and client are not deprived of their privileged character because the client, as a witness, is allegedly not telling the truth and is using the privilege as a shield to conceal the truth. Code Civ.Proc. § 1881, subd. 2.

8. Witnesses ⇨219(3)

The privilege of confidential communication between client and attorney should be regarded as sacred and is not to be whittled away by means of specious argument that it has been waived. Code Civ.Proc. § 1881, subd. 2.

9. Witnesses ⇨198(1)

Where attorney was compelled to testify against client under threat of punishment for contempt, procedure was justified only if the client with knowledge of his rights had waived the privilege in open court or by his statements and conduct had furnished explicit and convincing evidence that he did not understand, desire or expect, that his statements to his attorney would be kept in confidence. Code Civ. Proc. § 1881, subd. 2.

PARKER WOOD, Justice.

Harry Kor and one Kaufman were charged with violation of section 11500 of the Health and Safety Code (unlawful possession of heroin). In a trial by jury both defendants were convicted. Kaufman's motion for a new trial was granted, and the cause was then called for immediate trial, trial by jury was waived, and the cause was submitted upon stipulation. On such retrial, Kaufman was acquitted. Kor's motion for a new trial was denied and he was sentenced to the state prison. He appeals from the judgment and the order denying his motion for a new trial.

Appellant contends that the relationship of attorney and client existed between him and Attorney Joseph Rosen, and that the court erred prejudicially in receiving, over appellant's objection, testimony of Attorney Rosen regarding confidential communications between the attorney and appellant.

Three police officers testified in substance that on March 25, 1953, about 1:30 p. m., while they were traveling in an automobile west on Brooklyn Avenue they saw the defendants traveling in an automobile east on that avenue—that is the automobiles, going in opposite directions, passed each other on that avenue; then the driver of the officers' automobile turned their automobile around and proceeded to follow defendants; within a few blocks the defendants turned south onto Pleasant Avenue, a side street; when the officers turned onto the side street, defendants' automobile was not in sight but within a few moments the officers saw it as it was returning to Pleasant Avenue from another side street (Summit Avenue, a short dead-end street leading from Pleasant Avenue); the officers overtook the defendants and stopped them near the intersection of Pleasant and Summit Avenues; Kor was driving the automobile and Kaufman was on the right side of the front seat.

Officer Decious testified that he found a package—a newspaper package—in the center of the front seat of the automobile the defendants were in; and he delivered the package to Officer Arredondo who had Kor in custody.

Gary W. Sawtelle, Los Angeles, John Joseph Hall, Los Angeles, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., and Alan R. Woodard, Deputy Atty. Gen., for respondent.

Officer Arredondo testified that the package was about one inch wide and three inches long; Kor said that the package was his, that "some fellow" had told Kor "to pick it up there [by the curb on Summit]," and that Kaufman had picked it up for Kor. He also testified that Kaufman said he had just picked the package up for Kor from a place by the curb on Summit Avenue, that Kor was giving him a ride home and Kor drove by that place on Summit Avenue and asked him to pick up the package, and that he did not know what was in the package but he had an idea what was in it.

Officer Jones testified that Kaufman said that he had just picked the package up for Kor; that Kor said that the automobile in which defendants had been riding was his; the officer (witness) asked Kor if the "caps" belonged to him; and Kor replied "Yes." He also testified that in another conversation, in the presence of Kor, Kaufman asked the officers to give him (Kaufman) a break and stated that he was just on his way home and Kor told him to pick up the package; then Kaufman asked Kor to tell the officers that Kaufman did not have anything to do with "this," and he said further, "All I did was pick it up for you"; Kor said, "Yes. That is right."

The package contained 50 capsules of heroin.

Kaufman testified that he was at a street corner waiting for a bus, and he thumbed a ride as Kor come there in his automobile and stopped at the traffic signal; after he was in the automobile he told Kor he was going to 4th and Soto Streets; they went on Macy Street toward that neighborhood; he had seen Kor twice over a period of two months, and he had ridden with him once previously; when they reached Pleasant Avenue, Kor turned onto Pleasant Avenue and went to Summit Avenue—a little dead-end street about 30 feet long; Kor turned onto Summit, stopped the car, opened the door, pointed to a package and asked Kaufman to hand it to him; Kaufman stepped out of the car—about one step—picked up the package, got back into the car and handed the package to Kor; then the car started to leave and the police arrived; he did not know, and he had no idea, what was in the

package; he asked the officers why he was being arrested, and he also stated that he "had nothing to do with it," and that he had just picked it up.

Kor testified that he was in his automobile and coming to a stop at a street corner when Kaufman called his name; Kor stopped and Kaufman got into the automobile; Kor had known Kaufman about two months, and Kaufman had ridden with him twice previously; Kaufman asked him to go to Macy Street, and said that he wanted to pick up a package; they went, as directed by Kaufman, and turned into the little side street and Kaufman said, "This is the place"; then Kaufman got out and picked up the package; about that time Kor saw a car coming down the street; Kaufman said, "There goes the heat," and "Listen, Harry, I am in a jam already. Here is the package. Tell them it is yours"; Kaufman also said: "I will make it worth your while if you tell them it is yours"; Kaufman then said, "Get out of here, scoot"; after they had gone about half a block Kor said that he would tell that to them; when they saw the officers they (defendants) speeded up; the officers apprehended them about half a block from Summit Avenue; he told the officers that the package was his.

Kaufman also testified, on direct examination, that while they (Kaufman and Kor) were in jail he or Kor "contacted" an attorney. They saw Mr. Joseph Rosen, an attorney (from the office of Mrs. Root), in the interview room at the jail; at that time (the evening following the arrest) the two defendants and Mr. Rosen were present, and Kor made the statement that it was his car, that Kaufman was a passenger, that Kor asked Kaufman to hand the package to him, that Kaufman did not know what it was, and Kaufman handed it to him. On cross-examination, by counsel for Kor, Kaufman said that Kor "put out a call" and asked for Mrs. Root's office.

Kor also testified, on direct examination, that in the conversation with Mr. Rosen he told Mr. Rosen "what had happened and how it happened," and he made arrangements, and Mr. Rosen said it would cost \$350; that "all that was discussed was getting out on a writ"; that Mr. Rosen did

get him out on a writ. On cross-examination of Kor, by counsel for Kaufman, the following questions were asked and the following answers were given:

"Q. And at that time [conversation with Mr. Rosen] didn't you make the statement to Mr. Rosen that it was yours, and Mr. Kaufman knew nothing about it? A. I don't think I said that.

"Q. It is your testimony now that you made no such statement to Mr. Rosen? A. I might have said it was mine, yes.

"Q. Were you still taking the blame for Mr. Kaufman? A. Yes; I had already told him I would take the blame."

Counsel for Kaufman subpoenaed Mr. Rosen, and called him, as a witness. He testified on direct examination that he is an attorney; on March 25, 1953, he received a call from jail concerning Kor and Kaufman; the call was from both Kor and Kaufman; he went to the jail and had a conversation with Kor and Kaufman in a small (10 x 10) interrogation room where the three of them "were left alone." He was asked to relate the conversation. He said that he refused to testify to that conversation on the ground it was a confidential communication between attorney and client. Counsel for Kor objected to the conversation on the ground that it was privileged. Counsel for Kor requested permission to ask questions on voir dire as to the relationship. The permission was granted and, in response to questions, Mr. Rosen testified that he had Kor sign a contract, and he received \$100 and the contract from Kor on that occasion; the \$100 was part of a retainer fee. The judge overruled the objection of Kor's counsel and said, "Mr. Rosen, you are ordered to answer the question." Mr. Rosen said that he felt that this was an attorney and client relationship and that is why he objected, and that "I am doing this only under the penalty of contempt. I take it that your honor will hold me in contempt if I refuse to testify." The judge said, "You take it correctly, Mr. Rosen." Counsel for Kaufman then said, "I will ask you with regard to the specific charges in this case, for which you were called there, in regard to the possession of narcotics." Mr. Rosen said: "I asked Mr. Kor to relate

the facts of his arrest to me, what part he played and what part Kaufman played. Mr. Kor told me that he had picked up Kaufman earlier that day on the street corner, Mr. Kaufman was going home and he, Kor, was giving Kaufman a ride home; that after picking Kaufman up and on the way that Kaufman drove over to a certain location, * * * told Kaufman to get out of the car and pick up a package that was lying in the street or the sidewalk or gutter, that was wrapped in newspaper, and that Kaufman picked up that package and brought it back, put it in the front seat of the car, Kor's car, that Kaufman did not know what was in that package but was working—picked it up at the direction of Kor. I asked Kor what was in the package and he told me 5 grams of heroin. I asked him how much 5 grams of heroin was and he said, well, that was about 50 caps. I asked him when he was arrested and he said shortly after that the police pulled him over and arrested him and Kaufman. I asked if that was the story that he told the police when he was arrested. He said that it was."

[1] The relationship of attorney and client existed between appellant (Kor) and Mr. Rosen at the time of the conversation which was the subject of Mr. Rosen's testimony. Such relationship also existed between Kaufman and the attorney. When the defendants were in jail Kaufman told Kor to tell the jailer that he (Kor) wanted Mrs. Root as his attorney. Kaufman knew her previously. Both defendants sent a telephone message, by the jailer, to the law office of Mrs. Root, requesting legal aid. In response thereto Mr. Rosen, an associate in that office, went to the jail and conferred with both defendants while both defendants were present. Kor made a written contract with Mr. Rosen, employing him as his attorney, and paid him \$100 as part of the fee.

The attorney general asserts that the conversation between Kor and his attorney was not a privileged communication, because the conversation was had in the presence of Kaufman.

In the case of *People v. Abair*, 102 Cal. App.2d 765, 228 P.2d 336, the defendant was charged with illegal sale of marihuana. One Williams and his wife and the wife

of defendant Abair were involved in the transaction and were subject to criminal prosecution. Defendant, who had retained an attorney, invited Williams to use the services of the same attorney. The attorney had a conference, in his office, with defendant and Williams and their wives concerning the said transaction as to which the four clients were subject to prosecution. In a prior trial of that case, wherein the jury disagreed, the defense was permitted to introduce testimony of the attorney regarding a conversation he had with Williams during that conference. The attorney, Mr. Hervey, had testified in substance (in the prior trial) that in said conversation Williams had exonerated Abair from any complicity in the offense, and had said that Abair and his wife did not know anything about the marihuana transaction. At the second trial, Mr. Brown, the attorney for defendant at that trial, called Mr. Hervey, the attorney who had conferred with Abair and Williams (and their wives), as a witness and attempted to introduce evidence of the communications made to him by Williams. Williams, who was in the courtroom, objected to Mr. Hervey stating any of the conversation. The objection was sustained. Mr. Brown then offered in evidence the testimony of Mr. Hervey which was taken at the first trial. The offer was rejected. The court said in 102 Cal.App.2d at page 772, 228 P.2d at page 340: "It is argued that because the conversation was held in the presence of the appellant [Abair] and his wife, the privilege was waived. However, all four of the parties present at the conversation were charged with violation of the narcotics laws arising out of the sale of marijuana to Williams on January 10th, and the conversation was directed in some degree to the participation therein by the four persons present. Attorney Hervey at the time indicated that he could represent all four of the parties present and under such circumstances, we conclude that their communications to him, as far as concerns strangers, were privileged." In the present case, when the defendants and their attorney Mr. Rosen had the conversation, both defendants were in jail upon charges arising out of the same narcotics transaction.

The conversation pertained to the participation of both defendants in the offense charged. Under these circumstances the communications of each defendant with his attorney were privileged, even though the other defendant was present when the communications were made. The state (respondent herein) was a stranger as to those communications, and it could not require the attorney, merely because both clients were present, to disclose the information he received from one or both of them in such a confidential conference.
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[2] Respondent also asserts that the conversation between Kor and his attorney was not privileged, because the conversation embodied statements which Kor had made to the officers and therefore Kor did not regard his conference with his attorney as privileged. Kor's defense was that he made an agreement with Kaufman, while the officers were approaching, that he would take the blame for Kaufman's acts because Kaufman was "in a jam already"; and that he would tell the officers the package was his. He made that statement to the officers and presumably he made it to his attorney. When he was a witness, however, he testified to the effect that the package was not his, he had driven to the place as directed by Kaufman, and he did not know what was in the package. If his statement to the officers and his attorney was not true, then of course as a witness, if he had proper regard for his oath, he would not repeat that statement even though he had made said agreement with Kaufman and, pursuant thereto, had previously attempted to accommodate Kaufman by taking the blame. It seems clear that Kor regarded his conference with his attorney as confidential and that he did not intend that his attorney should be a witness against him even to repeat any statements that Kor had made to the officers. It cannot be said that, merely because Kor's conversation with his attorney included statements previously made to officers, he did not regard his conversation with his attorney as confidential and privileged.

[3,4] Respondent asserts further that, assuming the conversation with the attorney was privileged, the privilege was waived

by Kor's failure to object to the testimony of Kaufman who first testified regarding the conversation with the attorney. Kor's contention here is that it was error to permit *his attorney* to testify as to the conversation. Testimony by Kaufman, who had picked up the package and was attempting to exculpate himself, was quite a different matter from testimony by the attorney in whom Kor had confided in seeking legal advice. It might well be that Kor's counsel considered that, under the circumstances, the jury would not regard Kaufman's version of the conversation as of any importance, and for that reason he deemed it advisable not to object to Kaufman's purported recital of the conversation. It was the testimony of the attorney, who had conferred confidentially with Kor and Kaufman, that was of importance with respect to Kor's right to a proper application of the doctrine of privileged communications. The fact that Kaufman gave his version of the conversation, without objection by Kor, did not mean that Kor was required to forego an objection to testimony by the attorney. The right to have communications between attorney and client regarded as privileged is the right of the client. Section 1881, subd. 2 of the Code of Civil Procedure provides: "An attorney can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; * * *." Kaufman could not waive the privilege for Kor. Kor's failure to object to Kaufman's testimony did not constitute consent by Kor that the attorney might testify regarding the confidential communications.

[5,6] Respondent also asserts (in the first brief) that, assuming the conversation was privileged, the privilege was waived by Kor when he testified (on direct examination) that he told the attorney "what had happened and how it happened." Respondent asserts (in the supplemental brief) that since Kor and Kaufman testified as to the conversation with the attorney, the privileged character if any of the conversation was destroyed. With respect to the conference with the attorney, Kor testified, on direct examination, that he told the

attorney "what had happened and how it happened"; that he made arrangements with the attorney, and the attorney said it would cost \$350; that "all that was discussed was getting out on a writ"; that the attorney said he would get him out on a writ. Kor's statement that he told the attorney what had happened and how it happened was a general statement which did not disclose, or purport to disclose, what words were used by Kor in telling of the happening, or what in substance was said by him. That statement revealed nothing that was confidential. The other testimony by Kor on direct examination did not disclose any confidential information as to what was said about the happening—that testimony was to the effect that Kor employed the attorney and they discussed getting Kor out of jail on a writ. It thus appears there was no basis in the direct examination of Kor for a claim that Kor waived his right to object to his attorney testifying as to privileged communications. On cross-examination by counsel for Kaufman, Kor was asked if he told the attorney that the package was his (Kor's), and Kaufman knew nothing about it. He replied that he did not think that he said that. Then he was asked: "It is your testimony now that you made no such statement to Mr. Rosen?" He replied, "I might have said it was mine, yes." Then the following questions were asked and the following answers were given:

"Q. Were you still taking the blame for Mr. Kaufman? A. Yes; I had already told him I would take the blame.

"Q. Was this the attorney that said he would get you out in two hours? A. All he told me is, 'The attorney is going to get you out on a writ. He didn't tell me anything about that fellow being my attorney; he said my attorney would be Gladys Root.

"Q. He told you he would get you out in two hours? A. That's right.

"Q. So when you were in Lincoln Heights [jail], just you and Mr. Kaufman and Mr. Rosen, you were still taking the blame for Mr. Kaufman? A. Yes, sir." The deputy district attorney also cross-examined Kor about the conversation with his attorney. He asked Kor as follows:

"You also told Mr. Rosen that it was yours?" Kor replied, "Yes; I didn't know Rosen was the attorney; I figured he was going to get me out on a writ." The answers of Kor on such cross-examination were responsive to the questions, did not include volunteered information as to privileged communications, and were not voluntary disclosures of privileged communications. It cannot be said that Kor, by so answering such questions of Kaufman's counsel and the deputy district attorney, intended thereby to consent that his attorney might be examined as to communications made in confidence by Kor to his attorney. Such answers did not constitute a basis for a claim that Kor waived his right to object to his attorney testifying as to privileged communications.

[7] The attorney general states in his brief that: "This office as attorney for the State realizes that the attorney-client privilege must be vigorously protected when it is used by an accused to prohibit disclosure of his confidences to his attorney. But it would be grossly improper for this office to concede that the privilege may be used as a shield to conceal the truth when the person claiming the privilege is falsely accusing another of a crime." That statement assumes that Kor was falsely accusing Kaufman, that is, it assumes that Kor's testimony—to the effect that he agreed to take the blame for Kaufman—was false. That statement is also susceptible of the interpretation that communications between attorney and client should not be regarded as privileged communications if the client, as a witness, is not telling the truth and is using the privilege as a shield to conceal the truth. Under that view of the relationship between attorney and client, the fundamental doctrine of privileged communications between attorney and client might become of no importance since the truth of the client's testimony could easily be brought into question. In the case of *In re Ochse*, 38 Cal.2d 230, at page 231, 238 P.2d 561, it was said: "Adequate legal representation, of course, requires a full disclosure of the facts to counsel, and in order to assure that a client may safely reveal all the facts of his case to his attorney, the law has long recognized the need

for secrecy with respect to communications between them." Also, said statement of the attorney general assumes that the truth would be revealed by the testimony of the attorney. In the present case, if the statements by Kor to the attorney (which the attorney testified were made to him) were made by Kor pursuant to his alleged agreement that he would take the blame for Kaufman's crime, then, even though the attorney had testified precisely as to what Kor had told him, the statement of Kor to the attorney might not be the truth as to what actually occurred in the commission of the crime. The attorney general also states that in a case such as the one at bar, where each defendant is accusing the other of the crime, "if the truth is concealed by application of the attorney-client privilege" there is danger that a guilty man may go free, and danger that an innocent man may be found guilty; and that in fact were it not for the testimony of the attorney, Kaufman might very well be in San Quentin. Conversely, it might be said that were it not for the testimony of the attorney, which tended to impeach the testimony of Kor that he was taking the blame for Kaufman, Kor might have been found not guilty.

The attorney, Mr. Rosen, objected to testifying regarding his confidential conference with Kor. Kor objected to his attorney testifying as to such conference. The deputy district attorney, Mr. Stovitz, argued that the objection should be overruled. The trial judge overruled the objections, and stated that she would adjudge the attorney guilty of contempt of court if he refused to testify. It is clear that the trial judge erred in those rulings. The error was highly prejudicial to Kor, denied him his fundamental right to be protected against disclosure of confidential communications between him and his attorney, and prevented him from having a fair trial.

The judgment and the order denying motion for a new trial are reversed, and the cause is remanded for a new trial.

SHINN, Presiding Justice.

[8, 9] I concur: The privilege of confidential communication between client and attorney should be regarded as sacred. It is not to be whittled away by means of specious argument that it has been waived.

Least of all should the courts seize upon slight and equivocal circumstances as a technical reason for destroying the privilege. Here the attorney was compelled to testify against his client under threat of punishment for contempt. Such procedure would have been justified only in case the defendant with knowledge of his rights had waived the privilege in open court or by his statements and conduct had furnished explicit and convincing evidence that he did not understand, desire or expect that his statements to his attorney would be kept in confidence. Defendant's attorney should have chosen to go to jail and take his chances of release by a higher court. This is not intended as a criticism of the action of the attorney. It is, however, a suggestion to any and all attorneys who may have the misfortune to be confronted by the same or a similar problem.

VALLÉE, Justice.

I concur in the opinion of Mr. Justice WOOD, in the judgment, and in the comments of Mr. Presiding Justice SHINN.

Hearing denied; TRAYNOR and SPENCE, JJ., dissenting.



134 Cal.App.2d 871

**In re Shirley Ann FLODSTROM on
Habeas Corpus.
Cr. 3091.**

District Court of Appeal, First District,
Division 2, California.

Dec. 14, 1954.

Rehearing Denied Dec. 29, 1954.

Hearing Granted Jan. 12, 1955.

Proceeding by petitioner seeking discharge from custody pursuant to a writ of habeas corpus on the ground that she was being held to answer for a crime of murder without a showing of reasonable and probable cause. The District Court of Appeal, Kaufman, J., granted the petition on the ground that the corpus delicti had not been established.

Petitioner ordered discharged from custody.

1. Criminal Law ⇨535(1)

Although a confession may be considered by jury to support the corpus delicti, it must be shown to some extent independently of a confession, before accused can be held to answer for crime.

2. Criminal Law ⇨680(2)

Although the order of proof is discretionary and may be varied, there must be some showing of the corpus delicti before extrajudicial statements of the accused can be admitted.

3. Criminal Law ⇨535(1)

Before one can be held to answer for crime and stand trial there must be a prima facie showing of the corpus delicti independent of any extrajudicial statements of the accused.

4. Habeas Corpus ⇨21

Where disregarding the confessions and admissions of the accused, there was no proof even slight, of any criminal agency that caused the death of the infant child of accused, she was entitled to discharge from custody on habeas corpus on the ground that she was being held to answer for murder without a showing of reasonable and probable cause therefor. Pen. Code, §§ 187, 995, subd. 2.

Byron J. Snow, Steven P. Gazzera, Redwood City, Sidney L. Berlin, Redwood City, of counsel, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., N. J. Menard, Dist. Atty., of Santa Clara County, San Jose, for respondent.

KAUFMAN, Justice.

Petitioner, Shirley Ann Flodstrom, seeks discharge from custody pursuant to a writ of habeas corpus issued out of this court on the ground that she is being held to answer for the crime of murder without a showing of reasonable and probable cause. Petitioner alleges that she was arrested on October 12, 1954 and a complaint was filed in the Municipal Court for the San Jose-Alviso Judicial District, County of Santa

Clara, charging her with murder. A preliminary examination followed in the Municipal Court on October 22, 1954, after which petitioner was held to answer to the Superior Court. On October 29, 1954 an information was filed in the Superior Court charging her with a violation of Penal Code, § 187. On November 5, 1954 at petitioner's arraignment her attorney moved to set aside the information pursuant to Penal Code, § 995, paragraph 2. (Defendant committed without reasonable or probable cause.) This motion was denied on November 12, 1954 by the Superior Court Judge. No prior application has been made for a writ of habeas corpus.

Attached to the petition as Exhibit A is the testimony taken at the preliminary hearing on October 22, 1954. The events which culminated in the detention of petitioner are presented in this testimony. It appears that the only witness to testify at the hearing was a detective in the Police Department. He testified on direct examination that he went to the home of petitioner on October 6, 1954 and there viewed the dead body of David Flodstrom, six months old, the son of petitioner. He further testified that the petitioner then told him that she found the sleeve of the pajama top crammed in the baby's mouth. According to the testimony, on October 7, 1954 this police officer again went to petitioner's home accompanied by the Deputy Coroner. Both of these officers questioned petitioner at that time. The police officer further testified that petitioner was brought to the police station on October 12, 1954 where she confessed to the crime charged and signed a written statement to that effect. The police officer testified that petitioner told him that she crammed the pajama sleeve in the baby's mouth with her fingers because she was angry with her husband and wished to get even with him.

On cross-examination the police officer testified that when he arrived at the petitioner's house on October 6 he found the deceased baby lying on his back in his crib; that there were no indications or signs of violence on the child visible to him; that he did not see the pajama sleeve in the

baby's mouth; that one sleeve of the pajama top was damp and had two small blood spots on it; that he called the Coroner.

At the end of the preliminary hearing petitioner's attorney moved to dismiss the complaint on the ground that the State had not established the corpus delicti. This motion was denied.

Petitioner contends that she is held without probable cause in that there was no proper showing of the corpus delicti at the preliminary hearing. More specifically it is asserted that aside from the extra-judicial statements of the accused which ought not to have been admitted at the preliminary hearing there was no showing that the death was accomplished by means of a criminal agency. Petitioner's position that such extra-judicial statements cannot be considered in the first instance to determine if the corpus delicti has been shown *prima facie* is supported by authority. In *Hall v. Superior Court*, 1953, 120 Cal.App.2d 844, 262 P.2d 351, it was held that if the only evidence of a homicide produced at a preliminary examination comprises extra-judicial statements of the accused, he is held to answer without reasonable or probable cause. In that case the autopsy surgeon testified that the death was caused by a ruptured liver and that in his opinion the rupture was caused by a blow of some sort. In spite of this testimony the court felt that it was not shown that the rupture was due to any unlawful or criminal act. Thus it could be argued that the facts of the *Hall* case go further than those in the case at hand in indicating a criminal agency and yet the court felt that this was not a sufficient showing. It is significant that the Coroner in the instant case apparently examined the body and yet was not called to testify at the preliminary hearing. It would seem that if there were indications that death was caused by a criminal agency the Coroner would be the best witness to testify to this fact. If the omission of his testimony was inadvertent it can in all likelihood be supplied by the District Attorney in another proceeding

brought to charge petitioner with this crime.

In *People v. Eldridge*, 3 Cal.App. 648, 86 P. 832, the defendant was convicted of manslaughter. He had confessed the killing of his infant child. The record, independently of his confession, showed that the defendant at the insistence of his wife, administered 4 drops of chloroform, which he dropped on a handkerchief and then placed the handkerchief on the child's face and after removing the handkerchief found the baby dead. The evidence further showed that the amount of chloroform used would not produce death. A post mortem examination revealed nothing as indicating a violent or unnatural death. The appellate court reversed the conviction holding there was no satisfactory evidence of the corpus delicti.

[1] The Attorney General relies on *People v. McMonigle*, 1947, 29 Cal.2d 730, 177 P.2d 745, for the proposition that the confession may be considered in support of the corpus delicti. However, it is apparent from the language used by the court in the *McMonigle* case that it is consistent with the position contended for by petitioner. At page 738 of 29 Cal.2d, at page 749 of 177 P.2d, the court approved as a correct statement of the law an instruction to the effect that: "* * * the corpus delicti for every criminal case must be proven by satisfactory evidence aside from any statement, confession or admission of the defendant. * * * After the latter however have been received in evidence they may strengthen and fortify the proof of the corpus delicti * * *." Thus although a confession may be considered by the jury to support the corpus delicti, the corpus delicti must be shown to some extent independently of a confession before the accused can be held to answer for a crime. The District Attorney seems to admit this rule by his excerpt from *People v. Selby*, 1926, 198 Cal. 426, 245 P. 426, to the effect that after prima facie proof of the corpus delicti the statements of the accused may be admitted and considered by the jury to determine if the

accused is guilty of the crime charged beyond a reasonable doubt.

[2,3] The more recent cases dealing with the problem of admitting extra-judicial statements of the accused have established that although the order of proof is discretionary and may be varied, nevertheless there must be some showing of the corpus delicti before such statements can be admitted. Typical of this line of authority is *People v. Cullen*, 1951, 37 Cal.2d 614, on page 624, 234 P.2d 1, on page 7, in which it was stated: "It is the settled rule, however, that the corpus delicti must be established independently of admissions of the defendant. Conviction cannot be had on his extra-judicial admissions or confessions without proof aliunde of the corpus delicti; but full proof of the body of the crime, sufficient to convince the jury of its conclusive character, is not necessary before the admissions may be received. A prima facie showing that the alleged victims met death by a criminal agency is all that is required. The defendant's extra-judicial statements are then admissible, the order of proof being discretionary, and together with the prima facie showing must satisfy the jury beyond a reasonable doubt." The above case is of course concerned with the proof presented to the jury and does no violence to the rule that before one can be held to answer for a crime and stand trial there must be a prima facie showing of the corpus delicti independent of any extra-judicial statements of the accused. See *People v. Schubert*, 71 Cal.App.2d 773, 163 P.2d 498.

[4] It is our view that the corpus delicti has not been established. Disregarding the confession and admissions of the accused there is no proof, even slight, of any criminal agency that caused the death of the infant child.

Accordingly we must hold that the petitioner was held to answer without reasonable and probable cause and that she is entitled to be discharged from custody.

Ordered petitioner discharged from custody.

DOOLING, J., concurs.

129 Cal.App.2d 264

**JEFFERSON UNION SCHOOL DISTRICT
OF SANTA CLARA COUNTY, Peti-
tioner and Appellant,
v.**

**The CITY COUNCIL OF the CITY OF SUN-
NYVALE, and Walter Jones, W. W. Thell-
er, R. B. Gilmore, Kenneth S. Johnson and
Ernest N. Stout, as members of said City
Council, Respondents.**

No. 16067.

District Court of Appeal, First District,
Division 1, California.

Dec. 1, 1954.

Hearing Denied Jan. 26, 1955.

Mandamus and certiorari proceedings by a union school district to test the legality of a city council's adoption of a resolution proposing annexation to the city of certain uninhabited territory in the district. From a judgment of the Superior Court, County of Santa Clara, John D. Foley, J., for the city, the district appealed. The District Court of Appeal, Fred B. Wood, J., held that the council had jurisdiction to adopt the resolution after receiving an appropriate annexation petition, signed by a sufficient number of landowners, and the county boundary commission's report that the proposed boundaries described in the petition were definite and certain, though the petition was circulated and signed before it was submitted to and reported on by such commission.

Judgment affirmed.

1. Municipal Corporations ⇨33(5)

A city council had jurisdiction to adopt resolution proposing annexation of certain uninhabited territory to city after receiving appropriate annexation petition, signed by sufficient number of landowners, and county boundary commission's report that proposed boundaries described in petition were definite and certain, though petition was circulated and signed before it was submitted to and reported on by such commission. Government Code, §§ 35000-35003, 35002, 35300-35326, 35301.

2. Municipal Corporations ⇨29(1)

The provisions of Government Code section that no petition for annexation of territory to city shall be circulated or filed

until annexation proposal has been submitted to and reported on by county boundary commission with respect to definiteness and certainty of proposed boundaries are directory, not mandatory, as they are merely a guide to orderly proceedings and section defining verb "shall" as mandatory is modified by section declaring that definitions among general provisions shall govern construction of Code, unless provision or context otherwise requires. Government Code, §§ 5, 14, 35002, 35100-35158.

3. Statutes ⇨227

Statutory provisions which were enacted as guide to orderly proceedings and which, from legislature's intent gathered from provisions of act and end sought to be accomplished thereby, are not mandatory, are merely directory at least to extent of technical noncompliance therewith.

4. Municipal Corporations ⇨29(1)

The courts should not construe procedural requirements of act providing for annexation of uninhabited territory to cities so technically as to compel absolute and literal compliance with every word therein, as such construction in many cases would defeat will of majority in situations wherein no one was or could be misled. Government Code, §§ 35100-35158.

5. Mandamus ⇨145

Municipal Corporations ⇨33(8)

A union school district is proper party plaintiff in certiorari or mandamus proceedings to test legality of city council's adoption of resolution proposing annexation to city of certain uninhabited territory in such district which is party beneficially interested because such annexation would automatically remove annexed territory from district and tax rolls thereof. Code Civ.Proc. §§ 1069, 1086; Government Code §§ 35000-35003, 35300-35326.

6. Mandamus ⇨78

Mandamus is a proper remedy to compel city council to terminate proceedings for annexation of territory to city under Annexation of Uninhabited Territory Act before quo warranto becomes available. Code Civ.Proc. § 1086; Government Code, §§ 35000-35003, 35300-35326.

7. Municipal Corporations §33(8)

Certiorari is a proper remedy to test validity of proceedings for annexation of territory to city under Annexation of Uninhabited Territory Act. Code Civ.Proc. § 1069; Government Code, §§ 35000-35003, 35300-35326.

Burnett, Burnett & Somers, San Jose, for appellant.

Elizabeth C. McDonald, City Atty., Sunnyvale, Kirkbride, Wilson, Harzfield & Wallace, San Mateo, for respondents.

FRED B. WOOD, Justice.

The appellant school district instituted these proceedings in mandamus and in certiorari against the respondent city, questioning the legality of the adoption of a resolution by the city council on March 17, 1953, proposing the annexation of certain territory under the Annexation of Uninhabited Territory Act of 1939, Government Code, §§ 35300-35326 and §§ 35000-35003¹. From a judgment in favor of the city, the district has appealed.

[1] (1) *Did the city council have jurisdiction to adopt the resolution in view of the fact that the petition for annexation was circulated and signed before it was submitted to and reported upon by the county boundary commission even though such submission and report occurred prior to such action by the city council?*

The question is posed by section 35002 of the Government Code: "No petition seeking the annexation of territory to a city shall be circulated or filed, nor shall any public officer accept any such petition for filing, nor shall any legislative body initiate proceedings to annex on its own motion, until the proposal for the annexation of territory to a city has been submitted to and reported upon to the proponents by the boundary commission of the county with respect to the definiteness and certainty of the proposed boundaries.

"If the boundary commission does not report upon the petition or proceeding within 20 days after it is submitted to it, the petition or proceeding shall be deemed correct."

When, as in the instant case, a city council has received an appropriate petition bearing the signatures of a sufficient number of landowners and a report of the county boundary commission that the proposed boundaries described in the petition are definite and certain, it would seem an idle and useless act to return the petition to the proponents for resignature by the petitioners and resubmission to the council. The purpose of the statute has in fact been accomplished without such recirculation and resubmission.

We do not think that the Legislature intended to make any such requirement when it added section 35002 to the code and amended section 35301 to make it applicable to the Annexation of Uninhabited Territory Act of 1939.² It did not prescribe any penalties for non-compliance with the requirements of section 35002. The consequences of non-compliance it left to inference. It did not even declare the consequences of a report when the commission finds the proposed boundaries are indefinite and uncertain. It dispensed with the report if not filed within 20 days.

[2-4] It would seem that the provisions of section 35002 are directory, not mandatory, in accordance with the principle enunciated in *Skelly Estate Co. v. San Francisco*, 9 Cal.2d 28, 33, 69 P.2d 171, 174, that statutory provisions "which have been enacted as a guide to orderly proceedings and which, from the intent of that Legislature gathered from the provisions of the act and the end sought to be accomplished thereby are not mandatory, are merely directory"; at least to the extent of the non-compliance here involved. We need not, for example, consider what the consequences might have been if the city council had acted without submitting the petition to the boundary commission or if

1. Section 35004 was added by Stats. 1953, ch. 1284, p. 2840; section 35006 was added and section 35307 was amended by Stats. 1953, ch. 1251, p. 2812; each effective

September 9, 1953, subsequent to the events here involved.

2. See Stats. 1951, ch. 963, p. 2578.

the commission had filed an adverse report. As observed recently by this court in an opinion written by Presiding Justice Peters, concerning the procedural requirements of the Annexation Act of 1913, Gov.Code, §§ 35100-35158, the "courts should not so technically construe such statutes as to compel absolute and literal compliance with every word contained therein, because to do so, in many cases, would result in defeating the will of the majority in situations where no one was or could be misled." *People v. City of San Bruno*, 124 Cal.App.2d 790, 794, 269 P.2d 211, 214.

Appellant directs attention to the fact that section 35002 uses the verb "shall" and claims that the definition in section 14 of the Government Code requires us to treat that word as "mandatory." It happens that section 14 is modified by section 5 of the code. It declares that the definitions found among the "general provisions," including section 14, of the code shall govern the construction of the code *unless* "the provision or the context otherwise requires." As we have seen, the context does otherwise require, to the extent at least that there has been a technical non-compliance in this case.

[5] (2) *Is appellant a proper party plaintiff? Yes.*

Whether we view this as a proceeding in certiorari or in mandamus, the plaintiff is a "party beneficially interested" as that expression is used in section 1069 of the Code of Civil Procedure in relation to certiorari and in section 1086 in relation to mandamus.

The proposed annexation, if successful, will automatically remove the annexed territory from the school district and from its tax rolls. See *City of El Cajon v. Heath*, 86 Cal.App.2d 530, 534, 196 P.2d 81. If the city council lacked jurisdiction to adopt the questioned resolution, it is very much to the interest of the school district to obtain an early determination to avoid the confusion and loss of revenue that otherwise might ensue.

[6, 7] (3) *Mandamus is a proper remedy to compel the city council to terminate pro-*

ceedings under the Annexation of Uninhabited Territory Act of 1939, prior to the time when quo warranto becomes available. *American Distilling Co. v. City Council, Sausalito*, 34 Cal.2d 660, 213 P.2d 704, 18 A.L.R.2d 1247. *Certiorari is a proper remedy to test the validity of annexation proceedings under that statute.* *City of Anaheim v. City of Fullerton*, 102 Cal.App.2d 395, 227 P.2d 494.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



129 Cal.App.2d 342

Richard J. BICE and Lella M. Bice, Plaintiffs and Appellants,

v.

James STEVENS and Mabel Stevens, husband and wife, William F. Thompson, Earl L. Morrison and Florence E. Morrison, doing business under the fictitious firm name and style of Keystone Realty Company, Roland W. Hoagland, and Farmers and Merchants Bank of Long Beach, California, a corporation, Defendants and Respondents.

Civ. 20477.

District Court of Appeal, Second District, Division 3, California.

Dec. 3, 1954.

Hearing Denied Jan. 26, 1955.

Defendants' motions to dismiss appeal on ground notice of appeal was not timely filed. The Superior Court, Los Angeles County, Joseph M. Maltby, J., had sustained defendants' motion to exclude all evidence under the complaint, after the first witness had been called but before any evidence had been given, and the appeal was taken from the judgment which followed. The District Court of Appeal, Vallée, J., held that a "trial" had been had and that notice of motion for new trial was therefore valid and that notice of appeal

filed within thirty days after denial of the motion for new trial was timely.

Motions to dismiss appeal denied.

1. Appeal and Error ⇐801(3)

On motions to dismiss appeal from judgment in civil case on ground that no trial had been had and that notice of motion for new trial was therefore invalid and notice of appeal filed within 30 days after order denying new trial was therefore not timely, question of jurisdiction was involved and question of estoppel to contest appeal, by having argued motion for new trial on merits would not be considered. Rules on Appeal, rules 2(a), 3(a); Code Civ.Proc. § 657.

2. New Trial ⇐38

Motion for new trial can properly be entertained where motion of nonsuit is granted. Code Civ.Proc. § 657.

3. New Trial ⇐38

Motion for new trial can properly be entertained where motion for directed verdict is granted. Code Civ.Proc. § 657.

4. New Trial ⇐35

Where plaintiff at start of trial of civil case called a defendant as witness and defendants' motion to exclude all evidence under complaint was then sustained, a "trial" had been had and such sustaining, if erroneous, was "error in law occurring at the trial" and was reviewable on motion for new trial. Code Civ.Proc. §§ 657, 2055.

See publication Words and Phrases, for other judicial constructions and definitions of "Error in Law Occurring at the Trial" and "Trial".

5. New Trial ⇐35

An erroneous ruling in trial of a case which precludes plaintiff from introducing evidence in support of his complaint is an "error in law occurring at the trial" within statute specifying same as ground for new trial. Code Civ.Proc. §§ 588, 591, 657.

6. New Trial ⇐18

If in trial of case, whether evidence is received or not, motion for judgment on pleadings is granted, ruling may be reviewed on motion for new trial. Code Civ.Proc. §§ 588, 591, 657.

7. Appeal and Error ⇐345(1)

Where court ruling excluding all evidence under complaint in civil case after first witness was called but before any evidence was received was reviewable on motion for new trial, notice of motion for same was valid and notice of appeal from judgment filed within 30 days after entry of order denying motion was timely. Rules on Appeal, rules 2(a), 3(a); Code Civ.Proc. § 657.

Philip E. Poppler, Long Beach, and Glen A. Duke, Los Angeles, for appellants.

Reynolds, Painter & Cherniss and Louis Miller, Los Angeles, Walker & Horn and M. W. Horn, Long Beach, for respondents.

VALLÉE, Justice.

These are motions to dismiss the appeal. Respondents-defendants, other than William F. Thompson, have filed two motions to dismiss on the ground the notice of appeal was not filed within the time prescribed by the Rules on Appeal. Notice of appeal must be filed within 60 days from the date of entry of the judgment except that when a valid notice of intention to move for a new trial is served and filed by any party within 60 days after entry of judgment and the motion is denied, the time for filing the notice of appeal from the judgment is extended for all parties until 30 days after either entry of the order denying the motion or denial thereof by operation of law. Rules on Appeal, Rules 2(a), 3(a); 36 Cal. 2d 1, 2. The judgment was entered on January 5, 1954. Appellants-plaintiffs, within time, served and filed a notice of intention to move for a new trial. An order was entered denying the motion on March 4, 1954. The notice of appeal was filed on March 25, 1954, 79 days after entry of the judgment. The question is: Was the notice of intention to move for a new trial valid? If it was, the appeal was timely; if it was not, the appeal was not timely. We have concluded that the notice was valid and that the appeal was timely.

The cause came on regularly for trial on December 28, 1953. All parties were represented by counsel. When the court called

the cause, all defendants answered they were ready. The judge stated he had read the pleadings. Counsel for plaintiffs then made an opening statement. The court next directed counsel for plaintiffs to proceed. Counsel for plaintiffs then called one of the defendants under section 2055 of the Code of Civil Procedure. Before the witness was sworn, counsel for defendants moved the court to exclude all evidence on the ground "the complaint fails to state the facts sufficient to state a cause of action against the defendants or any of them." The motions were argued at length with comments by the court. During the course of the argument counsel for plaintiffs asked leave to amend the complaint, stating specifically the nature of the proposed amendment. The court then stated that the motions of the defendants to exclude all evidence were granted. Argument on the request for leave to amend followed. The request for leave to amend was denied. Counsel for defendants then asked, "Will the Court on the sustaining of the objection enter an order of judgment of dismissal?" The court responded, "For the defendants." Judgment that plaintiffs "take nothing by reason of this action, and that said action be and it is hereby dismissed," followed. The judgment recites that "The above entitled cause came on regularly for trial on December 28, 1953, * * *."

[1] Respondents contend that no valid notice of intention to move for a new trial was filed which would operate to extend the time for filing a notice of appeal for the reason, they assert, that no issue of fact was decided by the trial court and the judgment was decided on issues of law alone.¹ They rely on *Abbey Land & Improvement Co. v. San Mateo County*, 167 Cal. 434, 139 P. 1068, 52 L.R.A.,N.S., 408; *Gray v. Cotton*, 174 Cal. 256, 162 P. 1019; *City of Pasadena v. Grace*, 114 Cal.App. 24, 299 P. 565; *Confar v. Whelan*, 8 Cal.App. 2d 101, 46 P.2d 991; *Hotel Park Central v.*

Security-First National Bank, 15 Cal.App. 2d 293, 59 P.2d 606; and *Lynch v. Watson*, 69 Cal.App.2d 51, 158 P.2d 250. Appellants, in opposition, rely on *Stow v. Superior Court*, 178 Cal. 140, 172 P. 598; *Allen v. California Mut. Building & Loan Ass'n*, 40 Cal.App.2d 374, 104 P.2d 851; and *Smith v. City of Los Angeles*, 84 Cal.App. 2d 297, 190 P.2d 943.

In *Abbey Land & Improvement Co. v. San Mateo County*, supra, 167 Cal. 434, 139 P. 1068, when the case came on for trial the defendants moved for judgment on the pleadings, and the parties stipulated that it should be submitted on the pleadings. The defendants' motion was denied, and judgment rendered for the plaintiffs from which the defendants appealed. The defendants also appealed from an order dismissing their motion for a new trial. The court held, 167 Cal. at page 436, 139 P. at page 1068: "There was no trial of the cause upon issues of fact and, therefore a motion for a new trial could not be entertained. The court below properly refused to consider it, and it calls for no further discussion in this court." In *Gray v. Cotton*, supra, 174 Cal. 256, 162 P. 1019, on motion of the plaintiff, a judgment was entered against the surety in an undertaking for the stay of execution on appeal. The surety filed a notice of intention to move for a new trial of the motion. The motion was denied. More than 60 days after entry of the judgment, but within 30 days of the date the order was made denying a new trial, the surety filed a notice of appeal from the judgment. Dismissing the appeal, the court stated, 174 Cal. at page 258, 162 P. at page 1019: "By signing the undertaking on appeal the surety, Rowe, consented that judgment should be entered against him on motion for the amount as to which the judgment appealed from should be affirmed, and waived notice thereof. No notice to him of the making of the motion was necessary. [Citations.] The records

1. If a question of jurisdiction were not involved, respondents would be estopped to make the motions to dismiss the appeal. It developed at the oral argument that respondents resisted the motion for a new trial on the merits and that they did not

then question the jurisdiction of the trial court to entertain the motion. The motions to dismiss were filed in this court after appellants' opening brief was on file.

and files in the case were before the court for the purposes of the motion. Formal introduction thereof in evidence was unnecessary. The court had to decide, and in this case did in fact decide, only the question of law, whether or not, upon the facts appearing in these documents, the plaintiff was entitled to the judgment against the surety. [Citation.] The provisions of the Code allowing a new trial to be ordered (sections 656 to 660, Code Civ. Proc.) follow immediately the provisions for the framing of issues, the trial and the decision of civil actions. 'A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referee.' Section 656. This refers, of course, to the trials and decisions of the issues of fact in the civil actions and proceedings embraced in the preceding Code provisions, issues raised by ordinary pleadings, and it has no reference to decisions of questions of fact on motions. It is well settled that proceedings for new trial do not lie to secure the re-examination of the decision of a motion. [Citations.] It follows that the attempt to obtain a new trial was unauthorized, and that the pendency and decision thereof did not extend the time for taking the appeal beyond the 60 days allowed where no motion for a new trial is instituted."

City of Pasadena v. Grace, supra, 114 Cal.App. 2d, 299 P. 565, 566, was a motion to dismiss an appeal from a judgment dismissing a proceeding in eminent domain. The defendant moved to dismiss the proceeding on the ground of the failure of the plaintiff to proceed. The motion was granted and judgment entered in favor of the defendant and against the plaintiff. The plaintiff filed a notice of intention to move for a new trial, which motion was denied. More than 60 days after entry of the judgment, but within 30 days of entry of the order denying a new trial, the plaintiff filed a notice of appeal from the judgment. On motion the appeal was dismissed, the court holding that the determination of the motion to dismiss the proceeding "involved no determination of any issue of fact or law presented in that case, but was entirely disconnected therewith" (Italics

added), and "that the decision of the trial court was not rendered in the trial of the case, and the motion for a new trial could not, therefore, extend the time for the filing of an appeal." There was no petition for hearing by the Supreme Court in the *Grace* case. *Confar v. Whelan*, supra, 8 Cal.App.2d 101, 46 P.2d 991, was an appeal from a judgment of dismissal entered on an order sustaining a demurrer to a complaint without leave to amend. Notice of intention to move for a new trial of the issues raised by the demurrer was served and filed. The motion was denied. The appeal was dismissed on the ground that only questions of law were raised by the demurrer and the notice of intention to move for a new trial did not extend the time within which to appeal from the judgment beyond 60 days from entry of the judgment. The Supreme Court denied a hearing.

Hotel Park Central v. Security-First National Bank, supra, 15 Cal.App.2d 293, 59 P.2d 606, was an appeal by the plaintiff from a judgment for the defendant after an order sustaining an objection to the introduction of evidence, which was apparently followed by a motion for judgment on the pleadings which was granted. Notice of intention to move for a new trial was served and filed. The motion was denied. Notice of appeal was filed more than 60 days after entry of judgment but within 30 days after the ruling on the motion for a new trial. There was also an appeal from a later order denying relief under section 473 of the Code of Civil Procedure. Dismissing the appeal from the judgment, the court said, 15 Cal.App.2d at page 295, 59 P.2d at page 607: "The order of the court granting a motion for judgment on the pleadings after a ruling sustaining an objection to the introduction of evidence, on the ground that the amended complaint failed to state a cause of action, was a decision upon questions of law alone. No motion for new trial lies in such cases. *Abbey Land & Improvement Co. v. San Mateo County*, 167 Cal. 434, 139 P. 1068, Ann.Cas. 1915C, 804, 52 L.R.A.(N.S.) 408. An attempted motion for new trial in a case where none is authorized does not extend

the time within which an appeal can be taken." The order denying relief was affirmed. The Supreme Court denied a hearing. *Lynch v. Watson*, supra, 69 Cal. App.2d 51, 158 P.2d 250, 251, was an appeal from a judgment entered on an order granting a motion to dismiss the action made on three grounds: "(1) That plaintiff had failed to file or present any claim against the estate of Holmstrand as required by section 709, Probate Code; (2) that he had failed to prosecute said action with due or any diligence; and (3) that he had failed to file a non-resident cost bond as required by section 1030, Code of Civil Procedure." The ground on which the motion to dismiss the action was granted does not appear in the opinion. Notice of intention to move for a new trial was served and filed. The motion was denied. Notice of appeal was not filed within 60 days of the entry of judgment but was filed within 30 days of the order denying a new trial. In dismissing the appeal, the court stated, 69 Cal.App.2d at page 53, 158 P.2d at page 251: "Plaintiff's notice was not a 'valid' one. The filing of the alleged notice of motion for a new trial by plaintiff did not have the effect of extending the time for filing the notice of appeal because a motion for a new trial is not a proper proceeding to review the action of the court in dismissing a case where there has been no trial upon the issues presented by the pleadings. In such case there is no provision for a new trial and the notice of intention to so move is ineffectual for any purpose. [Citations.] In *Gray v. Cotton*, supra, 174 Cal. [256] at page 258, 162 P. at page 1020, the court said: 'It is well settled that proceedings for a new trial do not lie to secure the re-examination of the decision of a motion.'" The Supreme Court denied a hearing.

The identical question presented in the case at bar, on exactly the same facts, was decided adversely to respondents' contention in *Stow v. Superior Court*, supra, 178 Cal. 140, 172 P. 598, a proceeding in certiorari to review the action of the superior court in granting a motion for a new trial. The facts are stated in the opinion, 178 Cal. at page 141, 172 P. at page 599: "Action

was commenced in the superior court, plaintiff's cause resting largely upon the alleged obligations arising from a certain written contract attached to the complaint as an exhibit. Demurrer to the complaint was overruled, an answer was filed and the cause being at issue was brought on for trial before a judge other than the one who had ruled upon the demurrer. A trial by jury was waived; counsel for the respective parties made their addresses outlining their respective theories and the proofs which they intended to offer in support thereof; a witness for plaintiff was called and sworn, and his testimony was sought to be introduced by plaintiff. Defendants' counsel objected to the introduction of any evidence on behalf of plaintiff on the ground that the complaint failed to state facts sufficient to constitute a cause of action, in that the contract attached to the complaint as an exhibit was for an indefinite term. The objection was sustained by the learned judge of the superior court upon the ground that by the terms of the contract attached as an exhibit to the complaint an action on that agreement was not maintainable. Thereafter defendants moved to dismiss their cross-complaint and the motion was granted. Then they moved for judgment on the pleadings on the ground that the complaint did not state facts sufficient to constitute a cause of action. This motion was granted. The judge by affidavit has declared that in granting the motion last referred to, he did not take into consideration the allegations of the complaint at all, but only regarded the contract marked 'Exhibit A.' Subsequently, on motion for new trial the court, convinced that the conclusion regarding the insufficiency of the complaint had been erroneous, granted the motion, and this is the order which, it is contended, was beyond the jurisdiction of the superior court to make.

"At the trial, after the court had expressed a conviction that the complaint did not state facts sufficient to constitute a cause of action, counsel for plaintiff said: 'Well, if your Honor has that view of it, there is no use going any further; if the complaint does not state a cause of action,

of course, then, the easiest way to test that is by the defendant making a motion for judgment on the pleadings, and, if that is granted, then I can settle that bill of exceptions very quickly.' This was followed by dismissal of the cross-complaint at request of counsel for defendants and the making and granting of the motion for judgment on the pleadings." The court held, 178 Cal. at page 143, 172 P. at page 600:

"The situation, therefore, is this: Upon trial of issues under pleadings which had passed demurrer, proffered testimony was rejected upon the ground that it could not be relevant under the complaint believed by the court to be faulty; plaintiff stood upon his pleading; and the court gave judgment against him. Respondent takes the position that in essence this was a judgment of nonsuit, and with this view we agree. In the case of *Green v. Duvergey*, 146 Cal. 379, 80 P. 234, the court refused to permit the introduction of any evidence unless plaintiff would deposit a certain sum of money with the clerk. Plaintiff declining to obey this preliminary order a nonsuit was entered and a judgment of dismissal was given. Plaintiff's motion for a new trial was denied and on appeal the court reversed the order denying it, saying, in part: 'The trial of a cause includes all the rulings of the court and the proceedings before it which conduce to the decision which it makes upon the issues in the case as the basis of its judgment. *People v. Turner*, 39 Cal. 370; *Moore v. Bates*, 46 Cal. 29. Any erroneous ruling, by virtue of which a party is precluded from introducing evidence in support of his cause of action as set forth in his complaint or his defense, is an error of law occurring at the trial. The action of the court in improperly granting or refusing a nonsuit is also an error of law, whether made upon the opening statement of counsel or after the close of the evidence in the cause. *Craig v. Hesperia Land & Water Co.*, 107 Cal. 675, 40 P. 1057. Under these principles, the order of the court requiring the plaintiffs to pay into court the sum of \$25,000, as a condition upon which they could proceed to trial, and the order granting a

nonsuit upon the opening statement and admissions of their counsel, may be reviewed as errors of law occurring at the trial.' Respondent is of the opinion that in essence the judgment entered in the superior court in *Ewell v. McKenzie et al.* was a judgment of nonsuit, and that calling it by another name does not alter that fact. We are constrained to agree with this view and we believe that *Green v. Duvergey*, supra, supports our conclusion. In that case as in the *Ewell* case the court declined to hear proffered testimony at the trial. In that case the refusal was regarded as error of law by this court on appeal. In the *Ewell* Case the judge who made the ruling excluding the evidence believed that he had committed error and sought to give appropriate relief. That one error was due to a misunderstanding of the court's power and the other to a misconception of the sufficiency of a pleading does not, in our opinion make any difference in regard to the power and jurisdiction of the trial court upon motion for a new trial.

"The fact that the judgment itself recites that it was one entered upon the pleadings is not controlling. The whole record is before us, and a recital in the judgment will not prevent this court from examining the entire record for the purpose of learning all of the facts. A new trial may be granted for errors in law, occurring at the trial and excepted to by the party making the application. Section 657, subd. 7, Code Civ.Proc. Judge Hayne, in his work on New Trial and Appeal uses the following language (vol. I, § 1, p. 9, Rev.Ed.):

"'But errors occurring at the trial, and having an indirect relation to the pleadings, may be ground for a new trial. So at the trial a party may test the question whether his adversary's pleading states a cause of action or defense by objecting to the introduction of any evidence under it, and the ruling upon such objection may be reviewed on motion for new trial.'

"Since the court's ruling upon the exclusion of evidence under the complaint was reviewable as an alleged 'error in law, occurring at the trial,' we must hold that no

successful attack may be made upon the court's jurisdiction to pass upon the motion for a new trial." The writ was discharged.

[2, 3] In *Carton Corporation v. Superior Court*, 76 Cal.App. 434, 436, 244 P. 932, it was held that a motion for a new trial could properly be entertained in a case in which a judgment of nonsuit is granted, a motion which raises only a question of law. See also *Castillo v. Warren*, 44 Cal. App.2d 903, 907, 113 P.2d 232. The same rule applies in a case in which a motion for a directed verdict is granted, a motion which raises only a question of law. *Steele v. Werner*, 28 Cal.App.2d 554, 556, 83 P.2d 56.

The facts in *Allen v. California Mut. Building & Loan Ass'n*, 40 Cal.App.2d 374, 104 P.2d 851, are similar to those in the case at bar. The cause came on for trial; the plaintiffs called a witness; before the witness had given any testimony the defendants interposed an objection to the taking of any evidence on the ground the complaint did not state a cause of action. Later the objection was sustained. Still later, on motion of the defendants, the trial court ordered a judgment in their favor on the pleadings. The plaintiffs moved for a new trial, which was granted. The appeal was from that order. The defendants contended that a motion for a new trial was not proper, citing *Abbey Land & Improvement Co. v. San Mateo County*, supra, 167 Cal. 434, 139 P. 1068, 52 L.R.A., N.S., 408, and *Hotel Park Central v. Security-First National Bank*, supra, 15 Cal.App.2d 293, 59 P.2d 606. The court said, 40 Cal.App.2d at page 377, 104 P.2d at page 852: "The plaintiffs stress the fact that the trial court sustained an objection to the introduction of evidence. Thereupon they assert they had a right to make a motion for a new trial for the purpose of having reviewed an 'error in law, occurring at the trial and excepted to by the party making the application'. Code Civ.Proc., sec. 657, subd. 7. They then claim that because the court thereafter granted a motion for judgment on the pleadings they were not deprived of their right to make a motion for a new trial. They cite and rely on *Moore v. Bates*, 46 Cal. 29; *Green v. Duvergey*, 146 Cal. 379,

385, 80 P. 234; *Stow v. Superior Court*, 178 Cal. 140, 142-145, 172 P. 598; *People v. Garcia*, 98 Cal.App. 702, 705, 277 P. 747; *Johnson v. Superior Court*, 121 Cal.App. 288, 292, 8 P.2d 1047. We think the defendants are in error and that the contention of the plaintiffs must be sustained. The difference between the two lines of cases is not broad, but nevertheless it is clear. It is settled law and has been for many years, that an order granting a motion for a nonsuit, whether the motion is based on the opening statement or after the close of the evidence, may be reviewed on a motion for a new trial. *Carton Corp. v. Superior Court*, 76 Cal.App. 434, 436, 244 P. 932, and cases there cited. It is also settled law that an order ruling on a motion may not be reviewed on a motion for a new trial. 20 Cal.Jur. 19, New Trial, § 7. In accord with that rule a motion for judgment on the pleadings, not accompanied or associated with other rulings made at the time of the trial, falls within the rule last stated. *Abbey Land etc. Co. v. San Mateo County*, supra. But when on an examination of the entire record it appears the trial court sustained an objection of the defendants to the introduction of any evidence by the plaintiffs on the ground the plaintiffs' complaint failed to state a cause of action, and continuing it ordered judgment on the pleadings in favor of the defendants, such proceedings are, in effect, the granting of a nonsuit and the same may be reviewed by a motion for a new trial. *Stow v. Superior Court*, 178 Cal. 140, 142-145, 172 P. 598. And the fact that the judgment recites it was based on the pleadings is not controlling. *Stow v. Superior Court*, supra. The case entitled *Hotel Park Cent. v. Security-First Nat. Bank*, supra, refers to an 'attempted motion for new trial', and contains some language at variance with what we have said. But, if it was meant to hold that under the facts of that case a new trial did not lie, the case was not supported by the *Abbey* case in which the facts were different and it was in conflict with the *Stow* case in which the facts were similar. All we have said finds support, *arguendo* at least, in *City of Pasadena v. Superior Court*, 212 Cal. 309, 298 P. 968, and *Carton Corp. v. Superior Court*, supra. In the

latter case the authorities are carefully reviewed and we have but followed that court's conclusions. See, also, vol. 1, Hayne on New Trial and Appeal, Rev.Ed., p. 9, § 1. For the foregoing reasons we think it may not be said that the plaintiffs were not entitled to move for a new trial." The Supreme Court unanimously denied a hearing.

In Horstman v. Krumgold, 55 Cal.App. 2d 296, 130 P.2d 721, 722, the facts, as stated in the opinion, were: "When the action was called for trial twelve jurors were called to the jury box and their examination on *voir dire* was commenced, whereupon defendant presented a motion to the court to compel plaintiff to make an election between the first and second causes of action. The motion was granted and plaintiff elected to proceed under the first cause of action. The court then granted defendant's motion to dismiss the second cause of action. When the evidence had all been received the court, on defendant's motion, directed the jury to return a verdict for defendant. Thereafter the court granted plaintiff's motion for a new trial as to the second cause of action." The court held, 55 Cal.App.2d at page 298, 130 P.2d at page 722: "Defendants cite section 656 of the Code of Civil Procedure, in which it is stated that 'A new trial is a re-examination of an issue of fact' and, asserting that there has been no trial of an issue of fact as to the second count, contend that the court was without jurisdiction to grant the new trial as to such count. Section 656 must be considered in connection with section 590 of the Code of Civil Procedure in which it is provided: 'An issue of fact arises—1. Upon a material allegation in the complaint controverted by the answer'. In the case now before us an issue of fact arose as to the second cause of action upon material allegations in the complaint which were controverted by the answer. In section 657 of the Code of Civil Procedure it is provided that the verdict must be vacated and a new trial granted on all or part of the issues * * * for an 'error in law, occurring at the trial and excepted to by the party making the application.' Manifestly, the trial court committed er-

rors in law in compelling plaintiff to elect and in dismissing the second cause of action after the election to stand upon the first count. Our conclusion that the court had authority to grant the motion for a new trial is in line with several decisions of the reviewing courts of this state." The court referred to and quoted from Stow v. Superior Court, supra, 178 Cal. 140, 172 P. 598, referred to Green v. Duvergey, 146 Cal. 379, 80 P. 234, and Allen v. California Mut. Building & Loan Ass'n, supra, 40 Cal. App.2d 374, 104 P.2d 851, and continued, 55 Cal.App.2d at page 299, 130 P.2d at page 723: "In the case now before us the action of the trial court in dismissing the second cause of action was, in effect, the granting of a nonsuit and was reviewable on motion for new trial." There was no petition for hearing in the Horstman case.

Judge Hayne in his work on new trial and appeal says: "It is not necessary to a trial that evidence be actually introduced. Thus where, when the case was called for trial, the court upon motion of the defendant made an order excluding all evidence on the part of the plaintiff, upon the ground that he had failed to furnish a bill of particulars upon demand therefor, it was held that there had been a 'trial,' and that therefore a motion for a new trial was proper." 1 Hayne New Trial and Appeal, Rev.Ed. 13, § 1.

[4] The Code of Civil Procedure declares that "Issues arise upon the pleadings when a fact or a conclusion of law is maintained by the one party and is controverted by the other. They are two kinds: 1. Of law; and, 2. Of fact", § 588, and that "An issue of law must be tried by the court, unless it is referred upon consent" § 591. Section 657 provides that a new trial may be granted on any one of several grounds, one of which is error in law occurring at the "trial." Consideration of the meaning of the term "trial" points inevitably to the conclusion that a trial was had in the case at bar and that the granting of the motions to exclude all evidence was, if erroneous, an error in law occurring at the trial.

City of Pasadena v. Superior Court, 212 Cal. 309, 298 P. 968, was mandate to compel the superior court to settle a proposed

bill of exceptions. The court said, 212 Cal. at page 313, 298 P. at page 969: "A 'new trial' is defined by section 656 of the Code of Civil Procedure as 'a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee.' Subdivision 7 of section 657 provides that a new trial may be granted for an 'error in law, occurring at the trial and excepted to by the party making the application.' If the court's decision constituted a ruling on a matter of law *in the trial of a case*, the motion for a new trial was proper, and the time for taking the appeal extended. But if the court's decision was merely a ruling on a motion independent of a trial, the motion for a new trial was not proper, it being well settled that proceedings for a new trial do not lie to secure the re-examination of the decision on a motion. 20 Cal.Jur., p. 19, § 7."

In *Smith v. City of Los Angeles*, supra, 84 Cal.App.2d 297, 190 P.2d 943, a demurrer to a complaint was sustained without leave to amend and judgment entered dismissing the action. On appeal the judgment was reversed with directions to overrule the demurrer. Thereafter an answer was filed and the cause set for trial. On the day of trial, all parties being represented, the defendants moved to dismiss the action on the sole ground it had not been brought to trial within five years from the date of its commencement. The motion was granted and a judgment of dismissal entered. The question on appeal was whether the action had been brought to trial within the meaning of section 583 of the Code of Civil Procedure. The court held, 84 Cal.App.2d at page 301, 190 P.2d at page 946: "A definition of the word 'trial,' one quoted and never to our knowledge disapproved, is found in the case of *Tregambo v. Comanche Mill & Mining Co.*, 57 Cal. 501, 505, as follows:

" 'A trial is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such issue. When a court hears and determines any issue of fact or of law for the purpose of determining the rights of

the parties, it may be considered a trial.' (Emphasis added.)

"We are persuaded that such an issue was presented on the hearings of the demurrers, grounded on the claim that plaintiffs' complaints did not state facts sufficient to constitute a cause of action. The trial of the issues thus presented was the trial of the cause as a cause and not the settlement of a mere matter of form in procedure. When the final judgments were entered on the sustaining of the demurrers, it was a final determination of the rights of the parties, and could be pleaded in bar to any other suit for the same cause of action.

"The foregoing definition of a 'trial' includes trials which involve only questions of law. General demurrers such as were here interposed, challenging as they did the sufficiency of the facts, went direct to the determination of the rights of the parties, and all rights involved in the complaints. The judgments rendered herein, being upon orders sustaining demurrers without leave to amend, constitute a trial on the merits, based upon issues of law raised by such demurrers, and must be considered as judgments after trial. *Tregambo v. Comanche Mill & Mining Co.*, supra; *Goldtree v. Spreckels*, 135 Cal. 666, 669, 670, 671, 672, 67 P. 1091; *Booth v. County of Los Angeles*, 69 Cal.App.2d 104, 108, 158 P.2d 401; *Erganian v. Brightman*, 13 Cal.App. 2d 696, 700, 57 P.2d 971; *Provencher v. City of Los Angeles*, 10 Cal.App.2d 730, 732, 52 P.2d 983; *Olwell v. Hopkins*, 28 Cal.2d 147, 150, 168 P.2d 972. * * *

"Respondents contend that the foregoing cases are inapplicable because none of them involve a construction of Section 583 of the Code of Civil Procedure. However, the foregoing authorities do hold unequivocally that proceedings which result in a judgment finally determining the rights of the parties constitutes 'a trial' as that word is used in our Code of Civil Procedure, and we see no reason why the word 'trial,' as applied to the facts of the cases now before us, should be accorded a different meaning under the provisions of Section 583 of the Code of Civil Procedure." The court distinguished a ruling overruling a

demurrer from one sustaining a demurrer without leave to amend, saying, 84 Cal. App.2d at page 303, 190 P.2d at page 947: "There can be no question that under the facts of that case, [Perrin v. Miller, 35 Cal.App. 129, 169 P. 426] no 'trial' was had because the overruling of a demurrer does not constitute a determination of 'any issue of fact or law for the purpose of determining the rights of the parties.' Had the trial court sustained the demurrer without leave to amend and rendered judgment for the plaintiff, the situation would be analogous to the one now before us"; and continued, 84 Cal.App.2d at page 304, 190 P.2d at page 947. "Were we to follow respondents' contentions regarding what constitutes a 'trial' it would necessarily result in a determination that where a cause is submitted on an agreed statement of facts, there was no 'trial' because no determination of any issue of fact was involved, but only one of law, viz., what judgment should be entered. * * * The very fact that judgments have been rendered would seem to strongly imply that a 'trial' has been had, for as said by the Supreme Court in Matter of Lambert, 134 Cal. 626, 632, 66 P. 851, 854, 86 Am.St. Rep. 296, 55 L.R.A. 856: '* * * it is a cardinal principle in English jurisprudence that, before any judgment can be pronounced against a person, there must have been a trial of the issue upon which the judgment is given.' * * * We therefore conclude that the judgments entered herein after an order sustaining a demurrer without leave to amend constituted judgments after trial." The Supreme Court unanimously denied a hearing. See also Goldtree v. Spreckels, 135 Cal. 666, 67 P. 1091.

The term "trial" as defined in Tregambo v. Comanche Mill and Mining Co., 57 Cal. 501, 505, quoted in Smith v. City of Los Angeles, supra, 84 Cal.App.2d 297, 190 P.2d 943, is referred to or quoted with approval in Finn v. Spagnoli, 67 Cal. 330, 332, 7 P. 746, Redington v. Cornwell, 90 Cal. 49, 62, 27 P. 40, Goldtree v. Spreckels, 135 Cal. 666, 669, 67 P. 1091, Keating v. Keating, 169 Cal. 754, 758, 147 P. 974, City of Pasadena v. Superior Court, 212 Cal. 309, 313, 298 P. 968; People v. Stokes, 5

Cal.App. 205, 214, 89 P. 997; Perrin v. Miller, 35 Cal.App. 129, 131, 169 P. 426; and Gibbon v. Justice's Court, 81 Cal.App. 396, 397, 253 P. 961. In Finn v. Spagnoli, 67 Cal. 330, 7 P. 746, it was held that the hearing and disposition of a motion for a new trial is a trial. O'Day v. Superior Court, 18 Cal.2d 540, at page 544, 116 P.2d 621, says: "Generally speaking, a 'trial' includes all rulings of a court in proceedings before it made in furtherance of the decisions made upon the issues in the case which form the basis of the judgment. Stow v. Superior Court, 178 Cal. 140, 172 P. 598; see also Green v. Duvergey, 146 Cal. 379, 80 P. 234; Goldtree v. Spreckels, 135 Cal. 666, 67 P. 1091. The petitioners take the position that a trial has not commenced until the jury has been impaneled and the introduction of evidence begun. * * * [I]n the present proceeding the judgment of dismissal was rendered after the court had commenced to examine the great volume of evidence that was to be presented to the jury and to make rulings upon its admissibility. These determinations were decisions on questions of law and were made in furtherance of the trial upon the merits. The trial had, therefore, begun and the court was authorized to render a judgment of dismissal against the petitioners for their failure to attend."

[5, 6] We conclude: First, an erroneous ruling in the trial of a case which precludes the plaintiff from introducing evidence in support of his complaint is an error in law occurring at the trial. Second, if in the trial of a case, whether evidence is received or not, a motion for judgment on the pleadings is granted, the ruling may be reviewed on a motion for a new trial.

[7] In the case at bar the ruling excluding all evidence was made in the trial of the case. If erroneous, it was an error in law occurring at the trial and it was reviewable on motion for a new trial. Since the notice of appeal was filed within 30 days after entry of the order denying the motion for a new trial, it was timely.

The motions to dismiss the appeal are denied.

PARKER WOOD, J., concurs.

SHINN, P. J., concurs in the judgment.

43 Cal.2d 715

The PEOPLE of the State of California,
Plaintiff and Appellant,

v.

Herbert HALLNER, Defendant and
Respondent.

Cr. 5627.

Supreme Court of California,
In Bank.

Dec. 10, 1954.

Defendant was charged by indictment with having offered bribes to named officers of a city in violation of Pen.Code, § 67. The Superior Court, Los Angeles County, William B. Neeley, J., entered an order granting defendant's motion to set the indictment aside, and the People appealed. The Supreme Court, Edmonds, J., held that as used in cited Penal Code section making it a felony to give or offer a bribe to any "executive officer of this state", quoted phrase includes an executive officer of a city.

Order reversed.

Traynor and Carter, JJ., dissented.

Prior opinion, 271 P.2d 987.

1. Bribery §1(2)

As used in statute making it a felony to give or offer a bribe to any "executive officer of this state", quoted phrase includes an executive officer of a city. Pen. Code, § 67.

See publication Words and Phrases, for other judicial constructions and definitions of "Executive Officer of this State".

2. Statutes §199

The word "of", having different meanings, may be used in a statute either in its possessive sense or to indicate geographic location.

See publication Words and Phrases, for other judicial constructions and definitions of "Of".

3. Statutes §220

Where a statute has been construed by judicial decision and such construction is not altered by subsequent legislation, it must be presumed that the legislature is aware of the judicial construction and approves of it.

277 P.2d—25½

4. Statutes §214

The legislative intent should be ascertained not alone from the literal meaning of the words of a statute but upon a consideration of all of the law relating to the same subject matter.

5. Bribery §1(2)

Officers §31

One who offers a bribe to an executive officer in the state and any such officer who asks for or receives a bribe is guilty of a felony and is disqualified from holding public office. Pen.Code, §§ 67, 68.

6. Bribery §1(2)

Giving or offering a bribe to any ministerial officer is a crime, the penalty for which depends upon the value of the bribe, and any ministerial officer who asks for or receives a bribe is guilty of a felony regardless of the amount of the bribe. Pen.Code, §§ 67½, 68.

7. Bribery §1(2)

Giving or offering a bribe to a judicial officer is punishable as a felony and it is also a felony for a judicial officer to ask for or receive a bribe. Pen.Code, §§ 92, 93.

8. Bribery §1(2)

A person who gives or offers a bribe to a member of any legislative body of the state or of its political subdivisions, or a member of any such body who asks for or receives a bribe, is guilty of a felony. Pen. Code, §§ 85, 86, 165.

9. Courts §91(1)

A construction placed upon a statute by the highest court of the state will be adhered to in subsequent cases, unless very plainly shown to have been wrong, particularly where such construction is supported by a line of uniform decisions and has been acquiesced in by the legislature for a succession of years, in which case such construction becomes as much a part of the statute as if it had been written into statute originally.

10. Criminal Law §13

Liberal effect must be given to the legislative intent when possible, and a statute is not void for uncertainty, if it meets the test of reasonable certainty in view of the conditions.

11. Statutes ⇨47

A statute will not be declared void as being indefinite, if it contains a reasonably adequate disclosure of the legislative intent regarding an evil to be combatted in language giving fair notice of the practices to be avoided.

12. Statutes ⇨241(1)

The maxim that penal statutes are to be strictly construed is not an inexorable command to override common sense and evident statutory purpose, and it does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to fair import of the whole remaining language.

13. Bribery ⇨1(2)**Constitutional Law** ⇨258

In view of judicial construction of statute making it a felony to give or offer a bribe to any executive officer in this state, construing statute as applicable to any executive officer in the state does not make statute void as being so uncertain as to deny to accused due process of law. Pen.Code, § 67

14. Constitutional Law ⇨258

Construction of a statute by judicial decision becomes a part of statute and the standard thus established may be sufficient to satisfy the requirement of due process of law that one must be given adequate warning of the offense with which he may be charged.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan and Simon L. Rose, Deputy Dist. Attys., Los Angeles, for appellant.

Bodkin, Breslin & Luddy, Henry G. Bodkin, George M. Breslin, Michael G. Luddy and Peter E. Giannini, Los Angeles, for respondent

1. "Every person who gives or offers any bribe to any executive officer of this state, with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer is punish-

EDMONDS, Justice.

Herbert Hallner was charged in three counts of an indictment with having offered bribes to certain officers of the City of Los Angeles in violation of section 67 of the Penal Code.¹ The People have appealed from an order granting Hallner's motion to set the indictment aside.

The named officers were the president of the board of police commissioners, the city attorney and the executive assistant city attorney. It was alleged that Hallner offered the bribes with intent to influence the officials in their "acts, decisions, votes, opinions and proceedings" with respect to certain pending applications for permits to "conduct games of skill and science business" within the city. As stated by the trial judge in his memorandum opinion, the order was based upon the conclusion that "executive officers of the City of Los Angeles are not executive officers of this state as defined in section 67 of the Penal Code."

[1] It is undisputed that the evidence presented to the grand jury establishes reasonable and probable cause to believe that the city officials were executive officers and that Hallner offered bribes to them to influence their official determinations. The sole question is whether "executive officer of this state," as used in section 67, includes an executive officer of a city.

The People rely upon prior decisions of the District Court of Appeal construing the phrase "*of this state*" as being the equivalent of "*in this state*." As Hallner reads the statute, it applies only to an offer of a bribe made to an officer of the State of California.

In 1883, this court in dictum said that section 67 was all inclusive. "The sixty-seventh section of the Penal Code provides that any person who gives or offers a bribe to any executive officer, with intent to influence him in respect to any act, etc., as

able by imprisonment in the state prison not less than one nor more than fourteen years, and is disqualified from holding any office in this state."

such officer, is punishable. By the sixty-seventh section the offense defined is that of one who *offers*, by the sixty-eighth, that of one who *receives* a bribe." *People v. Markham*, 64 Cal. 157, 162, 30 P. 620, 622.

Many years later, one Singh, who had been charged with offering and giving a bribe to a district attorney applied to the District Court of Appeal for a writ of prohibition to stay all proceedings upon the indictment. In denying Singh relief, the court referred to Section 343 of the Political Code, as then in effect (see Sec. 1001, Gov.Code) which classified the district attorney as "a 'civil executive officer'". It also said: "[T]here is no other section in the Penal Code which makes it a crime to give or offer a bribe to an executive officer, either county or state, for the purpose of corruptly influencing his official action than section 67, and we shall not commit ourselves to the belief * * * that the Legislature has either intentionally or inadvertently omitted to pass a law authorizing the punishment of a person for corrupting or attempting to corrupt a county executive officer." *Singh v. Superior Court*, 44 Cal.App. 64, 67, 185 P. 985, 986.

Hallner argues that, after the court determined the status of the district attorney, further discussion of the questions presented constitutes dictum. But the holding that section 67 includes any executive officer "in the state" was expressly made the ground of decision. At the least, it was an alternative one.

Dictum in *Gayer v. Whelan*, 60 Cal.App. 2d 616, 619, 141 P.2d 514, 516, supports this analysis of the Singh opinion. "[It] did not directly hold that the district attorney was a state officer, but held in view of the fact that the legislature did not make any provision relating to the bribing of an executive county officer, as distinguished from an executive state officer, the term executive officer of the state was all inclusive."

[2] Hallner next contends that if the Singh case is more than dictum, it should be overruled. He argues that section 67 is not ambiguous, hence not subject to interpretation. But the word "of" has different meanings. It may be used in its

possessive sense or to indicate geographic location. "Lands of the state" means "lands within the state." *Sisson v. Board of Supervisors of Buena Vista County*, 128 Iowa 442, 104 N.W. 454, 458, 70 L.R.A. 440. "City court of Macon" means the city court should be located in Macon. *Ivey v. State*, 112 Ga. 175, 37 S.E. 398, 400. "Highways of Baltimore city" is not descriptive of or relating to title or ownership, but refers to location and municipal jurisdiction. *Patapsco Electric Co. v. City of Baltimore*, 110 Md. 306, 72 A. 1039, 1041. "Courts 'of' the state" means "courts 'in' the state". *Gregory v. City of Memphis*, 157 Tenn. 68, 6 S.W.2d 332. "Of a city" was used in a geographic sense, not in a possessive one. *Avant v. Ouachita Parish School Board*, 215 La. 990, 41 So.2d 854, 858.

At the time the Singh case was decided, section 68 of the Penal Code, enacted at the same time as the preceding section, declared it to be unlawful for any "executive officer or person elected or appointed to an executive office" to accept a bribe. By the judicial construction of section 67, that enactment and section 68, as then in effect, were complementary statutes insofar as they concerned executive officers. Each of these statutes made the defined crime a felony and prescribed punishment of imprisonment for from one to fourteen years with the additional penalty of disqualification from holding any office in this state.

In 1929, by the enactment of section 67½ of the Penal Code, the Legislature made it unlawful for any person to give or offer any bribe "to any ministerial officer, employee, or appointee of the state of California, county or city therein or political subdivision thereof." One who violated the statute was guilty of a misdemeanor. In 1939, the punishment was increased by providing that, if the theft of the thing given or offered as a bribe would be grand theft, the offense is a felony.

Section 68 was enlarged by the Legislature of 1933 to make it unlawful for any "executive or ministerial officer, employee or appointee of the State of California, county or city therein or political subdivision thereof," to ask for, agree to re-

ceive, or receive a bribe. The amendment made no change in the prescribed punishment.

[3] It is significant that since the decision in the Singh case, although the Legislature has considered the subject of bribery of public officers and made a number of statutory changes it has not amended section 67. Where a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it. *Slocum v. Bear Valley Irrigation Co.*, 122 Cal. 555, 556, 55 P. 403; *People v. Southern Pacific Co.*, 209 Cal. 578, 595, 290 P. 25.

[4-8] The legislative intent should be ascertained not alone from the literal meaning of the words of the statute but upon a consideration of all of the law relating to the same subject matter. *Stafford v. Realty Bond Service Corp.*, 39 Cal.2d 797, 805, 249 P.2d 241; *County of Los Angeles v. Frisbie*, 19 Cal.2d 634, 639, 122 P.2d 526; *People v. Roland*, 134 Cal.App. 675, 683, 26 P.2d 517. The statutes now in effect, in conjunction with the interpretation given section 67 in the Singh case, present a consistent pattern for the punishment of a person giving or offering to give a bribe to a public officer, or one who, as a public officer, asks for or receives a bribe. The offeror of a bribe to an executive officer in the state is guilty of a felony and is disqualified from holding public office. § 67. Any such officer who asks for or receives such a bribe is subject to the same penalty. § 68. It is also a crime to give or offer a bribe to any ministerial officer, the penalty being dependent upon the value of the bribe. § 67½. The ministerial officer who asks for or receives such a bribe is guilty of a felony regardless of the amount of the bribe. § 68. Giving or offering a bribe to a judicial officer is punishable as a felony. § 92. It is also a felony for a judicial officer to ask for or to receive a bribe. § 93. A person who gives, or offers, a bribe to a member of any legislative body of the state or of its political subdivisions, or a member of any such body who asks for or receives a bribe, is guilty of a felony. §§

85, 86, 165. There are no overlapping statutes and no omissions if section 67 is applicable to any executive officer in the state.

[9] Since the decision in the Singh case, five convictions for violation of section 67, or for conspiracy to violate it, have been upheld although the person bribed was not a state officer. *People v. Jackson*, 42 Cal.2d 540, 268 P.2d 6 (policeman); *People v. Mathews*, 124 Cal.App.2d 67, 268 P.2d 29 (policeman); *People v. Griffin*, 98 Cal. App.2d 1, 219 P.2d 519 (sheriff); *People v. Keyes*, 103 Cal.App. 624, 284 P. 1096, 1105 (district attorney). In each of the last four cases a petition for hearing in this court was denied. Only in the Mathews case was the meaning of the statute challenged and the court followed the Singh decision. "After the enactment of a statute, when a construction has been placed upon it by the highest court of the state, it will be steadily adhered to in subsequent cases, unless very plainly shown to have been wrong, and more especially where the construction so given is supported by a line of uniform decisions, and where it has been acquiesced in by the legislature for a succession of years. In that case, the construction becomes as much a part of the statute as if it had been written into it originally." *Black, Construction and Interpretation of the Laws*, 2d Ed., 1911, § 93, p. 298; See also *Alferitz v. Borgwardt*, 126 Cal. 201, 208, 58 P. 460.

[10-12] Hallner contends that to construe section 67 as applicable to any executive officer in the state makes the statute so uncertain as to give him inadequate notice of the offense of which he might be charged and thus deny him due process of law. However, "[r]easonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible." *People v. Kennedy*, 21 Cal.App.2d 185, 193, 69 P.2d 224, 229. A statute will not be declared void as being indefinite if it contains "a reasonably adequate disclosure of the legislative intent regarding an evil to be combatted in language giving fair notice of the practices

to be avoided." *People v. Deibert*, 117 Cal.App.2d 410, 418, 256 P.2d 355, 360. As declared by the United States Supreme Court in a comparable situation, "[t]he canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language." *United States v. Brown*, 333 U.S. 18, 25, 68 S.Ct. 376, 380, 92 L.Ed. 442; see also *Gooch v. United States*, 297 U.S. 124, 128, 56 S.Ct. 395, 80 L.Ed. 522; *Kordel v. United States*, 335 U.S. 345, 349, 69 S.Ct. 106, 93 L.Ed. 52; *Boyce Motor Lines v. United States*, 342 U.S. 337, 340, 72 S.Ct. 329, 96 L.Ed. 367.

[13, 14] Furthermore, even if prior to the judicial decisions construing it section 67 might have been subject to attack upon the ground of uncertainty, such an objection no longer is tenable. The construction of a statute by judicial decision becomes a part of it, and the standard thus established may be sufficient to satisfy the requirement of due process of law that one be given adequate warning of an offense with which he may be charged. See *Lanzetta v. New Jersey*, 306 U.S. 451, 456, 59 S.Ct. 618, 83 L.Ed. 888; *Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 92 L.Ed. 840. Since the *Singh* decision, one who gives or offers a bribe to any executive officer in this state is given ample notice that he is committing a felony.

The order is reversed.

GIBSON, C. J., and SHENK, SCHAUER, and SPENCE, JJ., concur.

TRAYNOR, Justice (dissenting).

The majority opinion interprets the phrase "executive officer of this state" to mean, not what it says, but "executive officer *in* this state", and therefore to include an executive officer of a freeholder-charter city despite the settled law that an executive officer of such a city is not an executive officer of the state. Civic

Center Ass'n v. Railroad Comm., 175 Cal. 441, 448, 166 P. 351; *Fleming v. Hance*, 153 Cal. 162, 169, 94 P. 620; *Popper v. Broderick*, 123 Cal. 456, 462, 56 P. 53; *Otis v. City of Los Angeles*, 52 Cal.App.2d 605, 611-612, 126 P.2d 954; *Constitution*, Art. XI, §§ 6, 8, 8½; Art. XX, § 16. It is urged that "of" was not used in a possessive sense but in a geographic sense to mean "in" or "within", even though according to standard dictionaries of the English language, "of" is not the equivalent of "in" or "within". Webster's New International Dictionary, p. 1689 (2d Ed., 1948, unabridged); Funk and Wagnall's New Standard Dictionary, p. 1712 (1933). The very language of section 67 itself, which includes both "of" and "in", demonstrates that the Legislature did not regard "of" as the equivalent of "in", and that when it used "of" it meant "of" and when it used "in" it meant "in": "Every person who * * * offers any bribe to any executive officer of this state * * * is punishable by imprisonment * * * and is disqualified from holding any office *in* this state." (Italics added.)

There is no substance to the court's argument in *Singh v. Superior Court*, 44 Cal.App. 64, 68, 185 P. 985, 986, on which the majority opinion relies, that "if the Legislature had intended to limit the application of section 67 to state officers, it would have been a very easy matter for it to have given apt and unambiguous expression of such intention. It would have undoubtedly said, if such had been its purpose, 'any state executive officer,' in the place of 'any executive officer of the state.'" There is no more difference in the meaning of these phrases than there is in the phrases "any Supreme Court opinion" and "any opinion of the Supreme Court." Each phrase has exactly the same meaning; neither is more "apt and unambiguous" than the other.

That the Legislature did not mean "in" when it used "of" is also made clear by the language of former section 74a of the Penal Code,¹ which was added in 1905 to

1. § 74a. "Every officer of this state, or of any county, city and county, city, or

township *therein*, who accepts, keeps, retains or diverts for his own use or the use

the same title of the code in which section 67 appears, Stats.1905, p. 646, 14 years before the decision in the Singh case. In that section the phrase "every officer of this state" was set off from the phrase "or of any county, city and county, city, or township therein," thus demonstrating that "officer of this state" meant an officer of the state as distinguished from an officer "of any county, city and county, city, or township therein." But, according to the majority opinion herein, it was an idle act to separate these phrases, and despite an established rule of construction, *County of Los Angeles v. Frisbie*, 19 Cal.2d 634, 641-642, 122 P.2d 526, we must regard the latter phrase as superfluous. Usages similar to those in section 74a can be found in sections 67½,² 68,³ and 70⁴ of the Penal Code. These sections also lead me to believe that the Legislature did not mean "in" when it used "of". Since this court, however, now holds that "of" means "in", the phrase "officer, employee, or appointee of * * * [any] county or city therein or political subdivision thereof", which appears in each of these sections, has also become superfluous.

Even if we believed, as the court apparently did in the Singh case, 44 Cal.App. 64, 67-68, 185 P. 985, that at the time of the enactment of section 67 the Legislature inadvertently omitted to provide for

the giving or offering of a bribe to an executive officer of a freeholder-charter city, we cannot create an offense that the Legislature failed to create. We must assume that the Legislature meant the section to be read as it was written, however unwise we may think the Legislature was in not creating an offense that we may think should have been created. We cannot create such an offense by enlarging the statute, or by inserting or deleting words, nor should we do so by giving a false meaning to its words. Pen.Code § 7(16); Code Civ.Proc. § 1858; *People v. Knowles*, 35 Cal.2d 175, 182-183, 217 P.2d 1; *Seaboard Acceptance Corp. v. Shay*, 214 Cal. 361, 365-366, 5 P.2d 882; *City of Eureka v. Diaz*, 89 Cal. 467, 469, 26 P. 961; *Gayer v. Whelan*, 59 Cal.App.2d 255, 262-263, 138 P.2d 763; *People v. Pacific Guano Co.*, 55 Cal.App.2d 845, 848-849, 132 P.2d 254. Such a practice makes it impossible for anyone to rely on the written word of the Legislature and only adds confusion to the already difficult task of drafting statutes. Thus, hereafter the Legislature must ponder the possibility that "of" will be construed to mean "in" and that other common words may also be given a distorted meaning. The harm attending the delay in legislative correction of its own omissions or its failure completely to attack an evil is outweighed by the confusion created by judicial correction of such

of any other person any part of the salary or fees allowed by law to his deputy, clerk, or other subordinate officer, is guilty of a felony." (Italics added.) This section was transferred to section 1195 of the Government Code in 1943, the language being changed to conform to the usage in that code.

2. § 67½. "Every person who gives or offers as a bribe to any ministerial officer, employee, or appointee of the State of California, county or city *therein* or political subdivision *thereof*, any thing the theft of which would be petty theft is guilty of a misdemeanor; if the theft of the thing so given or offered would be grand theft the offense is a felony." (Italics added.)
3. § 68. "Every executive or ministerial officer, employee or appointee of the State of California, county or city *therein* or political subdivision *thereof*, who asks, re-

ceives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in the State prison not less than one nor more than fourteen years; and, in addition thereto, forfeits his office, and is forever disqualified from holding any office *in* this State." (Italics added.)

4. § 70. "Every executive or ministerial officer, employee or appointee of the state of California, county or city *therein* or political subdivision *thereof*, who knowingly asks, receives or agrees to receive any emolument, gratuity or reward, or any promise thereof excepting such as may be authorized by law for doing an official act, is guilty of a misdemeanor." (Italics added.)

lapses under the guise of statutory construction.

Nor is there any substance to the argument that the Legislature's failure to amend section 67 after the decision in the Singh case constitutes a legislative approval of the interpretation of the section in that case. As the Supreme Court of the United States said in *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (involving a previous interpretation by that court of § 302(c) of the Revenue Act of 1926, 26 U.S.C.A. § 811), "It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines." In the present case not even the re-examination of this court's own doctrines is involved. Not only has section 67 never been previously construed by this court⁵ but, in the words quoted in the majority opinion from Black on *The Construction and Interpretation of the Laws*, the construction of that section in the Singh case is "very plainly shown to have been wrong."

The doctrine that legislative silence constitutes approval of judicial construction "must be derived by a form of negative inference, a process lending itself to much guesswork. * * * There are vast differences between legislating by doing nothing and legislating by positive enactment, both in the processes by which the will of Congress is derived and stated and in the clarity and certainty of the expression of its will. And there are many reasons, other than to indicate approval of what the courts have done, why Congress may fail to take affirmative action to repudiate their misconstruction of its duly adopted laws. Among them may be the sheer pressure of other and more important business. See *Moore v. Cleveland R. Co.*, 6 Cir., 108 F.2d 656, 660. At times political con-

siderations may work to forbid taking corrective action. And in such cases, as well as others, there may be a strong and proper tendency to trust to the courts to correct their own errors, see *Girouard v. United States*, supra, 328 U.S. [61,] 69, 66 S.Ct. [826,] at page 830, [90 L.Ed. 1084], as they ought to do when experience has confirmed or demonstrated the errors' existence. * * * More often than not the only safe assumption to make from Congress' inaction is simply that Congress does not intend to act at all. Cf. *United States v. American Trucking Ass'n*, 310 U.S. 534, 550, 60 S.Ct. 1059, 1067, 84 L. Ed. 1345. At best the contrary view can only be an inference, altogether lacking in the normal evidences of legislative intent and often subject to varying views of that intent. In short, although recognizing that by silence Congress at times may be taken to acquiesce and thus approve, we should be very sure that, under all the circumstances of a given situation, it has done so before we so rule and thus at once relieve ourselves from and shift to it the burden of correcting what we have done wrongly. * * * Just as dubious legislative history is at times much overridden, so also is silence or inaction often mistaken for legislation." Mr. Justice Rutledge, concurring in *Cleveland v. United States*, 329 U.S. 14, 23-24, 67 S.Ct. 13, 17, 91 L.Ed. 12. In my opinion silence or inaction is mistaken here for legislation. The words "of" and "in" remain in section 67. They mean now what they meant when the section was enacted, and their insistent presence belies the notion that by silence and inaction the Legislature has changed their meaning.

If, despite its plain wording, section 67 includes officers of a freeholder-charter city, it will, when read with section 77⁶ overlap section 67½. Thus, one who offers

5. This court's denial of a hearing does not commit it to the propositions of law laid down in an opinion of a District Court of Appeal. *Western Lithograph Co. v. State Board of Equalization*, 11 Cal.2d 156, 167-168, 78 P.2d 731, 117 A.L.R. 838; *Shelton v. City of Los Angeles*, 206 Cal. 544, 550, 275 P. 421; *People v. Rabe*, 202 Cal. 409, 418-419,

261 P. 303; *In re Stevens*, 197 Cal. 408, 423-424, 241 P. 88; *Bohn v. Bohn*, 164 Cal. 532, 537-538, 129 P. 981; *People v. Davis*, 147 Cal. 346, 350, 81 P. 718.

6. § 77. "The various provisions of this chapter apply to administrative and ministerial officers, in the same manner as if they were mentioned therein."

as a bribe a thing, the theft of which would be petty theft, to an administrative or ministerial officer of a freeholder-charter city will be punishable either as a misdemeanor under section 67½ (imprisonment in the county jail not exceeding six months, or a fine not exceeding \$500, or both) or as a felon under section 67 (imprisonment in the state prison for one to fourteen years and disqualification from ever holding any public office) in the discretion of the grand jury or district attorney that returns the indictment or information against him. Such a result subverts the legislative purposes of providing a lesser penalty for the less heinous offense.

Since there was no evidence before the grand jury either that the persons to whom defendant allegedly offered the bribes were "executive officer[s] of this state" or that the bribes were allegedly offered with intent to influence their actions in any capacity as such officers. *Greenberg v. Superior Court*, 19 Cal.2d 319, 321-322, 121 P.2d 713; Pen.Code, § 995, I would affirm the judgment.

CARTER, J., concurs.



129 Cal.App.2d 660

**Roy E. GLASGOW, Frances Glasgow, and
Ida M. Whitley, Plaintiffs and
Appellants,**

v.

Mark E. ANDREWS, Defendant,

**Frank J. O'Connor and Constance M. O'Connor,
Defendants and Respondents.**

Civ. 4800.

**District Court of Appeal, Fourth District,
California.**

Dec. 17, 1954.

Action to have a defendant's grant deed conveying to two other defendants a motel received by grantor in trade for an apartment house, conveyed to him by plaintiffs,

and another property in which grantor owned an equity, declared an equitable mortgage. From a judgment of the Superior Court of Orange County, Franklin G. West, J., declaring that the deed was not in fact an equitable mortgage, plaintiffs appealed. The District Court of Appeal, Barnard, P. J., held that the evidence supported the trial court's finding that the deed was absolute and not mortgage.

Judgment affirmed.

1. Mortgages ⇨36

There is a strong presumption that holder of legal title to property owns full beneficial interest therein, and evidence to overcome such presumption and establish that deed conveying property to such holder is in fact a mortgage must be clear and convincing.

2. Appeal and Error ⇨1011(1)

Whether evidence is clear and convincing that a deed is in fact a mortgage is for trial court to decide, and its decision of such question on conflicting evidence is not reviewable on appeal.

3. Mortgages ⇨38(2)

Equity courts are loathe to hold that a deed which is absolute in its terms is a mere mortgage, unless satisfactory and convincing evidence to that effect is produced.

4. Mortgages ⇨33(5)

The mere fact that option to repurchase land conveyed is given grantor at same time as execution of deed is insufficient to establish that parties intended a mortgage.

5. Mortgages ⇨38(1)

In action to have a defendant's deed, conveying to two codefendants a motel received by grantor in trade for apartment house, conveyed to him by plaintiffs, and other property in which he owned equity, declared an equitable mortgage, evidence supported trial court's findings that defendant grantees did not know that plaintiffs claimed interest in motel under agreement with grantor and that plaintiffs knew of grantor's conveyance of motel by grant deed and taking back of option to repurchase such property for specified sum plus amounts paid by grantees for taxes and on trust deeds encumbering property.

6. Mortgages ⇐32(2)

The fact that one of parties to deed has secret intention not disclosed to other party cannot change character of transaction from absolute deed to equitable mortgage.

7. Mortgages ⇐27

The consideration for transfer of motel, received by transferor in trade for apartment house conveyed to him by others and other property in which he owned equity, was not a debt subsisting after his conveyance of motel to transferees by grant deed, so that such deed was not an equitable mortgage, where grantees did not hold either of two trust deeds encumbering motel and had nothing to do with such property or mortgage indebtedness before conveyance to them.

8. Mortgages ⇐27

A grant deed conveying motel, subject to two trust deeds, to parties giving grantor option to repurchase property at slightly higher price for limited time, was not an equitable mortgage, though transfer was made because of threat to foreclose trust deeds by holder thereof and necessity of grantor raising additional sum to discharge second trust deed if delinquencies were not paid up within a day or two, as such threat was not made by grantees, who were not responsible for grantor's financial situation.

9. Mortgages ⇐38(1)

In action to have a grant deed of motel, received by grantor in trade for apartment house, conveyed to him by plaintiffs, and other property in which he owned equity, declared an equitable mortgage, evidence supported trial court's finding that deed was not based on inadequate consideration.

10. Mortgages ⇐38(1)

In action to have defendant's grant deed, conveying to codefendants a motel received by grantor in trade for apartment house, conveyed to him by plaintiffs, and other property in which he owned equity, declared an equitable mortgage because of agreement that plaintiffs should have interest in motel proportionate to respective equities of plaintiffs and grantor in properties traded therefor, evidence supported trial court's findings that defendant grantees did not know of trust relationship be-

tween grantor and plaintiffs, that the transaction was a sale, not a loan of money, and that parties did not intend deed to be in fact a mortgage.

Desmond & Desmond, Long Beach, for appellants.

Harry Polglase, Huntington Park, Otto A. Jacobs, Santa Ana, for respondents.

BARNARD, Presiding Justice.

The plaintiffs appeal from a judgment holding that a grant deed was not, in fact, an equitable mortgage.

The plaintiffs owned an apartment house in Long Beach which was encumbered by a first trust deed of \$54,000, and a second trust deed in favor of the defendant Andrews for \$22,000. On August 8, 1950, the plaintiffs deeded that property to Andrews. On the same day Andrews traded that property, and another property in which he owned an equity, for a motel at Newport Beach called the "Balport Motel". This motel was encumbered by a first trust deed for \$43,000 and a second trust deed for \$50,000. Title to the motel was taken in the name of Andrews and his wife, but it was agreed between them and the plaintiffs that the plaintiffs had an interest in the motel proportionate to the respective equities of the parties in the two properties which had been traded for the motel. It was the plan of the parties that the motel would be sold at an early date and the proceeds used to build an apartment building in which Andrews and the plaintiffs would have the same ratio of interest as in the motel. Pending such a sale plaintiffs moved into the motel and served as managers thereof, collecting the rents and turning them over to Andrews.

The parties got into financial difficulties two months later, and were soon in default under the trust deeds on the Balport property and on the payment of taxes. They were unsuccessful in their efforts to sell the property or to borrow money with which to meet the obligations which had become due. The holder of the second trust deed, having made certain payments

to protect his interests, gave notice of foreclosure and sale under that trust deed. until the plaintiffs left that employment about June 1, 1951.

On or about March 10, 1951, Andrews entered into negotiations with the defendants O'Connor, as a result of which they entered into an escrow whereby the O'Connors agreed to buy the Balport property for \$97,754.89. The O'Connors deposited \$6,600 in this escrow and agreed to take the property subject to the trust deeds. Contemporaneously therewith, the O'Connors gave Andrews an option to purchase the property for \$7500, plus any amount thereafter paid by the O'Connors for taxes or on the trust deeds, provided that amount was paid on or before June 12, 1951; and further providing that Andrews should pay all expenses, that the option should be void if not exercised by June 12, 1951, and that if Andrews should find a purchaser for said property before June 1, he should allow the O'Connors the right, within five days after notice, to cancel the option and retain the property upon paying the optionees the amount offered by such a purchaser. The delinquent payments and expenses on the trust deeds and the taxes were immediately paid from the escrow funds, and a rescission of the notice of default and election to sell under the trust deed was recorded. The O'Connors also put up additional funds, to pay certain other expenses and to release an attachment which Andrews was unable to do, taking a note from Andrews for that amount. A grant deed conveying the property from Andrews and his wife to the O'Connors was recorded on March 27, 1951. On March 12, 1951, Andrews notified the holder of the first trust deed in writing that he had sold this property to the O'Connors, and on the same day he gave the O'Connors a statement that he had sold them this property and that they were authorized to collect any and all rents or income from and after March 13, 1951. The O'Connors showed this writing to the plaintiffs on the same day and took possession of the property, arranging with the plaintiffs to continue to manage the property at stipulated salaries which he paid, together with all operating expenses,

The option was not exercised by June 12, 1951, or at any other time, and this action was brought on December 3, 1951. In addition to the general facts, the court found that it was not true that the plaintiffs' equity in the Long Beach property which they had deeded to Andrews was of the value of \$46,000, and that the plaintiffs had failed to introduce any evidence establishing the value of their said equity; that the deed from Andrews and his wife conveying the Balport property to the O'Connors was an absolute deed and was not given as security for any sum of money or otherwise; that the option given by the O'Connors to Andrews was made upon the conditions set forth therein; that this option was never exercised, expired on June 12, 1951, and was of no force or effect after that date; that it is not true that the giving of this deed to the O'Connors and the option to Andrews was done without the knowledge of the plaintiffs; that it is not true that when this deed and option were given the O'Connors knew that the plaintiffs had an equitable interest in the Balport property; that the value of the Balport property did not exceed \$125,000 at any time prior to the trial, which began on April 30, 1952; that it is not true that the deed to the O'Connors was based upon an inadequate consideration; that the O'Connors purchased this property in good faith and for value, and said purchase was made without notice that any of the plaintiffs had or claimed any interest in the property; that this deed conveyed full title to the O'Connors; and that Andrews has had no interest whatsoever in the property since March 12, 1951, except an option of purchase which expired on June 12, 1951, without being exercised by Andrews or by anyone else. The plaintiffs have appealed from the judgment which followed.

Appellants' main contention is that the court erred in holding that appellants and defendant Andrews had no right, title or interest in this property, and in holding that the transfer to respondents was

a deed absolute and not a mortgage. It is argued that the only credible substantial evidence compels the conclusion that the deed thus given was an equitable mortgage; that the evidence established the fact that appellants had an equity of \$46,000 in the Long Beach property which they conveyed to Andrews, and a corresponding equity in the Balport property; that the Balport property was worth at least \$125,000 and the consideration for the transfer to the respondents was highly inadequate; that this transfer was made under threat of an immediate foreclosure, and the consideration therefor was a debt subsisting after the conveyance; that the giving of the option to repurchase shows that the conveyance was a mortgage; and that the finding that the option is now of no effect is not supported by the evidence.

[1-4] It is well settled that there is a strong presumption that the holder of the legal title owns the full beneficial interest in the property, and that evidence to overcome this presumption and establish that the deed is in fact a mortgage must be clear and convincing. *Rench v. McMullen*, 82 Cal.App.2d 872, 187 P.2d 111; *Beeler v. American Trust Co.*, 24 Cal.2d 1, 147 P.2d 583. In the latter case, it is pointed out that the question as to whether the evidence offered to change the ostensible character of the instrument is clear and convincing is one for the trial court to decide, and that the decision of that question by the trial court upon conflicting evidence is not open to review on appeal. It was pointed out in *Pallett v. Pallett*, 123 Cal.App. 701, 11 P.2d 898, that courts of equity are loathe to hold that a deed which is absolute in its terms is a mere mortgage unless satisfactory and convincing evidence to that effect is produced. The mere fact that an option to repurchase is given at the same time is not sufficient, of itself, to establish the fact that a mortgage was intended by the parties. *Garwood v. Wheaton*, 128 Cal. 399, 60 P. 961; *Thompson v. Mansfield*, 84 Cal.App. 560, 258 P. 702; *Davis v. Stewart*, 31 Cal.App.2d 574, 88 P.2d 734.

[5,6] There is ample evidence to support the findings that the respondents did

not know that the appellants claimed any interest in this property, and that the appellants had knowledge of the manner in which Andrews was conveying the property to the respondents and taking back an option. The testimony of the respondents was positive to the effect that Mr. O'Connor refused to make a loan, and refused to consider taking a third trust deed because no loan was involved. The appellants were not present when the deal was being negotiated and consummated, and they gave no evidence in that connection other than to the effect that Andrews told them that the transaction was a loan. A part of Andrews' testimony tends to confirm the respondents' testimony as to the nature of the transaction. Among other things, he testified that Mr. O'Connor consistently refused to take a third trust deed, that he told O'Connor if he was going to lose the property he would rather see O'Connor get it, and that at the escrow office on March 12 "We discussed it pro and con, and we finally worked out the way it was drawn up, but my intention all the time was to have it as a loan." He also testified that at the escrow office they discussed the amounts and terms of the two trust deeds and the taxes, and that "I couldn't understand at the time why Frank was so insistent in getting everything prorated, because at that time I was under the impression I was getting a loan, and he was handling it more or less as a purchase, and that wasn't my idea at all." The fact that one of the parties may have had a secret intention not disclosed to the other could not have the effect of changing the character of the transaction. *Wehle v. Price*, 202 Cal. 394, 260 P. 878; *Davis v. Stewart*, 31 Cal.App.2d 574, 88 P.2d 734. In addition to the presumption from the deed itself the main finding is further supported by the language of the escrow instructions, the language of the option, and the two writings signed by Andrews on March 12, 1951, stating that the property had been sold to the respondents on that date.

[7] The consideration for this transfer was not a debt which subsisted after the conveyance, as appears in some cases where

the property was conveyed to the party holding the mortgage. The respondents here did not hold either of the trust deeds and had nothing to do with this property or with the indebtedness prior to this transaction. While it appears that O'Connor did hold two notes signed by Andrews, aggregating about \$1,000, these were in no way involved in this transaction.

[8] While Andrews made this transfer because a foreclosure of the trust deeds was imminent and because, as he testified, an additional \$50,000 would have to be raised to take care of the second trust deed if the delinquencies were not paid up within in a day or two, the threat of foreclosure was not made by the respondents, and they were in no way responsible for the situation in which Andrews found himself. There is evidence that the respondents refused to make a loan; that they were willing to buy the property, giving Andrews a limited opportunity to repurchase it at a slightly higher price; and that Andrews agreed to enter such a transaction hoping to be able to sell the property in the meantime, which would enable him to exercise the option. While there is some inferential evidence to the contrary, any conflict has been resolved by the trial court in favor of the respondents.

[9] The appellants contend that the evidence establishes, without conflict, that their equity in the Long Beach property which they transferred to Andrews was of the value of \$46,000, giving them a proportionate equity in the Balport property, and that the consideration for the deed here in question was highly inadequate since the evidence shows that the Balport property was worth at least \$125,000. The question of value and the amount of consideration, while an important element in such a case, is not necessarily controlling and the evidence, with respect to these matters, is not too convincing. There was evidence that Andrews traded the two properties for the Balport Motel, and that each party placed a value of \$150,000 upon his own property for the purpose of the trade. There was no evidence as to the actual value of either of the Long Beach properties which figured in that trade. It

does appear that the Long Beach property formerly owned by the appellants was subject to trust deeds amounting to \$76,000, and that there were no revenue stamps on the deed conveying that property to Andrews, indicating that he paid no cash. Whether or not the appellants would have been able to keep that property and meet the payments on those trust deeds does not appear. While there was opinion evidence that the Balport Motel was worth from \$145,000 to \$160,000, and evidence that respondents later listed it for sale at a price of \$165,000, the property was not sold. There was also evidence that it was worth only about \$98,000 when they bought it in March, 1951. There was evidence that the income from the property was not sufficient to meet the payments on the trust deeds, that the taxes were not paid, and that the owners had been trying without success for some six months to sell the property, or to secure a sufficient sum of money to enable them to hold on to it. Andrews testified that having been unsuccessful in raising some \$7,000 to enable them to hold it, he entered into the transaction with the respondents because he knew it would be impossible to raise that sum and an additional \$50,000 which would become necessary if something was not done within the next day or so. Under these circumstances he entered into this transaction and thereby secured a written option which would give him three months more in which to try to sell the property. In that he was unsuccessful. In addition to the purchase price the respondents gave him such an option, which was a part of the consideration and which would have enabled him to repurchase the property at a slight profit to the respondents, had he been able to find a purchaser. The evidence as a whole supports the finding that this deed was not based upon an inadequate consideration at the time and under the circumstances shown.

[10] While the evidence discloses a trust relationship between Andrews and the appellants, with respect to this property, it supports the finding that this was not known to the respondents. The evidence supports the findings to the effect that this

was a sale and not a loan of money, and that the parties did not intend this deed to be, in fact, a mortgage. While there was a conflict in the evidence it cannot be held, as a matter of law, that the evidence is clear and convincing that a mortgage was intended.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



**Christine J. ALBERTSON, also known as
Mrs. Lee Albertson, Plaintiff and
Appellant,**

v.

**Joseph RABOFF, Defendant and
Respondent.***

Civ. 20304.

**District Court of Appeal, Second District,
Division 3, California.**

Dec. 13, 1954.

Hearing Granted Feb. 10, 1955.

Action for slander of title. The Superior Court, of Los Angeles County, Louis H. Burke, J., rendered judgment of dismissal, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that recordation of notice of lis pendens was not a publication in judicial proceeding within Civil Code § 47, declaring a publication made in a judicial proceeding to be privileged.

Judgment reversed.

1. Libel and Slander ☞38(1)

Privilege conferred by statute upon "publication made in a judicial proceeding" does not transcend limits of what may properly be characterized as judicial proceeding, and privilege will not attach to extrajudicial publications, related to the litigation, which are made outside purview of judicial proceeding. Civ. Code, §§ 46, 47.

See publication Words and Phrases, for other judicial constructions and definitions of "Publication in Judicial Proceeding".

2. Libel and Slander ☞38(1)

Recordation of a notice of lis pendens was not a "publication in judicial proceeding" within statute declaring a publication made in judicial proceeding to be privileged. Civ.Code, § 47.

3. Libel and Slander ☞130

Liability for slander of title may be predicated upon recordation of notice of lis pendens in connection with suit maliciously brought without honest belief in validity of asserted claims involving title to realty. Civ.Code, § 46.

4. Libel and Slander ☞130

Portions of judgment adverse to plaintiff upon all causes of action seeking to impress a lien upon realty or attacking validity of defendant's title thereto became final upon expiration of time for taking an appeal and hence recordation of notice of lis pendens in connection with such action afforded proper basis for action against plaintiff therein for slander of title, though appeal was pending from portion of judgment that made a money award to plaintiff. Rules on Appeal, rule 1(a); Civ.Code, § 46.

5. Appeal and Error ☞396

An appeal from judgment of the Superior Court is taken by filing with clerk a notice of appeal stating in substance that appellant appeals from a specified judgment or from a particular part thereof. Rules on Appeal, rule 1(a).

6. Appeal and Error ☞161

A party may accept the provisions of a judgment that are favorable to him and appeal from those that are adverse. Rules on Appeal, rule 1(a).

7. Judgment ☞564(1)

Where an appeal is taken from only part of a judgment, independent adjudications which are not appealed from become final when the time for appeal expires. Rules on Appeal, rule 1(a).

8. Libel and Slander ⇨ 139

Complaint stated a cause of action for slander of title based on recordation of a notice of *lis pendens* in connection with prior action to impress a lien upon realty owned by plaintiff in slander of title action and for a judgment declaring that she had obtained title to such realty from her husband without consideration and in fraud of his creditors. Civ.Code, § 46.

Albert E. Wheatcroft and Charles Murstein, Los Angeles, for appellant.

Paul R. Hutchinson and C. L. Gardner, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an action for slander of title in which the court sustained an objection to the introduction of evidence and rendered judgment of dismissal from which plaintiff appeals.

The principal question is whether the recording of a notice of *lis pendens* furnishes a proper foundation for an action for slander of title.

Sections 46 and 47 of the Civil Code are found in division 1, part II, of the Code which treats of personal rights, including libel and slander. Section 46 reads in part: "Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which * * * by natural consequence, causes actual damage." Section 47 reads in part: "A privileged publication or broadcast is one made * * * in any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law."

[1-3] The ruling excluding evidence was made upon the ground that the recording of a notice of *lis pendens* is a privileged publication. Subsequent to the entry of judgment the question was decided in *West Investment Co. v. Moorhead*, 120 Cal.App.2d 837, 262 P.2d 322, 324, to the contrary of the holding of the trial court in the present action. Speaking of the scope of section 47, the court

said: "But such absolute privilege does not transcend the limits of what may properly be characterized as judicial proceeding; it will not attach to extrajudicial publications, related to the litigation, which are made outside the purview of the judicial proceeding. Thus, the recordation of a notice of *lis pendens* is not an act in the course of a judicial proceeding within the meaning of the privilege conferred by Civil Code, section 47, subd. 2. No function of the court or its officers is invoked; no machinery associated with the judicial process is set in motion. It is merely a private act undertaken dehors the judicial proceeding for the purpose of calling to the attention of all the world the pendency of litigation affecting the designated real property. * * * It must be concluded, therefore, if defendants brought their suit against plaintiff maliciously and without an honest belief in the validity of their asserted claim, then it follows that liability for slander of title would attach upon the filing of the *lis pendens* notice." A judgment of dismissal on sustaining of a demurrer without leave to amend was reversed. We are satisfied with the reasoning and the conclusion of the court quoted above and adopt it as our own.

[4] A further contention of the defendant is that plaintiff's amended complaint did not allege that final judgment had been rendered in her favor in the action in which the notice of *lis pendens* was recorded. This criticism of the complaint is unsound. In the former action, Raboff had filed a complaint containing six causes of action. In two of them he sought the recovery of a money judgment against Mrs. Albertson. By his second, third, fourth and fifth causes of action and upon several different theories, he sought either to impress a lien upon real property owned by Mrs. Albertson or a judgment declaring her title to have been obtained from Lee Albertson, her husband, since deceased, without consideration and in fraud of the latter's creditors. Findings and judgment were in favor of Raboff upon a single cause of

action namely, the assumption by Mrs. Albertson of an indebtedness of her husband in favor of Raboff. Findings were against Raboff upon all the causes of action for the impressing of a lien upon the property or which attacked the validity of Mrs. Albertson's title thereto. Judgment was in favor of Mrs. Albertson as to these several causes of action and the claims of Raboff to an interest in the property were declared to be invalid. Mrs. Albertson appealed only from that part of the judgment which made an award of money to Raboff. Raboff did not appeal. With respect to Raboff's claim of a lien upon the property and his attack upon the validity of Mrs. Albertson's title, the judgment became final. All these facts were alleged in the amended complaint in the present action.

In arguing the insufficiency of the complaint to state a cause of action, defendant relies upon the following facts: The judgment in Raboff v. Albertson in the Superior Court was entered March 10, 1952; it was affirmed on appeal January 18, 1954, 122 Cal.App.2d 555, 265 P.2d 139; the present action was instituted July 7, 1952. Defendant says there was no final judgment in the case until the judgment on appeal was rendered. In this he is mistaken. The provisions of the judgment which determined that Raboff had no interest in or lien upon the real property of Mrs. Albertson were independent of the provision which awarded Raboff a sum of money. With respect to the former provisions, the judgment became final sixty days after it was entered.

[5,6] An appeal from a judgment of the superior court is taken by filing with the clerk a notice of appeal, stating in substance that the appellant appeals from a specified judgment or a particular part thereof. Rule 1(a), Rules on Appeal. It is elementary that a party may accept the provisions of a judgment that are favorable to him and appeal from those that are adverse.

[7] Where an appeal is taken from a part of a judgment and there are in-

dependent adjudications which are not appealed from, the latter become final when the time for appeal has expired. *G. Ganahl Lumber Co. v. Weinsveig*, 168 Cal. 664, 143 P. 1025; *Whalen v. Smith*, 163 Cal. 360, 125 P. 904.

[8] Defendant does not criticize the amended complaint in any other particulars. We have studied its allegations and found them sufficient to state a valid cause of action for slander of title.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ.,
concur.



129 Cal.App.2d 464

PEOPLE of the State of California, Plaintiff and Respondent,
v.

William TATE, Defendant and Appellant.
Cr. 5226.

District Court of Appeal, Second District,
Division 2, California.

Dec. 9, 1954.

Defendant was convicted in the Superior Court of Los Angeles County, Burdette J. Daniels, J., of a wilful, unlawful and felonious assault upon a human being by means of force likely to produce great bodily injury and he appeals. The District Court of Appeal, McComb, J., held that the evidence sustained conviction.

Affirmed.

1. Criminal Law §1144(13)

The record is viewed in the light most favorable to sustain the findings of the trier of fact.

2. Criminal Law §1144(13)

Where there is a conflict in the evidence the evidence most favorable to sustaining the judgment is accepted as true and contrary evidence is disregarded.

3. Assault and Battery \S 292

Evidence sustained conviction for wilful and felonious assault upon a human being by means of force likely to produce great bodily injury. Pen.Code, \S 245.

4. Criminal Law \S 260(11)

On appeal from a judgment of conviction for assault the reviewing court must disregard conflicting testimony of defendant that complaining witness had struck him first since such testimony merely raised a conflict which was for the determination of the trier of fact who disbelieved defendant's testimony.

Earl C. Broady, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Theodore S. Tabah, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

[1,2] Following a judgment of guilty of violating Section 245 of the Penal Code (wilful, unlawful and felonious assault upon a human being by means of force likely to produce great bodily injury), after trial before the court without a jury, defendant appeals from (a) the order granting probation and (b) the denial of his motion for a new trial.

Facts:* Mr. Holt, the complaining witness, testified that on the date of the alleged offense he was 62 years of age and weighed 151 pounds; that he had a dinner party at his home which was attended by defendant and three other persons; that drinking was indulged in by all; that without provocation defendant hit him many times causing the loss of an eye and several teeth.

Question: Was there substantial evidence to sustain the trial court's finding of guilt?

[3,4] Yes. Clearly under the rule established in the oft cited case of *People v.*

Newland, 15 Cal.2d 678, 681, 104 P.2d 778, the foregoing testimony if believed, as it was by the trial court, sustains its finding. We of course must disregard conflicting testimony of defendant that the complaining witness had struck him first. Such testimony merely raised a conflict in the evidence which was for the determination of the trier of fact who disbelieved defendant's testimony. (*People v. DeVaughn*, 136 Cal. App. 746, 752, 29 P.2d 914; *People v. Thomas*, 103 Cal.App.2d 669, 672 [4], 229 P.2d 836; *People v. Huston*, 21 Cal.2d 690, 693 [1], 134 P.2d 758.)

Affirmed.

MOORE, P. J., and FOX, J., concur.



129 Cal.App.2d 525

Birdie Rogers FOSTER, Plaintiff and Appellant,

v.

Mary A. DELGRAVE, individually; Mary A. Delgrave, operating and doing business as Community Hospital, Defendant and Respondent.

Civ. 8447.

District Court of Appeal, Third District, California.

Dec. 14, 1954.

Hearing Denied Feb. 10, 1955.

Personal injury action by hospital patient who was burned on leg which had been wrapped in hot compresses and electric heating pad for 48 hours. Patient's requested instruction on doctrine of *res ipsa loquitur* was refused. The Superior Court, Nevada County, James Snell, J., entered judgment for hospital upon jury's verdict and patient appealed. The District Court

* Pursuant to settled rules the record is viewed in the light most favorable to sustain the findings of the trier of fact. Where there is a conflict in the evidence the evidence most favorable to sustaining

the judgment is accepted as true and contrary evidence disregarded. (See *People v. Renek*, 105 Cal.App.2d 277, 281, 233 P.2d 43.)

of Appeal, Warne, J. pro tem., held that patient was entitled to inference of negligence arising from happening of such accident and failure of court to instruct on doctrine of *res ipsa loquitur* was error.

Judgment reversed.

1. Hospitals ☞8

Where hospital patient had been burned on leg which had been wrapped in hot compresses and electric heating pad for 48 hours, and heating pad had been under sole control of hospital, patient was entitled to inference of negligence arising from happening of accident and doctrine of *res ipsa loquitur* was applicable.

2. Hospitals ☞8

Negligence ☞121(2)

Where specific cause of accident is known, doctrine of *res ipsa loquitur* does not apply, but where patient in hospital knew only that leg was being burned by either hot compresses or electric heating pad, without knowing specific cause of burn, such knowledge was not sufficient to make doctrine of *res ipsa loquitur* inapplicable.

3. Evidence ☞5(2)

Heating pads are of general use, and court may take notice of the fact that their use is not dangerous when ordinary care is exercised.

4. Hospitals ☞8

Complaint averring that hospital negligently, carelessly and unskillfully applied heating pad to leg, with result that patient was burned, did not allege negligence specifically or specific acts of negligence, but averred only generally the negligent conduct of hospital and did not preclude application of doctrine of *res ipsa loquitur*.

5. Hospitals ☞8

Neither admission by counsel for hospital in argument to jury that burns on patient's leg were result of acts by hospital, nor admission, on appeal, of legal liability operated to remove necessity for instruction to jury on doctrine of *res ipsa loquitur* in trial in which such doctrine was applicable.

Lamb, Hoge & Killion, by J. Hampton Hoge, Jr., San Francisco, William J. Cassettari, Grass Valley, for respondent.

WARNE, Justice pro tem.

This is an appeal from the judgment entered upon a jury's verdict in favor of respondent in a personal injury action in the nature of malpractice of a hospital in the care of a patient.

It is admitted that appellant suffered a second-degree burn on her left leg while she was under treatment at respondent's private hospital, which she entered at the request of her personal physician because of an infected toe. Upon her doctor's orders, one of the nurses employed by respondent applied hot compresses to appellant's leg over which was placed an electric heating pad. Appellant's left leg was then extended out over the edge of the bed in an elevated position. It is admitted by respondent that when the packing was removed approximately 48 hours later, it was discovered that appellant had sustained a second-degree burn on her leg. The burn healed slowly and she received medication therefor for many months. She still has a small scar on her leg as a result of the burn.

The sole question presented on this appeal is whether or not the trial court committed reversible error in refusing to instruct the jury on the doctrine of *res ipsa loquitur* as requested by appellant.

While the evidence shows that appellant knew that she was being burned, there is nothing in the record to show that she knew the specific cause thereof.

[1] The heating pad was under the sole control of the respondent, and appellant was entitled to the benefit of an inference of negligence arising from the happening of this unusual accident, because respondent was in a far better position to know what caused the instrument to be dangerous. We therefore conclude that the doctrine of *res ipsa loquitur* was applicable to the facts of this case, and that the trial court erred in refusing to instruct the jury in that regard. *Manuel v. Pacific Gas & Electric Co.*, 134 Cal.App. 512, 517, 25 P.2d 509; *McCullough v. Langer*, 23 Cal.App.2d 510, 517-

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, Chico, for appellant.

518, 73 P.2d 649; *England v. Hospital of the Good Samaritan*, 22 Cal.App.2d 226, 70 P.2d 692. See also 173 A.L.R. 535, 538, et seq.

[2,3] Respondent argues that the doctrine of *res ipsa loquitur* is not available when the cause of the accident is known, and not in dispute. In support of respondent's position she cites 38 Am.Jur. "Negligence", Sec. 303; *Gordon v. Goldberg*, 3 Cal.App.2d 659, 661, 40 P.2d 276; *Keller v. Pacific Tel. & Tel. Co.*, 2 Cal.App.2d 513, 38 P.2d 182, and *Dees v. Pace*, 118 Cal.App. 2d 284, 257 P.2d 756. It is true that where the specific cause of the accident is known, the doctrine of *res ipsa loquitur* does not apply; however in the instant case we have an entirely different situation. As stated above, the specific cause of the burn was unknown to appellant. It may have been that the heating pad was defective or improperly adjusted, or that the compresses had been dipped in some harmful solution, or excessive temperature, or several other causes. These were all matters within the peculiar knowledge of the respondent. Heating pads are now of such general use that one may take notice of the fact that their use is not dangerous when ordinary care is exercised.

[4] Respondent next contends that the complaint alleges negligence specifically, and that such fact precludes the application of the doctrine. The allegation of negligence in appellant's complaint is as follows:

"That * * * the defendants * * * negligently, carelessly and unskillfully applied a heating pad to her said left leg; that although plaintiff protested that she was being burned, the defendants, or one or more of them, negligently, carelessly and unskillfully failed, refused and neglected to remove said heating pad.

"That as the proximate result of the carelessness, negligence and lack of

skill of defendants, as aforesaid, plaintiff suffered a severe burn on the calf of her left leg * * *."

It should be observed that the complaint does not state what specific act of the respondent caused the heating pad to burn her. It merely avers generally that the negligent conduct of the respondent caused the heating pad to burn her. The nature of the acts which caused the heating pad to cause the injury are not even suggested. It may be inferred from the language used that the appellant was ignorant of the specific acts of negligence which caused the injury. The doctrine of *res ipsa loquitur* is therefore applicable. *Jianou v. Pickwick Stages System*, 111 Cal.App. 754, 757, 296 P. 108; also see *Leet v. Union Pac. R. Co.*, 25 Cal.2d 605, 617-618, 155 P.2d 42, 158 A.L.R. 1008, and the many cases cited therein.

[5] Respondent also argues that the doctrine was not applicable because at the trial defense counsel in his argument to the jury admitted liability for the burn. As we read the evidence in this case, all that respondent's counsel admitted was that the burns were caused by respondent. He uses such phrases as these: "One of the unavoidable accidents that is liable to happen at any time when you put on a heating pad." "We admit the second degree burn there through an unavoidable accident * * *." "We admit it,—that we put the second degree burn on there." All of the admissions were of the same tenor. It is obvious from the language quoted the respondent did not admit *legal* liability. Had he admitted legal liability, true, there would have been no necessity for any instructions other than those pertaining to the measure of damages to be awarded to appellant, nor does the fact that respondent, before this Court, now admit legal liability help or change the situation.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

129 Cal.App.2d 515

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

William Richard COOPER, Defendant and
Appellant.

Crim. 1011.

District Court of Appeal, Fourth District,
California.

Dec. 13, 1954.

Prosecution for burglary. The Superior Court, Imperial County, L. J. Mouser, J., entered a judgment and an order denying a new trial, and accused appealed. The District Court of Appeal, Griffin, J., held that the evidence was sufficient to establish identification of accused and to sustain conviction for second degree burglary.

Judgment and order denying new trial affirmed.

Burglary §41(6)

Evidence was sufficient to establish identification of accused and sustain conviction for second degree burglary.

Charles F. Sturdevant, Jr., El Centro,
for appellant.

Edmund G. Brown, Atty. Gen., Norman
H. Sokolow, Deputy Atty. Gen., for re-
spondent.

GRIFFIN, Justice.

A trial without a jury resulted in the conviction of defendant of the crime of burglary, second degree. As a condition of a five-year probation order defendant was required to serve 30 days in jail, pay a fine of \$600, and make restitution for actual damage done to the premises which defendant was found to have entered.

The sole question involved is the sufficiency of the evidence to support the judgment, and this bears mainly on the question of the identification of the accused. It is conceded that the evidence shows a burglary of the Dold Auto & Equipment Company building located near Dold's Used Car Lot in El Centro. There were two doors entering from this lot into the main

building. Another door led to the showroom and another to the shop. Dold inspected and left the premises locked on Sunday, January 31, 1954, about 2 p.m. He returned about 4 p.m. and on entering the showroom he observed the window broken at the cashier's office, and a number of tools, consisting of small punches, crow-bars, and a sledge hammer, were lying on the floor by the safe. Marks were on the vault door. He then proceeded to the shop and the south door was found to be unlocked and partially open, and the east door had a screwdriver placed through the inside clasp. The doors were locked with padlocks when he left at 2 o'clock. The lock on a door on the north side had been pried loose and a lock had been broken on a tool box. A trap door leading from the roof to the parts department had been pried open and entrance was gained by means of a ladder.

It appears that about 3 o'clock that day Denson, the parts man, and one Hembree drove to the shop in their own cars, unlocked the front door and heard a noise as though someone was running into the shop department. They proceeded to that place and saw a man near the south door which led to the used-car lot. He was standing there with his head down and he then went out the door. He was wearing baggy slacks, a reddish-colored shirt, and no hat. Hembree identified this man as the same one who was standing at the edge of the lot when they arrived at the door. Denson called to him on two occasions and on the last one defendant came back to them. He was asked what was going on and defendant said a man just ran by, grabbed his (defendant's) hat, and "went that-a-way". He pointed toward the front of the premises. Denson saw no one in that direction but all three of them ran to the front of the building and they still observed no one there. About that time a blue Chevrolet car pulled out from the curb across the highway and defendant said that the persons in that car were the ones who ran by him. A discussion ensued as to the probability of apprehending them and someone asked about a fast car and defendant volunteered

to use his car which was parked near by and he drove away with Hembree to follow them. Denson returned to the building and called the officers. Defendant and Hembree soon returned and defendant left with the sheriff to further pursue the blue Chevrolet car. Such a car was stopped and two men were in it. Defendant failed to identify them. Neither of these two men wore a hat and none was found in their car.

Denson would not absolutely identify the defendant as the person he first saw in the shop when he entered it but did describe the clothing he wore with some accuracy. Hembree testified he observed defendant in the south door as he left the shop and the clothing he was wearing, and that he was sure it was the defendant whom he saw running out of the shop; that he saw no other person around there and that he knew it was the defendant who was standing in the used-car lot when he arrived at the door of the shop.

As corroboration of the fact that it was the defendant who was in the shop on the occasion in question, examination was made of the shop by an officer and it was found that there were footprints in the grease on the floor in several places, some by the tools, others in the shop, and particularly where the person departed through the side door. An examination was made of defendant's car and there was quite a bit of greasy dirt on the floor boards on the driver's side, and on the clutch, brake and gas pedal. Samples were taken of it. There appeared to be grease on the bottom of defendant's shoes. Some of the shoe prints in and about the shop appeared almost identical with the measurement of defendant's shoes. A laboratory technician received eight samples of dirt and oil taken at the premises and on the floor boards and pedals of defendant's car. A "spectrum" test, "special lines cast by the elements on igniting them" was made of these samples. They "checked very closely". Defendant accounted for the oil on his shoes as being from another plant where he worked as a mechanic. Samples were taken of the oil on the floor at the place where defendant worked and there was **no comparison** by the spectrum test. **No finger prints were**

found on or about the safe or tools but only smudges which could have indicated that gloves were worn by the culprit. A pair of cotton gloves were found with some grease marks on them in the rear of the premises cached away under a loading dock, and evidence was introduced that a grocer sold a pair of cotton gloves very similar to the ones found, about 1:30 that afternoon to a man answering somewhat defendant's description. Similar footprints to those of defendant's shoes were found leading to the place where the gloves were found, and a stray blue-colored thread taken from inside defendant's shirt was compared to a thread taken from the gloves and they were found to be identical.

Upon questioning by the officers defendant made various statements. He claimed he was looking at a car in the used-car lot and suddenly a man ran past him and grabbed his hat. He stated that he did not chase him because the man was drunk; that he did not know whether he was white or colored but he knew he wore Levi's. When questioned about going around in front of the place of business with Denson and observing the two men drive away in the blue Chevrolet, he changed his story and said that two men had run by him and one grabbed his hat; that he felt badly about being questioned by the officers, and later, after some further questioning, he, according to the officers, remarked: "All right, so I did run out of there, so I did run and jump across the chain, so what? Go down there and find my finger prints. You just go down there and find them". The officer then testified that the next morning defendant said the reason for not telling him about his previous arrests for burglary was because he was afraid they would hold it against him; and that he had not actually seen any man run by him or across the street on the occasion indicated.

Defendant did not take the witness stand but produced a witness who testified that she saw defendant at a near-by restaurant that afternoon about 3 p.m. and he was wearing a "Texas" hat at that time. In being questioned by the officers defendant stated he was wearing a Stetson hat then

and he had obtained it at an auction that morning.

A recapitulation of the facts related and the inferences that might reasonably be drawn therefrom is unnecessary since they fully support the judgment. *People v. Colletta*, 100 Cal.App.2d 1, 222 P.2d 922.

Judgment and order denying new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



Sadie HILLMAN, Plaintiff and Appellant,
v.

Rudolph GARCIA-RUBY and Katherine
Garcia-Ruby, Defendants and
Respondents.*

Civ. 16104.

District Court of Appeal, First District,
Division 1, California.

Dec. 13, 1954.

Rehearing Denied Jan. 12, 1955.

Hearing Granted Feb. 10, 1955.

Action for personal injuries sustained when defendants' dog jumped on plaintiff and knocked her down as she was walking along sidewalk near defendants' residence. From a judgment of the Superior Court, City and County of San Francisco, Ben V. Curler, J., on a jury's verdict for defendants, plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that the trial court's failure to instruct the jury in some appropriate form on plaintiff's theory of defendants' strict liability, adequately presented by plaintiff's requested instructions, if defendants knew or had reason to believe that the dog had vicious or dangerous propensities, was error prejudicial to plaintiff.

Judgment reversed.

1. Trial ⇨260(8)

In action for injuries to pedestrian knocked down by defendants' dog, defend-

ants' given instructions to jury that defendants owed duty to restrain or confine dog, if it was vicious and defendants knew or should have known of such fact, did not present to jury plaintiff's theory, on which she requested instructions rejected by court, that defendants were liable, even if not negligent, if they knew or had reason to know of dog's dangerous propensity to jump on people, as given instructions failed to tell jury whether such duty was absolute duty, duty of utmost care or duty of ordinary care and spelled out duty of ordinary care only, in view of other instructions.

2. Animals ⇨74(7)

Appeal and Error ⇨1067

In action for injuries to pedestrian knocked down by defendants' dog, trial court's failure to instruct jury in some appropriate form on plaintiff's theory of defendants' strict liability, adequately presented by plaintiff's requested instructions, if defendants knew or had reason to believe that dog had vicious or dangerous propensities, was error prejudicial to plaintiff.

3. Animals ⇨74(2)

Appeal and Error ⇨172(1)

In action for injuries to pedestrian knocked down by defendants' dog, portion of complaint, stating facts extensively enough to cover proof under either theory of defendants' liability because of negligence in permitting dog to roam at large or theory of their strict liability, irrespective of negligence, if they knew or had reason to believe that dog had vicious or dangerous propensities, did not limit plaintiff to recovery on theory of defendants' negligence, so that plaintiff was not limited to such theory on appeal from judgment on jury's verdict for defendants.

4. Pleading ⇨64(2)

A complaint pleading facts supporting recovery on either common law or statutory theory of defendants' liability or on theory of either agency or express consent is not duplicitous.

5. Appeal and Error ⇨172(1)

In action for injuries to pedestrian knocked down by defendants' dog, plaintiff's counsel's argument, in response to defendants' motion for directed verdict for

* Opinion vacated 283 P.2d 1033.

want of proof of defendants' negligence, that negligence could not be considered, if plaintiff proved defendants' knowledge of dog's propensity of causing injuries to others and that, in absence of such knowledge, keeper of dog must use ordinary care, and court's statement, in denying motion, that court's theory was that case was one of negligence and that defendants' prior knowledge of dog's propensity was fact question for jury, did not show that plaintiff tried case on theory of negligence and hence should be limited to such theory on appeal.

James C. Purcell, Michael Riordan, San Francisco, for appellants.

Bronson, Bronson & McKinnon, San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiff filed this action for personal injuries sustained when a large dog owned by the defendants jumped upon and knocked plaintiff down as she was walking along a sidewalk in the vicinity of defendants' residence. The jury found in favor of the defendants. The sole question is whether or not the jury was properly instructed concerning defendants' obligations toward the plaintiff.

Plaintiff claims that by the rejection of certain of her instructions and the modification of others the court erroneously failed to instruct the jury in accordance with her theory that defendants were liable even in the absence of negligence if the dog had the dangerous propensity of jumping upon people and if the defendants knew or had reason to know of that propensity.

Defendants agree concerning the applicable rule of liability. They say: "Regardless of the terminology of the theory the owner of a vicious dog is liable for injuries caused by the dog if the owner knew or should have known of the viciousness, *Heath v. Fruzia*, 50 Cal.App.2d 598 [123 P.2d 560]; *Frederickson v. Kepner*, 82 Cal. App.2d 905 [187 P.2d 800]," and "[t]he question presented here, then, is simply this: Was the jury instructed that, if defendants knew or should have known that

their dog was vicious and plaintiff's injuries were proximately caused by the dog, plaintiff was entitled to recover?"

[1] Defendants differ concerning the import of the instructions of which plaintiff complains. They say that the instructions given on this subject were in conformity with the rule as stated by them. They rely specifically upon the following instructions given by the court: "It is the duty of a keeper of a dog to inform himself or herself of the habits and disposition of said dog." (Plt. No. 9, as modified.) "If the keeper of a dog knows it to have dangerous propensities, he is under a duty to restrain or confine it that it may not exercise its propensities to the injury of others." (Plt. No. 6.) "A vicious animal is one having a propensity to do an act dangerous in its character to either person or property or a propensity to do an act that might endanger the safety of persons and property in a given situation." (Plt. No. 13.) "The intent with which a dog inflicts injury upon a human being is not material." (Plt. No. 5, as modified.) "If the keeper of a dog knows that the dog was accustomed to jump upon human beings, the keeper's liability is not affected by the high character of the dog for mildness among the neighbors." (Plt. No. 4.) "If you find from the evidence in this case that the dog in question did jump upon and against plaintiff on the 9th day of March, 1952, then in determining whether or not defendants had notice prior to that time of such a propensity on the part of such dog, you are instructed that if they had notice of such facts concerning said dog which would put a reasonable man on his inquiry and would be apparent to such a reasonable man, then I instruct you that the defendants will be charged with knowledge of the said characteristic on the part of the dog. Before the provisions of this instruction can be applied to the facts of this case the evidence must show by a preponderance thereof that the defendants so charged had the care, custody, and control of said dog." (Plt. No. 1.)

These instructions, it is true, as claimed by defendants, told the jury that if defendants' dog was vicious and defendants knew

it or should have known it, they were under a duty to restrain or confine it that it might not exercise its propensities to the injury of others, but they did not tell the jury whether that was an absolute duty, or a duty of utmost care, or a duty of ordinary care. Viewed in their context, these instructions spelled out a duty of ordinary care because they were immediately preceded by an instruction that "A keeper of a dog must use that degree of care to restrain it that an ordinarily prudent person would have used in the same or similar circumstances" (Plt. No. 11, as modified), and immediately followed by an instruction that "under the law of this state every person is bound, without contract, to abstain from injuring the person or property of another or infringing upon any of his rights, and that everyone is responsible for injury occasioned to another for his want of ordinary care or skill in the management of his property or person. However, defendant was not an insurer of the safety of the plaintiff or the public." (Plt. No. 31, as modified by the addition of the last sentence.)

[2] The following will serve to illustrate instructions requested by plaintiff which were expressive of her theory of strict liability: "the keeper of any dog which he knows or has reason to know to have dangerous propensities is liable without wrongful intent or negligence for damages to others proximately resulting from such a propensity" (Plt. No. 2, refused); "if you find from the evidence in this case: (1) That the dog in question by reason of its nature and instinct was likely to jump upon or against a human being while said human being was traveling upon a public sidewalk, (2) That defendants were the keepers or custodians of said dog, (3) That said defendants knew of said traits or propensities, (4) That said defendants allowed said dog to roam at large on said sidewalk, (5) That said dog did jump upon plaintiff in this action, and as a proximate cause of said jumping, plaintiff was injured, then your verdict must be in favor of plaintiff and against said defendants" (Plt. No. 10, refused); "you are instructed that where injury is caused by a vicious animal,

which at the time of said injury and previous thereto was known by the keeper to be vicious, the keeper is liable as an insurer unless the injured person voluntarily or consciously does something to bring about the injury, and the question of negligence on the part of the owner is immaterial. In such a case it is the duty of the keeper of such vicious animal to protect the public generally, including strangers as well as those dealing with or standing in some relation to the owner, and the only persons excluded from such protection are those who voluntarily or consciously do something to bring about the injury" (Plt. No. 12, refused); "and if he or she [the keeper of the dog] knows of its vicious or mischievous propensities (if you find that the dog did have such propensities) or by the exercise of ordinary care that fact could be ascertained, then I instruct you that such keeper or keepers are liable for any injuries proximately caused by such animal" (deleted from latter portion of Plt. No. 9).

Some of the instructions which plaintiff requested were based upon the theory of negligence in terms of the duties of the "keeper of a dog" irrespective of knowledge that the dog has vicious or dangerous propensities. In short, the plaintiff's requested instructions proceeded upon the theory of negligence if the jury found that defendants neither knew nor had reason to believe their dog had dangerous traits but upon the theory of strict liability if they had such knowledge or reason to believe. By refusing some and modifying others, the trial court erroneously applied the negligence principle in both situations. We do not mean that the court should have given plaintiff's every instruction precisely as presented. That would have resulted in some duplication and possibly some inconsistencies. But plaintiff did adequately present her theory of strict liability, which should have been given the jury in some appropriate form. This error, under the circumstances of the case, was prejudicial.

[3, 4] Defendants have offered the suggestion that plaintiff tried the case upon the theory of negligence and should be limited to that theory upon this appeal. They assert that the "complaint charges

negligence on the part of defendants in permitting the dog to roam at large" and that "the case was tried and argued on that theory," citing a portion of the complaint and that portion of the transcript which records the discussion which occurred upon the hearing of defendants' motion for a directed verdict.

The portion of the complaint thus cited merely sets forth the facts extensively enough to cover proof under either of the two theories of liability mentioned. While defendants have not elaborated their views, there seems implied the suggestion that such a complaint limits the pleader to recovery upon the theory of negligence. That is not correct. It has been held, for example, that a complaint is not duplicitous when it pleads facts which support a recovery either upon a common law or upon a statutory theory of liability, *Coleman v. City of Oakland*, 110 Cal.App. 715, 721, 295 P. 59, or when those facts would support recovery upon the theory either of agency or of express consent. *Smith v. McLaughlin*, 81 Cal.App.2d 460, 463, 184 P.2d 177.

[5] At the conclusion of the taking of testimony defendants moved for a directed verdict, claiming there was no proof of negligence. Plaintiff's counsel responded with the argument that there are two theories, one that "if you prove knowledge of a trait or propensity [of causing injury to others], negligence is no longer to be considered"; the other, that, in the absence of such knowledge, "the keeper of a dog must use ordinary care, as he would with an automobile or anything else * * *." The court denied the motion and said: "Now, gentlemen, according to the court's theory, the situation is this. This is a case of negligence; that is, that is the theory of the court, that it is a case of negligence. On knowledge, prior knowledge, I think there is sufficient to go to the jury. It is a question of fact for the jury to determine." We construe that as a statement of the trial court's view concerning the applicable rule of law, not a statement that such was the sole theory upon which plaintiff had tried the case; especially in view of plaintiff's instructions on each of the two theories

mentioned, instructions which the record shows were served upon the defendants and presented to the court at or prior to the commencement of the trial.

The judgment is reversed.

PETERS, P. J., and BRAY, J., concur.



129 Cal.App.2d 498

Leah Ruth FOWLER, Plaintiff and Appellant,

v.

Frank Gilman FOWLER, Defendant and Respondent.
Civ. 20305.

District Court of Appeal, Second District,
Division 1, California.

Dec. 13, 1954.

Proceeding instituted by wife for order modifying divorce judgment to increase alimony payments from \$100 per week to \$350 per week. The Superior Court of Los Angeles County, Elmer D. Doyle, J., entered order increasing alimony payments to \$150 per week, and wife appealed. The District Court of Appeal, Doran, J., held that evidence on issues of husband's assets and wife's needs supported judgment of trial court in increasing alimony to \$150 per week.

Order affirmed.

Divorce ⇨ 245(3)

In wife's proceeding for order to increase alimony provisions of divorce judgment so that she would receive \$350 per week, rather than \$100 per week from husband who had obtained discharge in bankruptcy subsequent to divorce judgment and who was paying wife in addition to alimony, \$75 per week for support of daughter of marriage, evidence on issues of husband's assets and wife's needs supported judgment of trial court in increasing alimony to \$150 per week.

Hahn, Ross & Saunders, and Max A. Goodman, Los Angeles, for appellants.

Covey & Covey, Los Angeles, and Manley C. Davidson, Hollywood, for respondent.

DORAN, Justice.

This is an appeal from an order modifying an Interlocutory Judgment of Divorce and Final Judgment of Divorce which increased an award to her of alimony from \$100 per week to \$150 per week. At the time the increase to \$150 was made, the respondent was required to pay, and was paying in addition thereto, \$75 per week to appellant for the support of their daughter.

The parties were married eighteen years before the separation. In July, 1949 the parties entered into a property settlement agreement. In the same month an Interlocutory Judgment of divorce was entered in favor of the appellant herein. The judgment also approved the property settlement agreement.

It is contended by appellant that "The trial court abused its discretion in increasing the alimony award only fifty dollars".

The property settlement agreement which was comprehensive and included debts, community property assets, etc., and the disposition thereof. As recited in appellant's brief, "On June 16, 1953, respondent was in arrears in the sum of \$11,829.18 in repayments due appellant on account of 'community debts' paid by her pursuant to the provisions of the above-quoted portions of the property settlement agreement and the divorce judgment. He had also encumbered the insurance policies to the approximate sum of \$7,000.00. Appellant sought to hold him in contempt for these two violations of the Judgment. Respondent filed an affidavit admitting the arrearage, and alleging that a discharge in bankruptcy obtained by him on February 5, 1953, discharged the obligations. The trial court, on September 24, 1953 held that the bankruptcy extinguished the obliga-

tions. Thereafter, on October 7, 1953, appellant filed an Order to Show Cause and Affidavit in re Modification of the Interlocutory and Final Judgments of Divorce (the Final Judgment having incorporated the provisions of the Interlocutory Judgment) requesting the Court to increase the alimony from \$100.00 per week to \$350.00 per week."

In the within action it was stipulated that the net income of respondent is \$27,800. Appellant argues that, "appellant is financially worse off now than she was before the bankruptcy and alimony increase".

Respondent argues that, "Appellant's own testimony showed that despite the fact that she was no longer getting the \$300.00 per month and was getting \$100.00 per week as alimony, her cash position at the time of the hearing was no different than it had been two months previous at a prior hearing. By merely reading the amounts testified to, the conclusion is obvious that these amounts were exaggerated. The trial judge not only heard her testify to these amounts, but also observed her and her manner of testifying as to these amounts. The trial judge had also heard her testify in previous hearings. It is therefore evident that the trial judge properly determined that an allowance of \$150.00 per week would satisfy her needs, particularly as the court granted appellant a fifty (50%) per cent increase."

Differences of opinions always exist in such situations but it does not appear that, as argued by appellant, "a grave injustice has been done to appellant through a judicial abuse of discretion by the trial judge".

In the light of the record and by reason of well settled law applicable to the question involved in the within appeal, the order is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

129 Cal.App.2d 466

Ira ODLE, Plaintiff and Respondent,
v.

James DUNBAR, Defendant and Appellant.
Civ. 8489.

District Court of Appeal, Third District,
California.

Dec. 9, 1954.

Action to recover for injuries to plaintiff's airplane while parked at defendant's airport. The Superior Court, Placer County, Lowell L. Sparks, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Schottky, J., held that evidence supported findings that defendant was bailee for hire who, by leaving airplane out of hangar in storm, secured by deteriorated ropes, had not exercised ordinary care for airplane's safety.

Judgment affirmed.

1. Bailment ⇨2

Person is not gratuitous bailee when bailment is made at his own instance or at his own invitation because of benefits, direct or contingent, expected to accrue, or when bailment is made pursuant to contract, express or implied, for a legal consideration. Civ.Code, §§ 1851, 1852, 1854.

2. Bailment ⇨31(3)

In action to recover for injuries to plaintiff's airplane when it was blown loose, in storm, from ropes by which it was tied to ground, at defendant's airport, where plaintiff had rented space for airplane until month of accident, evidence on issues of whether defendant was still bailee for hire by having requested plaintiff to leave his airplane at airport to help defendant make sale and whether bailment had been terminated upon reasonable notice (by newspaper article) supported verdict for plaintiff. Civ.Code, §§ 1851, 1852, 1854.

3. Bailment ⇨31(3)

In action to recover for injuries to plaintiff's airplane when it was blown loose, in storm, from ropes by which it was tied to ground at defendant's airport, where plaintiff had rented space for airplane until month of accident, evidence supported findings of trial court that defendant, by

leaving airplane in open field tied only by ropes which had deteriorated rather than placing airplane in hangar where it was ordinarily stored, did not exercise ordinary care for airplane. Civ.Code, §§ 1851, 1852, 1854.

4. Bailment ⇨14(1)

Where airport owner was bailee for hire of plaintiff's airplane but airport owner, by leaving airplane in open field, tied only by deteriorated ropes, in severe storm, failed to exercise ordinary care for airplane's safety, airport owner would be liable to plaintiff for resultant injuries to airplane. Civ.Code, §§ 1851, 1852, 1854.

Carr & Kennedy, Redding, for appellant.
F. H. Bowers, Roseville, for respondent.

SCHOTTKY, Justice.

Plaintiff commenced an action against defendant to recover for damages to plaintiff's airplane when it was blown upside down at defendant's airport, the complaint alleging that defendant had failed to use ordinary care in the storage of the plane. Defendant denied the material allegations of the complaint and also set up an affirmative defense that the relationship of depositary for hire had terminated prior to the time the plane was damaged. The action was tried by the court, sitting without a jury, and the court found "that after December 31, 1949 plaintiff's aeroplane was left at the defendant's hangar at the instance and request of the defendant's agent and for defendant's benefit; that the bailment was not in fact a gratuitous one; that the defendant was obliged, at the time of the damage to said aeroplane, to exercise ordinary care in its preservation; that defendant did not exercise ordinary care but was guilty of negligence in removing said aeroplane from the hangar where it had been stored and negligently placing it outside and tied down in such a manner that the wind tipped it upside down and damaged the aeroplane." Judgment in the sum of \$1,500 was entered in favor of plaintiff and this appeal is from said judgment.

Appellant states that "The sole question raised by this appeal is whether the evi-

dence supports the finding that appellant was bailee for hire on January 13, 1950, the date of the damage to respondent's plane?" Appellant does not raise the question of negligence and concedes that the appellant was a bailee for hire until January 7, 1950. However, it is appellant's position that upon this latter date he ceased to be a bailee for hire by reason of having terminated the bailment upon notice as authorized by Civil Code, section 1854.

The record shows that commencing in January, 1947, respondent rented from appellant, the owner of the Roseville Airport, storage space for respondent's airplane in appellant's hangar on a month to month oral agreement for the sum of \$15 per month. This arrangement continued without interruption until December, 1949, at which time John Parris, appellant's agent, advised respondent that the airport would be closed on January 1, 1950. On December 29, 1949, when respondent went to the hangar to remove his plane, Parris requested him to leave his plane in appellant's hangar to help in the prospective sale of the airport, and told him that the closing of the airport would be postponed indefinitely, at least seven days. At this time respondent inquired about payment of the rent for the month of January and was told by Parris to wait as it was then undetermined to whom payment should be made. After January 1, 1950, no rent was paid by respondent nor was any charged by appellant. Respondent testified that prior to this time he had made arrangements for storage of his plane elsewhere and would not have left his plane at appellant's airport had it not been for Parris' request. On December 30, 1949, an article concerning the closing of the local airport appeared in the Roseville Press Tribune, wherein it was stated that:

"Owner Jim Dunbar said he would extend the closing date until January 7 after Leo Connell, local resident, offered an option to buy the airfield."

Respondent admitted having read this article.

Respondent testified that from December 29, 1949, until January 14, 1950, he was working in the railway snow service, was

not in Roseville except to sleep and therefore had no opportunity or occasion to go to the airport. Although appellant's mechanic Parris had notified others by mail in the latter part of December that they should move their planes due to the closing of the airport, respondent denied ever having received any like notice, oral or written.

Appellant testified that by January 5, 1950, it became apparent that a sale of the airport would not be consummated and he therefore commenced closing operations, which included taking two or three planes out of the hangar and tying them down outside. It was appellant's further testimony that two days prior to the official closing of the airport on January 7, 1950, respondent was present at the airport and discussed the matter of future storage of his plane with appellant. This was denied by respondent.

On January 13, 1950, a violent storm arose with winds exceeding 60 miles per hour, as the result of which the ropes mooring respondent's plane outside the hangar pulled apart and the plane was damaged in the stipulated sum of \$1,500. There was testimony of the usual practice followed in tying down small planes and testimony that appellant had used defective rope in securing respondent's plane.

It was on the day following the storm that respondent went to the airport, discovered the damage to his plane, and proceeded, with the help of Parris, to dismantle it. Two of plaintiff's witnesses testified that the airport was open and doing business not only on the 13th and 14th of January, but also for some days thereafter. There was also testimony that at the time the damage was incurred there were no X's on the field as an official indication that the airport was closed.

The learned trial judge in his memorandum stated:

"Defendant's counsel, on the other hand, contends that the bailment was, at best, a 'gratuitous' one, under Section 1844, C.C., and that as such defendant was only obligated to exercise 'slight care'; but that if the Court found that defendant was a bailee for hire, that he had exercised

ordinary care for the preservation of the plane.

"After reviewing the facts, and the several contentions of counsel as set forth in their briefs, the Court has come to the conclusion that the evidence supports a holding that defendant Dunbar was a bailee for hire, and that as such he was obligated under the law to exercise ordinary care to prevent plaintiff's airplane from being damaged. There is no question but that plaintiff in the first instance had paid a monthly fee for the privilege of storing his plane in *defendant's hangar*. Under such circumstances, it has been held that the relationship of bailor and bailee came into being. (*Downey v. Martin Aircraft Service, Inc.*, 96 Cal.App.2d 94, 214 P.2d 581.)

"The evidence stands in the record undenied, inasmuch as defendant's said manager, John Parish, was never called as a witness, nor his deposition taken, that thereafter plaintiff had made arrangements to store his plane elsewhere, but was requested to leave his plane in storage at the airport, for the reason that plaintiff's continuing storage would help defendant in the prospective sale of the airport.

"It is settled as a general proposition of law that a person is not a gratuitous bailee when the bailment is made at his own instance, or on his invitation because of benefits, direct or contingent, expected to accrue, or in a contract express or implied for a legal consideration. (*Hummingbird v. Schurich*, 24 Cal.App.2d Supp. 757, 68 P.2d 319; 6 Am.Jur. Page 185.)

"The Court must conclude, then, that since plaintiff's airplane was left at defendant's hangar at the instance and request of defendant's agent, and for defendant's benefit, that the bailment was not in fact a gratuitous one, and that defendant was obligated to exercise ordinary care in its preservation.

"Did the evidence show the defendant exercised such ordinary care?

"The Court is of the opinion that it did not. In the first place, the airplane was removed from the hangar where it had ordinarily been stored and tied outside in an open field; the plane was left outside

the hangar, even though on January 13, 1950, a storm had arisen and was in progress, and that at six-thirty p. m. of that day the wind velocity was thirty miles per hour, with gusts even as high as fifty-five miles per hour; that between eleven-thirty p. m. and twelve-thirty a. m. of the next day (during which time the plane was blown over), the wind gusts had increased to sixty miles per hour in velocity. In addition, the evidence showed that the rope which tied the plane to the ground had been used and exposed to the elements for three years, and according to plaintiff's testimony, had become 'rotten'. From all of the foregoing facts, the Court has come to the conclusion that defendant did not exercise ordinary care in the preservation of plaintiff's property, and therefore he should be held liable for damages."

[1-3] The record and the authorities fully support the trial judge's conclusions as to the facts and the law. Appellant's argument is in effect an argument as to the weight of conflicting evidence. He contends that because respondent, on December 30, 1949, read an article in the Roseville Press Tribune which stated that respondent had extended the closing date of the airport until January 7th, this was sufficient actual and constructive notice to terminate the relationship of bailee for hire on January 7th. However, as appears from the record, respondent had made arrangements to store his plane elsewhere but was induced to leave his plane at appellant's airport to help appellant make a prospective sale. Under such circumstances respondent was certainly entitled to more personal notice of the closing of the airport than an article in the newspaper which merely stated that appellant would extend the closing date to January 7th. Furthermore, there was evidence tending to show that the airport was in operation by appellant even after the damage to respondent's plane.

[4] We are satisfied that the evidence is sufficient not only to support the finding that defendant was a bailee for hire who failed to use ordinary care for the preservation of plaintiff's airplane, Civ.Code, §§ 1851, 1852, but also to support the implied

finding that defendant as bailee had not terminated the bailment upon reasonable notice. Civ.Code, § 1854.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J.,
concur.



129 Cal.App.2d 546

**June Greathouse BLUHM, Plaintiff and
Appellant,**

v.

**Helmuth C. BLUHM, Defendant and
Respondent.**

Civ. 5037.

District Court of Appeal, Fourth District,
California.

Dec. 14, 1954.

Wife's divorce action, wherein she moved for attorney's fees, costs and alimony pendente lite. The Superior Court, Riverside County, John G. Gabbert, J., denied motion, and wife appealed. The District Court of Appeal, Griffin, J., held that where wife did not allege facts disputing legal effect of property settlement which had been previously entered into and which contained provision whereby each party waived right to attorney's fees, court costs and alimony, she was not entitled to attorney's fees, costs and alimony pendente lite.

Orders affirmed.

1. Divorce ⇨188, 209, 221

Where there is in full force and effect at time of divorce action a property settlement agreement providing that parties waive one another's obligations, including right of support, alimony, attorney's fees and court costs, trial court in a divorce action is obliged to deny a motion for attorney's fees, court costs and alimony pendente lite.

2. Divorce ⇨188, 209, 221

Where wife, in her divorce action, did not allege facts disputing legal effect of

property settlement which had been previously entered into and which contained provision whereby each party waived right to attorney's fees, court costs and alimony, she was not entitled to attorney's fees, costs and alimony pendente lite. Civ.Code, §§ 158, 159.

3. Divorce ⇨211, 223

Statutory discretion contemplated by statutes relating to awards of alimony pendente lite and of attorney's fees is a legal discretion controlled by established legal principles. Civ.Code, §§ 137.2, 137.3.

4. Husband and Wife ⇨279(3)

Proof of reconciliation alone does not establish, as a matter of law, that a property settlement agreement has been abrogated or rescinded, particularly where parties have received and accepted benefits of the settlement.

Charles H. Carter, Corona, for appellant.
Richard J. Welch, John D. McFarland,
Riverside, for respondent.

GRIFFIN, Justice.

On February 18, 1954, plaintiff and appellant filed an action for divorce against her defendant and respondent husband, alleging cruelty. On the same day, upon plaintiff's affidavit and the usual questionnaire form adopted by the court, and the pleadings, she obtained an order to show cause on February 26, why defendant should not pay plaintiff's attorney's fees, court costs, and alimony pendente lite. On the hearing date, defendant filed the usual form of questionnaire. He attached thereto a copy of a property settlement agreement entered into between the parties on September 5, 1951. The portion of plaintiff's questionnaire which was answered recited generally that the parties were married September 11, 1946, and separated on February 14, 1954; that her monthly expenses were \$150 per month; that her present financial worth was "nothing except home"; that she, aged 63 years, had no income; and that her husband's income was about \$75 per week; that there were no children; that she prayed for \$275 attorney's fees, \$25 costs, and \$150 a month alimony. She

lists no particular amount of community property owned by the parties, but alleges that defendant might dispose of a community property bank account and a motor vehicle. She lists their debts at \$325. Defendant's questionnaire, insofar as it is material here, merely refers to the property settlement agreement which recites that on the day it was executed the parties had had unfortunate marital differences and were then living separately and apart; that there was "now" pending, an action between the parties in Los Angeles County for divorce, and that they were possessed of certain community property, i. e., a car, tools, dress-making equipment, furniture, etc., two U. S. bonds valued at \$25 each, and an internment space. It recites that the wife is the sole owner of property in San Pedro (a duplex) and that it is the desire of the parties to make a permanent, complete and final adjustment of all property rights and claims, present or future. Under it, the wife received all the property except the automobile and certain machinery and tools. The husband agreed to satisfy an incumbrance of \$1,400 still due on the automobile, pay plaintiff \$380, evidenced by a promissory note, and to pay plaintiff's attorney's fees in the pending divorce action.

There is an additional provision that each party waives any obligation of the other to pay any money arising out of the marital relationship or otherwise, including the right of support, alimony, attorney's fees, court costs, etc., and that the agreement may be made a part of any divorce decree made in the pending action.

There is no showing made, at least in this court, whether that action for divorce was dismissed or is still pending, or that the parties ever reconciled their differences, or canceled or rescinded the property settlement agreement.

At the hearing on the order to show cause, the trial court signed an order dated March 26, 1954, reserving "the right to determine the amount of attorney's fees, if any, to be awarded to the wife, at the time of the trial of this matter on its merits", restraining both parties from dis-

posing of any community property, and ordering an early hearing of the issues.

Subsequently, on March 30, 1954, plaintiff moved the court to "reconsider the order heretofore made" on March 26, on the ground that no decision was made therein as to the alimony requested, and that she was entitled to a positive determination as to whether she was to receive attorney's fees and court costs.

The motion was fortified by an affidavit of plaintiff's attorney that he received from plaintiff only \$25 by way of advance of costs, received no attorney's fees from her, that since defendant was making \$62 per week, defendant should be ordered to pay plaintiff's attorney's fees; and that if this is not done he will ask the court for leave to withdraw from the action.

Defendant filed objections to this motion, contending that no change of circumstances had transpired since the order of March 26th; that plaintiff had a very valuable home and some rooms therein could be rented; that she had a "very good trade and occupation by which she could have had a good earning capacity", and since the property settlement agreement was never rescinded nor set aside, plaintiff may not now claim attorney's fees, alimony and court costs, she having accepted the fruits and benefits of the property settlement agreement. Counsel for defendant offered to stipulate that if the plaintiff would amend her complaint so that an answer could be immediately filed, he would be willing to submit the merits of the case to a pro tem judge for the purpose of an early hearing, as suggested by the judge hearing the motion. Apparently this offer was not met.

The trial court denied this latter motion on March 13, 1954, and plaintiff appealed from it and from the order of March 26, 1954.

On April 21, plaintiff moved the same court for an allowance of \$500 attorney's fees and \$50 court costs, to prosecute her appeal from those orders. In support of the motion she filed an affidavit reciting that she was unemployed and without means of support or to pay her attorney, and had no assets except her personal

effects, a home in Corona and its furnishings, and \$10 per month for the rental of one room and \$25 per month for custom sewing. This motion was likewise denied and plaintiff appealed from this order.

The questions presented are whether the court abused its discretion in reserving the question of fixing attorney's fees until the trial of the action, failing to rule upon the motion, insofar as alimony pendente lite was sought, refusing to reconsider this order, and refusing to allow attorney's fees on appeal from these orders. In support of plaintiff's contentions she cites such cases as *Larkin v. Larkin*, 71 Cal. 330, 12 P. 227; *Newman v. Freitas*, 129 Cal. 283, 61 P. 907, 50 L.R.A. 548; *Helpling v. Helpling*, 74 Cal.App. 431, 240 P. 1023; *Whelan v. Whelan*, 87 Cal.App.2d 690, 197 P.2d 361; and *Cargnani v. Cargnani*, 16 Cal.App. 96, 116 P. 306.

[1,2] If the property settlement agreement was in full force and effect at the time of the hearing, the trial court would have been obliged to deny the motion for attorney's fees, court costs, and alimony pendente lite. Under these circumstances, plaintiff could not claim that she was prejudiced by reserving a ruling on the motion until the trial of the action, at which time the evidence might disclose the exact status of the property settlement agreement and the court would be able to determine plaintiff's rights to attorney's fees, etc., at that time. None of the pleadings here presented allege any facts disputing the legal effect of the property settlement agreement, nor do they allege any facts showing a rescission of it, either in writing, orally, or by conduct of the parties. Under the showing made, plaintiff was not, as a matter of law, entitled to any of the orders sought, and no abuse of discretion appears. *Spreckels v. Spreckels*, 111 Cal.App.2d 529, 244 P.2d 917; *Patton v. Patton*, 32 Cal.2d 520, 196 P.2d 909; *Taliaferro v. Taliaferro*, 125 Cal.App.2d 419, 270 P.2d 1036; Secs. 158-159, Civ.Code; *Hill v. Hill*, 23 Cal.2d 82, 142 P.2d 417; *Morgan v. Morgan*, 106 Cal.App.2d 189, 234 P.2d 782; *Beeler v. Beeler*, 125 Cal.App.2d 41, 269 P.2d 949; *Walsh v. Walsh*, 108 Cal.App.2d 575, 239 P.2d 472.

The cases relied upon by plaintiff do not involve a property settlement agreement waiving a right to future alimony, attorney's fees and costs. In most of the cases cited there was presented by the pleadings, or in some manner, the question of fraud, rescission, or unfair advantage.

[3] The discretion contemplated by sections 137.2 and 137.3 of the Civil Code with respect to pendente lite awards and attorneys' fees is a legal discretion controlled by established legal principles. *Spreckels v. Spreckels*, supra.

[4] Proof of reconciliation alone does not establish, as a matter of law, that the agreement has been abrogated or rescinded, particularly where the parties have received and accepted the benefits of the property settlement agreement as herein indicated. *Plante v. Gray*, 68 Cal.App.2d 582, 157 P.2d 421; *Crossley v. Crossley*, 97 Cal.App.2d 627, 218 P.2d 132; *DeVault v. DeVault*, 90 Cal.App.2d 15, 202 P.2d 375.

Orders affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



129 Cal.App.2d 459

Pearl LOFY, as Administratrix of the Estate
of Walter F. Lofy, Sr., Deceased,
Plaintiff and Appellant,
v.

SOUTHERN PACIFIC COMPANY, a corporation,
Defendant and Respondent.

Civ. 19944.

District Court of Appeal, Second District,
Division 1, California.

Dec. 8, 1954.

Rehearing Denied Jan. 3, 1955.

Hearing Denied Feb. 2, 1955.

Action under Federal Employers' Liability Act by employee of railroad to recover for personal injuries allegedly sustained as result of employer's negligence.

The Superior Court, Los Angeles County, William B. Neeley, J., entered judgment of nonsuit and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that evidence on issue whether railroad was negligent in failing to provide its employees with reasonably safe place in which to work, was sufficient for jury.

Judgment reversed.

1. Courts ⇨97(5)

Rules governing state courts on motions for nonsuit and directed verdict in actions under the Federal Employers' Liability Act are to be found in federal decisions. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

2. Master and Servant ⇨284(1)

In actions under Federal Employers' Liability Act, when evidence is such that without weighing credibility of witnesses there can be but one reasonable conclusion as to verdict, court should determine proceedings by nonsuit, directed verdict or otherwise in accordance with applicable practice without submission to jury. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

3. Master and Servant ⇨101(9)

In actions under Federal Employers' Liability Act, it is duty of railroad to exercise ordinary care in furnishing its employees with reasonably safe place in which to work. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

4. Master and Servant ⇨284(1)

In actions under Federal Employers' Liability Act, where facts are in dispute and evidence in relation to them is such that fair-minded men may draw different inferences from them, case should go to jury.

5. Jury ⇨9

Right to trial by jury is basic and fundamental part of our state and federal systems of jurisprudence.

6. Master and Servant ⇨286(14)

In action under Federal Employers' Liability Act by employee of railroad to recover for injuries received when he stepped into hole on toe path next to tracks after

alighting from railroad car while acting as switchman, evidence on issue whether railroad was negligent in failing to provide its employees with reasonably safe place in which to work, was sufficient for jury. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

7. Trial ⇨165

Trial courts should not take under submission motion for nonsuit, and then continue with trial until its conclusion before ruling on nonsuit.

Robert M. Holstein, Los Angeles, for appellant.

Spray, Gould & Bowers, Malcolm Archibald, Los Angeles, for respondent.

DRAPEAU, Justice.

Decedent Walter F. Lofy, Sr., was a switchman for defendant Southern Pacific Company. He was employed in the switching yards of that company at Colton, California. He was riding a freight car on one of the switching tracks in the yard, as the car was being pushed slowly up to another for coupling.

Decedent had his left foot on the last step down on the ladder going up the side of the car. He was holding onto the ladder with his left hand. This last step is called a "stirrup." It was dark, and he had his signal lantern in his right hand.

As the car upon which decedent was riding came close to the other car, he swung off the stirrup to the ground, to run forward and see that the coupling was made. When he stepped to the ground his right foot dropped into a hole on the toe path next to the track. He "kind of hit" the hole with his heel, and caught himself with his left foot. This toe path is on ground, not rock ballast, and the surface is packed hard and smooth for the use of switchmen working in the yard.

As he stepped into the hole, decedent felt a jerk in his back. After he finished his shift and went home serious pain developed in his back. Next day the pain kept getting worse, and he couldn't go back to work.

After a day or two he went to an osteopathic doctor. He took a few treatments from that doctor, but kept getting worse and worse. Then he was sent to the company hospital in San Francisco.

From the time of the accident until the trial of the case, he suffered terrific pain and was unable to work. When he tried to work for a few days he had to quit on account of the pain.

A medical witness for decedent testified that in his opinion the deceased suffered a ruptured intervertebral disk. This is a serious and sometimes a lasting injury.

This appeal is taken from a judgment following the granting by the trial court of defendant's motion for a nonsuit.

During the pendency of this appeal, Walter F. Lofy, Sr., died, and Pearl Lofy, as Administratrix of his estate, has been substituted herein as plaintiff and appellant.

[1] The action being under the Federal Employers' Liability Act, 35 Stats. 65, 45 U.S.C.A. § 51 et seq., the rules governing state courts on motions for nonsuit and directed verdict are to be found in the federal decisions.

[2] "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury * * *." *Brady v. Southern R. Co.*, 320 U.S. 476, 480, 64 S.Ct. 232, 234, 88 L.Ed. 239, 240, 243.

Defendant railroad company relies upon two California cases, cited in its brief, and argued to the trial court: *Spencer v. Atchison, etc., Ry. Co.*, 92 Cal.App.2d 490, 207 P.2d 126, and *Thompson v. Atchison, etc., Ry. Co.*, 96 Cal.App.2d 974, 217 P.2d 45.

In the *Spencer* case the District Court of Appeal affirmed a directed verdict where a railroad brakeman was throwing a spring switch. Nothing was apparently wrong with the switch.

In the *Thompson* case, a judgment under Section 630 of the Code of Civil Procedure was affirmed where a railroad employee was injured while pushing an express truck up a two per cent grade in a station platform.

The facts in these cases may be readily distinguished from the facts in this case. Here we have a hard, smooth surface next to a railroad track, maintained for the use of switchmen in a switching yard, with a hole in it that caused an accident and serious injury. Mr. Lofy testified that the hole was about six or eight inches deep, and ten or twelve inches "along cross ways on the track," and that it had the appearance of having been "worn down."

From these facts the inference could have been drawn that the condition had been present for some time, that defendant in the exercise of ordinary care should have discovered and remedied it, and that the failure to discover and remedy it was negligence in failing to maintain a reasonably safe place for decedent to work in.

[3] It is the duty of a railroad to exercise ordinary care in furnishing its employees with a reasonably safe place in which to work. *Lowden v. Hanson*, 8 Cir., 134 F.2d 348. The case of *Girvetz v. Boys' Market, Inc.*, 91 Cal.App.2d 827, 206 P.2d 6 (in which a customer slipped and fell on a banana on the floor of a market) is not in point here. Here we have evidence to support the inference of constructive notice.

[4, 5] In these cases the federal rule is to the same effect as our state rule. When the facts are in dispute and the evidence in relation to them is such that fair-minded men may draw different inferences from them, the case should go to the jury. *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610. And the right to trial by jury is a basic and fundamental part of our state and federal systems of jurisprudence. *Jacob v. City of New York*, 315 U.S. 752, 62 S.Ct. 854, 86 L.Ed. 1166.

[6] Applying the facts in this case to the rules stated, this Court has come to the conclusion that this is a jury case, and that it was error to grant the motion for a nonsuit.

[7] Defendant argues that the issues as to adequate inspection and lighting are not properly raised on appeal. Having come to the conclusion just stated, it is not necessary to consider the issue of lighting, and the evidence before the court before plaintiff rested is sufficient to support the decision of this Court. The confusion, if any, as to the issues on appeal was because the trial court took under submission the motion for nonsuit, and continued with the trial until the conclusion of defendant's case, and plaintiff's rebuttal. This is not good trial practice.

The judgment is reversed.

WHITE, P. J., and DORAN, J., concur.



**Katherine EILKE, as Executrix of the Will
of Herta Rehnach, Deceased, Plaintiff
and Appellant,**

v.

**David RICE, Defendant and Respondent.*
Civ. 20515.**

District Court of Appeal, Second District,
Division 1, California.

Dec. 13, 1954.

Rehearing Denied Jan. 3, 1955.

Hearing Granted Feb. 10, 1955.

Action was brought on two notes. The Superior Court of Los Angeles County, James G. Whyte, J., entered judgment of dismissal, and the plaintiff appealed. The District Court of Appeal, Doran, J., held that statutory provision that any payment on account of principal or interest due on note made by party to be charged shall be deemed sufficient acknowledgment or promise of continuing contract to take case out of operation of four year statute of limitations, and time within which action may be brought on note or on any installment of principal or interest thereof shall not commence to run until last payment of

principal or interest made by party to be charged prior to time when statute of limitations would otherwise have run on principal sum or on installment thereof last due, means that statute of limitations shall commence to run from last payment of principal or interest made prior to time when statute of limitations would otherwise have run on principal sum or on installment thereof last due, and does not mean that statute of limitations will be tolled indefinitely, as long as interest payment is made and there is not a period of four years intervening between successive payments of interest.

Judgment affirmed.

Limitation of Actions §151(4)

Statutory provision that payment on note shall be deemed sufficient acknowledgment to take case out of operation of four year statute of limitations, and time within which action may be brought on note or on any installment of principal or interest thereof shall not commence to run until last payment prior to time when statute of limitations would otherwise have run on principal sum or on installment thereof last due, means that statute of limitations shall commence to run from last payment of principal or interest made by party to be charged prior to time when statute of limitations would otherwise have run, and does not mean that statute of limitations will be tolled indefinitely, as long as interest payment is made and there is not a period of four years intervening between successive payments of interest. Code Civ.Proc. §§ 337, subd. 1, 360.

Moore, Trinkaus & Binns; Walter R. Trinkaus, Los Angeles, for appellant.

Vaughan & Brandlin; J. R. Vaughan, Los Angeles, Richard I. Roemer, Van Nuys, for respondent.

DORAN, Justice.

This is an appeal from a judgment of dismissal following the sustaining of a demurrer without leave to amend.

The action is on two promissory notes dated August 1, 1944, one payable on or

* Opinion vacated 286 P.2d 349.

before six months and the other on or before one year after date. The notes were for \$3,000 each. Regular payments were made on the notes, thirty payments in all, the last on November 15, 1952.

The notes made by respondent were in favor of Herta Reinach who died April 26, 1953.

As recited in appellant's brief, "The crux of the controversy is strictly one of statutory interpretation, i. e., the meaning and effect of Section 360 of the Code of Civil Procedure, and, particularly, the meaning and effect of that section as amended in 1947.

"Section 360, since the 1947 amendment, and with the portion added in 1947 set forth in italics, reads as follows:

"[Acknowledgment or promise.] No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby, *provided, that any payment on account of principal or interest due on a promissory note made by the party to be charged shall be deemed a sufficient acknowledgment or promise of a continuing contract to take the case out of the operation of this title and the time within which an action may be brought upon a promissory note or upon any installment of principal or interest thereof shall not commence to run until the last payment of principal or interest made by the party to be charged prior to the time when the statute of limitations would otherwise have run on the principal sum or on the installment thereof last due.*"

"Prior to the 1947 amendment, the section read:

"[Acknowledgment or promise.] No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby."

"It will be observed that before the 1947 amendment the section was the same as at present, except that the portion beginning

with the word 'provided' was not included. It will also be observed that the language added by the amendment has to do with the issue now under consideration, that is, the effect of interest payments upon the running of the statute of limitations. The added language being introduced by the word 'provided,' it is apparent that the section as amended must be considered as a whole if its true significance is to be appreciated."

"Defendant's demurrer was based upon the premise that the action was barred by Section 337, subdivision 1 of the Code of Civil Procedure. Unless tolled or extended by the payments of interest as aforesaid, the statute of limitations would have run on the first note on February 1, 1949, and on the second note on August 1, 1949. The issue involved in the court below and on this appeal is whether or not the payments of interest on said notes, made regularly by the defendant until November 15, 1952, had the effect of extending or tolling the operation of the statute of limitations beyond the date of the filing of this action, namely, November 30, 1953.

"Appellant contends that the periodic payments of interest on the notes, made with regularity up to and including November 15, 1952, had the effect of extending the running of the four-year statute of limitations so that the time would commence to run at the time of the last payment of interest made by the defendant, i. e., November 15, 1952."

Respondent on the other hand argues that, "The plain language of Section 360 clearly indicates when the statute of limitations shall commence to run. A simple reading of the statute is all that is required to sustain the respondent's position, and that of the Court below, that the statute of limitation shall commence to run from the date of the last payment of principal or interest made by the party to be charged prior to the time when the statute of limitations would otherwise have run on the principal sum or on the installment thereof last due.

"The period of limitation applicable to an action on a promissory note is four years, Section 337, subd. 1, of the Code of Civ.

Proc. In the case at hand both notes were made on August 1, 1944. One was payable on or before six months from date and the other one year from date. Hence, the first note was payable on or before the close of business January 31, 1945 and the second note on or before the close of business July 31, 1945. Therefore, the statute of limitations 'would otherwise have run' on the first note on February 1, 1949 and 'would otherwise have run' on the second note on August 1, 1949. This action was filed on or about November 30, 1953. Clearly then, but for the amendment to Section 360, appellant's action would be barred by the provisions of Section 337, subdivision 1. The irregular payments of interest made by respondent over approximately an eight-year period would not have tolled the statute of limitations.

"It is agreed that the amendment to Section 360 was intended to extend the time within which one might bring an action on a promissory note. The language of the statute indicates that payment of interest will toll the statute of limitations and it shall not commence to run until the last payment of principal or interest made before the time when the statute of limitations would otherwise have run on the principal sum or on the installment thereof last due. Of the many payments of interest made by the respondent, two were made within the period of time specified by the amendment to Section 360 as the time when the statute of limitations shall commence to run. An interest payment was made by respondent on November 10, 1948 and another on May 9, 1949. Both payments, therefore, were the last ones made prior to the time when the statute of limitations would otherwise have run on the respective notes. Under appellant's interpretation of Section 360, the dates of the above two payments of interest would be a starting date for the running of the statute of limitations; with this respondent agrees. But appellant goes further and reads into Section 360 that the legislature intended to toll the statute of limitations indefinitely, as long as an interest payment is made and there is not a period of four years intervening between successive payments of inter-

est. Such an interpretation is not warranted by a simple reading of Section 360."

Obviously the trial judge's interpretation of the code section is correct. As argued by respondent, it was not the intent of the legislature "to toll the statute of limitations indefinitely".

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



129 Cal.App.2d 509

Charles L. SHAHA and Pearl Shaha, husband and wife, Plaintiffs and Appellants,

v.

Ben E. FREY, Frey Industries et al., Defendants and Respondents.

Civ. 5017.

District Court of Appeal, Fourth District, California.

Dec. 13, 1954.

Action for damage to plaintiffs' dwelling house when vapor gas escaping from a stationary tank near the house caught on fire while individual defendant was refilling the tank with butane gas from a tank truck. From a judgment of the Superior Court of Riverside County, Russell S. Waite, J., for defendants, plaintiffs appealed. The District Court of Appeal, Griffin, J., held that the evidence supported the trial court's findings that defendants were not guilty of negligence proximately causing the damage and that the judgment would not be reversed merely because the evidence might have justified application of the *res ipsa loquitur* rule, as the ultimate judgment would be the same.

Judgment affirmed.

1. Appeal and Error ⇨717

The trial court's language in discussing evidence at conclusion of trial without jury cannot be considered by appellate

court, where trial court's written finding is unambiguous and supported by record, such finding being trial judge's ascertainment of fact and court's decision on facts.

2. Appeal and Error ⇨533(1)

The trial judge's reasoning in announcing his decision is not such a part of record on appeal as may be used for purpose of establishing a fact in case when written findings are filed by him and entire record of evidence and findings are before appellate court.

3. Appeal and Error ⇨931(1)

In support of judgment appealed from, appellate court must assume as true any evidence supporting trial judge's findings.

4. Gas ⇨20(2)

In action for damage to plaintiffs' dwelling house when vapor gas escaping from plaintiffs' stationary tank near house caught fire while defendant was refilling tank with butane gas from a tank truck, evidence supported trial court's findings that defendants were not guilty of negligence proximately causing damage.

5. Negligence ⇨136(6)

Whether *res ipsa loquitur* doctrine applies is normally a factual question.

6. Appeal and Error ⇨1029

Gas ⇨20(2)

In action for damage to plaintiff's dwelling house by fire, where trial court, sitting without jury, found that damage was not due to defendant's negligence, *res ipsa loquitur* doctrine was not necessarily applicable, and judgment for defendants will not be reversed by appellate court merely because evidence might have justified trial court's application of such doctrine, as ultimate judgment would be the same.

ants and respondents Ben E. Frey, Frey Industries et al., for claimed negligence resulting in property damage to plaintiffs. By way of defense, in the answer, defendants claim no negligence on their part, contributory negligence on the part of plaintiffs, and that the fire resulting in the damage claimed was unavoidable.

The evidence shows that on September 17, 1951, plaintiffs owned a dwelling house near Perris, and were using butane type fuel for cooking and water heating. A stationary tank located on plaintiffs' property was "right up against" and practically within three feet of the dwelling. The water heater was located on the front porch about eight feet from the tank. The stove was in the kitchen which was also near the tank. Defendant Frey had been supplying fuel to plaintiffs for about nine months. On the day in question he was in the process of transferring gas from a tank truck to this stationary tank of plaintiffs. This stationary tank was owned by plaintiffs. Another company had been serving it prior to the time defendant started to do so.

Defendant testified he asked plaintiff Mr. Shaha to move the tank away from the house at the time he started serving it, because it would be safer; that plaintiff replied that he did not want to move it because it would ruin his flower bed. The tank had a safety valve on it to release gas and to relieve pressure in the tank when the pressure was too high or the tank was too full, or when the temperature became too warm. On this day the temperature was about 100 degrees. Defendant stopped his truck about 20 feet from the tank, went over and "gauged" it, and started the pump by means of the truck motor. The fill valve which operates like a bicycle pump on a tube was stuck, and while defendant was standing there the safety valve started blowing off vapor gas. Defendant testified that he never did attach the fill hose to this tank; that he went to the truck to shut off the motor and returned, and while he was standing near the stationary tank the escaping gas caught on fire and the house burned to the ground. Defendant was burned on the face but was able to drive his truck away from the scene for safety purposes.

Coudures & Carter, Perris, for appellants.

L. Donald St. Clair, Riverside, for respondents.

GRIFFIN, Justice.

Plaintiffs and appellants Charles L. Shaha and wife brought this action against defend-

Plaintiff's testimony was that when defendant first came to service the tank, nine months before, he asked defendant if they should turn the fire out in the water heater and stoves when he started to fill the tanks and that defendant said "No," that it did not make any difference; that he never did discuss with defendant anything about moving his stationary tank away from the house; that on the afternoon of the fire he and his wife were painting in the house; that he heard the noise of escaping gas and went outside and found that his house was burning.

Mrs. Shaha testified she knew the butane delivery was being made and subsequently heard a hissing noise, looked out the window and saw the defendant at the tank; that she later saw him pounding on their stationary tank with a metal trowel; and that the tank exploded and the house burned. She said the driver from the other company had told them that any fire in the house should be turned off while the tank was being refilled and that if they did not do it the driver for that company would always come in and do it himself.

Plaintiff's brother testified he saw defendant drive up, attach the hose from the truck to the stationary tank, start the motor, and then, in a few seconds, white vapor came spewing from the tank; that defendant stopped the motor, returned to the tank and detached the hose, picked up a trowel, hammered on the tank, and suddenly a flash occurred and the house burned.

Plaintiffs' expert witness testified it was dangerous to allow any flame or fire in the area when tanks were being filled with such gas, and that the safety valve on the tank, although it was not in very good condition, indicated, by the number thereon, that it was an approved and accepted design, and that the tank showed no evidence of having exploded.

The judge signed written findings, finding in general that the allegation of plaintiffs' complaint in reference to the negligence of defendants was untrue. In an oral opinion he stated that the fire could have been caused in any one of three different ways: (1) by sparks from the hammer-

ing on the tank, but he ruled that out because at the time the fire started there apparently was no such hammering; (2) by the butane tank itself being defective or having a defective valve which allowed the gas to escape; that in such case the defendants would not be any more liable than would plaintiffs for maintaining the tank in that condition; (3) by someone negligently permitting the tank to be filled while outlets were still lighted in the house; but if this theory was followed plaintiffs would be as negligent as defendants in this respect and accordingly plaintiffs would be guilty of contributory negligence. He then concluded that he could find no basis for the application of the doctrine of *res ipsa loquitur* because he could not find from the evidence that the instrumentality causing the fire was under the exclusive control of defendants, and that there was no burden upon defendants to keep the tank in proper condition; that there was "no basis whatever that I can find showing negligence" of defendants, and accordingly the doctrine would not apply.

As will be noted, the court signed no findings indicating that defendants were negligent or that plaintiffs were guilty of contributory negligence. Had the court's written findings followed the reasoning stated in its oral opinion in reference to the claimed negligence of the defendants and the contributory negligence of plaintiffs, no question would here arise as to the sufficiency of the evidence to support the judgment. The court found that defendants were not negligent. Therefore it was not necessary to find on the question of plaintiffs' contributory negligence.

[1, 2] It is the rule that no resort may be had to the language of the court in discussing the evidence at the conclusion of the trial where the finding is unambiguous and the record supports it. The written finding is the ascertainment of the fact by the judge. It is the court's decision upon the facts. The reasoning of the judge in announcing his decision is not such part of the record as may be used for the purpose of establishing a fact in the case when findings are filed. The entire record of

the evidence and the findings are before us. The language employed by the judge in his extemporaneous announcement of his findings can serve no particular office. *Herman v. Glasscock*, 68 Cal.App.2d 98, 155 P.2d 912.

[3] The only question is whether the evidence would support the findings made. In support of the judgment we must assume as true any evidence produced which would support those findings. *Campion v. Continental Casualty Co.*, 94 Cal.App. 621, 625, 271 P. 786; *Davidson v. American Liquid Gas Corp.*, 32 Cal.App.2d 382, 390, 89 P.2d 1103.

[4] The evidence is somewhat similar to the facts in *Davidson v. American Liquid Gas Corp.*, supra, reviewed by this court. However, in that case there was a finding in favor of plaintiffs as to defendants' negligence. In the instant case there is evidence that the instrumentality, i. e., the stationary tank was the property of plaintiffs and maintained by them on their premises for the purpose of storing the gas. Apparently its relative location to the house was of plaintiffs' choosing. At any rate, it was not defendants' responsibility. Plaintiffs, according to the evidence, had knowledge of the fact that such location was dangerous under the circumstances, and the facts established so indicated. There is likewise evidence that the safety valve on that tank was defective and that this caused the gas to escape; that plaintiffs, notwithstanding notice of the fact that no flames should be allowed to burn in any fixture in the house or on the porch while the tank was being refilled, allowed them to burn with full knowledge that defendant was filling their tank at the time; that any one or all of these acts constituted negligence on the part of plaintiffs, and if true, might well have been the proximate cause of the fire and damage which resulted; and that the acts of the defendant did not contribute proximately to such damage. At least the trial court was justified in so believing. While the evidence might well have supported a judgment in favor of plaintiffs, *Sawyer v. Southern California Gas Co.*, 206 Cal. 366, 274 P. 544, in the face of the con-

flicting evidence on the subject we cannot say, as a matter of law, that defendant was negligent and that such negligence was a proximate cause of the damage.

[5] The additional contention of plaintiffs is that the trial court erred in failing to apply the doctrine of *res ipsa loquitur*, and in denying the plaintiffs the benefit of the inference arising therefrom, citing such cases as *Zentz v. Coca Cola Bottling Co.*, 39 Cal.2d 436, 445, 247 P.2d 344; and *Black v. Partridge*, 115 Cal.App.2d 639, 252 P.2d 760. Since the trial was had without the benefit of a jury, and since the pleadings and findings do not indicate whether the trial court considered the application of the doctrine, we have no method of determining that fact other than the oral summarization of the trial judge in announcing his decision. There he stated he did not believe the elements necessary to its application had been established. This is normally a factual question. *Pruett v. Burr*, 118 Cal.App.2d 188, 189, 257 P.2d 690.

[6] The *Zentz* case directly holds, in applying the doctrine, that the requirement of control is not an absolute one; that the doctrine will not ordinarily apply if it is equally probable that the negligence was that of someone other than the defendant; that it must appear that the defendant had sufficient control or connection with the accident that it can be said that he was more probably than not the person responsible for plaintiff's injury and that the plaintiff may properly rely upon *res ipsa loquitur* even though he has participated in the events leading to the accident if the evidence excludes his conduct as the responsible cause. For a further discussion of the subject matter see *Davidson v. American Liquid Gas Corp.*, supra. Here the court found, upon sufficient evidence, that the damage was not due to defendant's negligence. Accordingly, the doctrine was not necessarily applicable.

We do not feel disposed to order a reversal of the judgment merely because the evidence might have justified the application of the rule of *res ipsa loquitur* by the trial court, where it is apparent that the ultimate

judgment would be the same, particularly if the reasoning expressed in the trial judge's oral opinion as to the contributory negligence of plaintiffs is followed.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



FINANCIAL INDEMNITY COMPANY, a
California corporation, and G. Kenneth
Vaughn, Petitioners,
v.

The SUPERIOR COURT of the State of Cal-
ifornia, In and for the COUNTY OF LOS
ANGELES, Respondent.*

John R. Maloney, Real Party in Interest.
Civ. 20599.

District Court of Appeal, Second District,
Division 2, California.

Dec. 15, 1954.

Rehearing Denied Jan. 3, 1955.

Hearing Granted Feb. 10, 1955.

Mandamus proceeding to require the Superior Court in and for the County of Los Angeles to hear an order to show cause why insurance commissioner should not be restrained from taking over and conducting business of insurance company. The District Court of Appeal, McComb, J., held that Superior Court had jurisdiction to entertain motion for an order to show cause when the present management of corporation was acceptable to the commissioner, and sole owner of company, who was unacceptable to commissioner, was no longer in control and there was no evidence of any acts committed which would authorize commissioner to seize the corporation pursuant to statute.

Defendant's motion to dismiss denied and writ of mandate issued.

Injunction ⇨110

Mandamus ⇨31

Superior Court had jurisdiction to hear application for order to show cause why

* Opinion vacated 289 P.2d 233.

insurance commissioner should not be restrained from taking over and conducting business of insurance company which was being managed by persons approved by and acceptable to the commissioner, and whose sole owner, who was not acceptable to commissioner, was no longer in control, and court's failure to exercise jurisdiction could be corrected by mandamus. Insurance Code, §§ 1011, 1013.

John S. Bolton and Wright, Wright, Greene & Wright, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Edmund G. Brown, Atty. Gen., and Lee B. Stanton, Deputy Atty. Gen., for Real Party in Interest.

McCOMB, Justice.

This is a petition for a writ of mandamus to require respondent court to hear an order to show cause why the insurance commissioner of the State of California should not be restrained from taking over and conducting the business of petitioners until the determination of action No. 63372, entitled Financial Indemnity Company, a California corporation and G. Kenneth Vaughn, plaintiffs, vs. John R. Maloney, Individually and as Insurance Commissioner of the State of California, Department of Insurance of the State of California, defendants, which action is now pending in the superior court of the State of California, in and for the County of Los Angeles. There is also a motion to dismiss the order to show cause issued by this court.

Undisputed Facts.

Petitioner Financial Indemnity Company is a California corporation doing business as an insurer in the State of California. Petitioner Vaughn is the owner of 100% of the outstanding issued stock of Financial Indemnity Company.

On the 14th of September, 1954, petitioners filed a complaint in the superior court of the State of California against John R. Maloney, individually and as insurance

commissioner of the State of California, and the department of insurance of the State of California, whereby they sought an injunction and declaratory relief against said defendants. At the same time they requested respondent court to issue an order to show cause and temporary restraining order, restraining defendants from taking over the conduct of the business of Financial Indemnity Company until the above mentioned action had been tried. Respondent denied petitioners' application for an order to show cause and temporary restraining order on the ground that it did not "have any jurisdiction" to issue the same.

Question: In view of the facts herein-after related, did the trial court have jurisdiction to issue an order to show cause as requested by petitioners?

Yes. The record discloses that Financial Indemnity Company, hereinafter called the "corporation", was duly organized under the laws of the State of California and qualified to do business in said State as an insurance company; that the company furnishes a market to automobile dealers and finance companies for the placing of automobile insurance; that the department of insurance issued a permit authorizing the corporation to sell its capital stock to Olin E. Darby, Paul R. Lietzell and George E. Darby; that the stock was issued pursuant to such permit; that in July, 1948, G. Kenneth Vaughn purchased all of the issued stock of the company and has ever since been the sole owner of all the outstanding stock of said company; that under the direction of John R. Maloney, insurance commissioner of the State of California, hereinafter referred to as the "Commissioner", and the Department of Insurance, hereinafter designated as "Department", the financial condition of the company has been investigated since its inception in December 1945, and reports thereof filed with the department; that as a result of said investigations and examinations, the Department and the Commissioner have claimed that G. Kenneth Vaughn was not a proper person to be an officer, director, or manager of said Corporation and have claimed that the original incorporators of

the corporation obtained the corporation's stock permit and its original certificate of authority by means of false and fraudulent representations as to the true incorporators of the corporation.

Defendants' claim is succinctly set forth in a letter from the Commissioner to petitioners' counsel, which reads in part as follows: "Does your proposal contemplate that the trustees, directors and management be fully informed that it is the Vaughn control which the Commissioner has found created and constitutes a hazardous condition, that the purpose of the entire arrangement which you propose is to effectively and permanently remove such Vaughn control and that it be understood and agreed by them that any action on their part which re-establishes or continues the condition which the Commissioner has found to be hazardous will defeat that purpose and is, therefore, prescribed to them? I ask this question to ascertain whether there is any thought on your part in making your proposal that the judgment of these impartial persons is to be substituted for the judgment of the Commissioner on the question whether Vaughn control or management constitutes a hazardous condition, and the Commissioner bound thereby, and I trust you will appreciate the necessity for my having your answer to this question before expressing myself on the acceptability of your proposal."

As a result of defendants' criticism of the company plaintiffs offered to sell all of G. Kenneth Vaughn's stock in the company within ninety days and pending the sale of said stock to provide an independent management acceptable to the Department and deposit the stock certificates with counsel for the company with instructions to notify the department if any effort were made to vote or regain possession of said stock. This offer was accepted by defendants, whereupon G. Kenneth Vaughn, as 100% owner of the stock in the corporation (1) elected Joseph Froggatt, Jr., Kenneth P. Mackenzie, and Allan Bair as an independent board of directors of the company and independent managers of its affairs; such persons were approved by the Commissioner; (2) assigned all powers in the

company to the aforesaid management and such management was named as signatories on all bank accounts, safety deposit boxes and all other financial papers of the corporation; (3) delivered to Lloyd Wright, one of his counsel, the stock certificates representing 100% of the outstanding stock in the company, instructing him to inform the Commissioner if he, G. Kenneth Vaughn, requested possession of said stock or attempted to vote it in any way; (4) executed a voting proxy to John S. Bolton, said proxy being an irrevocable proxy coupled with an interest, and instructed and agreed with said John S. Bolton that in the event the interest making said proxy irrevocable was disposed of, said John S. Bolton was to give the Commissioner 30 days notice of the relinquishment of said interest.

Thereafter a certified audit of the company's financial condition was prepared and delivered to the Commissioner. Such audit showed the company to be solvent within the meaning of the Insurance Code of the State of California.

It further appears that if defendants become the conservators of the company irreparable injury will result to G. Kenneth Vaughn and the company.

In such a state of the record defendants threatened, pursuant to the provisions of Section 1011 of the Insurance Code, to secure an ex parte order from the superior court vesting title to all of the assets of the corporation in the Commissioner and to forthwith take possession of all its books, records, real and personal property and assets and to conduct as conservator the business of said corporation.

Section 1011 of the Insurance Code reads as follows: "The superior court of the county in which is located the principal office of such person in this State shall, upon the filing by the commissioner of the verified application showing any of the following conditions hereinafter enumerated to exist, issue its order vesting title to all of the assets of such person, wheresoever situated, in the commissioner or his successor in office, in his official capacity as such, and direct the commissioner forth-

with to take possession of all of its books, records, property, real and personal, and assets, and to conduct, as conservator, the business of said person, or so much thereof as to the commissioner may seem appropriate, and enjoining said person and its officers, directors, agents, servants, and employees from the transaction of its business or disposition of its property until the further order of said court:

"(a) That such person has refused to submit its books, papers, accounts, or affairs to the reasonable inspection of the commissioner or his deputy or examiner.

"(b) That such person has neglected or refused to observe an order of the commissioner to make good within the time prescribed by law any deficiency in its capital if it is a stock corporation, or in its reserve if it is a mutual insurer.

"(c) That such person, without first obtaining the consent in writing of the commissioner, has transferred, or attempted to transfer, substantially its entire property or business or, without such consent, has entered into any transaction the effect of which is to merge, consolidate, or re-insure substantially its entire property or business in or with the property or business of any other person.

"(d) That such person is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or creditors, or to the public.

"(e) That such person has violated its charter or any law of the State.

"(f) That a certificate of authority of such person has been revoked under section 10711.

"(g) That any officer of such person refuses to be examined under oath, touching its affairs.

"(h) That any officer or attorney-in-fact of such person has embezzled, sequestered, or wrongfully diverted any of the assets of such person.

"(i) That a domestic insurer does not comply with the requirements for the issuance to it of a certificate of authority, or

that its certificate of authority has been revoked; or

"(j) That the last report of examination of any person to whom the provisions of this article apply shows such person to be insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1 of this Code."

From an examination of the foregoing section, together with the facts of the instant case above related, it is apparent that not any fact listed in the section under subdivisions (a) to (j), inclusive, exists which would authorize defendants to take the action which they threaten; also, that irreparable damage would result to petitioners should such action be taken.

Defendants' authority is not enlarged by Section 1013 of the Insurance Code, which provides for the seizure of the books and property of an insurance company only when "it appears to the Commissioner that any of the conditions set forth in section 1011 exist." Hence, since none of the facts appear in the instant case which are necessary to authorize the Commissioner to take over the assets of the corporation, the trial court had jurisdiction to issue an order to show cause to determine whether a restraining order should be issued, and its failure to do so is error which will be corrected by this court upon application for a writ of mandamus. (*Stratton v. Superior Court*, 87 Cal.App.2d 809, 811 [1], 197 P.2d 821; *Katenkamp v. Superior Court*, 16 Cal. 2d 696, 698 [1], 108 P.2d 1.)

Modern Barber Colleges v. California Employment Stabilization Comm., 31 Cal. 2d 720, 192 P.2d 916; *Louis Eckert Brewing Co. v. Unemployment Reserves Comm.*, 47 Cal.App.2d 844, 119 P.2d 227, and *Rhode Island Ins. Co. v. Downey*, 95 Cal.App.2d 220, 212 P.2d 965, urged by defendants in support of their thesis that neither the superior court nor this court has jurisdiction to consider the relief which petitioners are seeking are inapplicable to the facts of the

present case. In the first two cases cited there was applicable a statute reading in part as follows: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any contribution sought to be collected." (Statutes 1935, page 1226; Statutes 1939, page 2058; *Deering's Gen.Laws 1939 Supp.*, Act 8780(d).) In the present case there is no such statute. Relative to *Rhode Island Ins. Co. v. Downey*, supra, in such case the right of the insurance commissioner to act was predicated upon a showing that one or more of the acts listed in Section 1011 of the Insurance Code authorizing him to seize the defendant in such case in fact existed.

As set forth above, in the present case there was no evidence of any of the acts having been committed which would authorize the Commissioner to seize the corporation under the provisions of Section 1011 of the Insurance Code. On the contrary, it appears from the record that the contemplated action of the Commissioner is predicated upon the fact that (a) he did not approve of Mr. Vaughn's having control of the corporation, and (b) he believed that the original incorporators had obtained their permit through fraud and misrepresentation. The record discloses that Mr. Vaughn is no longer in control of the corporation and there is nothing in Section 1011 of the Insurance Code authorizing the Commissioner to seize the corporation because of fraud of the original incorporators in obtaining a permit. It further appears that the present management of the corporation is in fact acceptable to the Commissioner and has been approved by him.

The motion to dismiss is denied. Let the peremptory writ of mandate issue as prayed.

MOORE, P. J., and FOX, J., concur.

129 Cal.App.2d 471

Joe GRAY, Charles A. Gray, Joe Gray & Son,
a copartnership consisting of Joe Gray and
Charles A. Gray, copartners, Plaintiffs and
Respondents,

v.

**AMERICAN SURETY COMPANY OF NEW
YORK, a corporation, Defendant and
Appellant.**
Civ. 8491.

District Court of Appeal, Third District,
California.

Dec. 9, 1954.

Hearing Denied Feb. 2, 1955.

Action against surety, to recover, on terms of undertaking, by plaintiffs whose property had been attached, by surety's principal, in action which had terminated in plaintiffs' favor. The Superior Court, Butte County, Dudley G. McGregor and Harry Deirup, JJ., entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Schottky, J., held that plaintiffs were entitled to interest at rate of seven per cent per annum on money attached, for period which it was under attachment, and to interest at same rate on such interest from time when attachment was released, and plaintiffs were not required to introduce evidence as to what profit could have been realized from sum had it not been attached.

Judgment affirmed.

1. Trover and Conversion ⇨41

Where personal property is unjustly taken, taker is liable to owner for reasonable value of use during period of detention, and whether property taken is put to use or placed in storage, reasonable value is the same.

2. Trover and Conversion ⇨41

That owner had plans for disposing of his chattel by speculative sale or for lending it gratis to friend cannot preclude his recovery, against wrongful taker, of reasonable value for its use during period of detention.

3. Interest ⇨31

Reasonable value of use of money wrongfully taken or detained is legal rate of interest thereon during period of deten-

tion. Gen.Laws, Act 3757, § 1; Civ.Code, § 1915; Const. art. 20, § 22.

4. Attachment ⇨350, 351

Where plaintiffs' money had been attached in action which had terminated in their favor and they instituted action to recover, upon surety's written undertaking, damages sustained by them by reason of attachment, they were entitled to interest rate of seven per cent per annum on money attached for period which was under attachment and to interest, at same rate, on such interest from time attachment was released, and plaintiffs were not required to introduce evidence as to what profit could have been realized from sum had it not been attached. Gen.Laws, Act 3757, § 1; Civ. Code, § 1915; Const. art. 20, § 22.

5. Damages ⇨62(1)

Owner of property wrongfully under attachment is under no duty to secure release of attachment, to mitigate damages, if he is financially unable to do so.

6. Attachment ⇨350

In action by plaintiffs whose money had been under attachment in action which terminated in their favor, to recover against surety, evidence on issue of whether plaintiffs were financially able to secure release of attachment supported award of interest on money attached. Gen.Laws, Act 3757, § 1; Civ.Code, § 1915; Code Civ.Proc. § 555; Const. art. 20, § 22.

7. Damages ⇨163(2)

In action against surety to recover, on terms of undertaking, for wrongful attachment, by surety's principal, surety has burden of proving plaintiffs' ability to mitigate damages by procuring release of attachment. Code Civ.Proc. § 555.

Sterling Carr, San Francisco, for appellant.

Rich, Carlin & Fuidge & Charles C. Dawson, Jr., Marysville, for respondents.

SCHOTTKY, Justice.

In April, 1949, one Alex Wilson commenced an action against plaintiffs herein for recovery of money alleged to be due

from these plaintiffs to Wilson for services rendered, and caused an attachment to be levied against certain moneys on deposit to the credit of plaintiffs in a title insurance company. The undertaking on attachment was furnished by defendant American Surety Company, and the sum of \$39,398.05 was held under attachment from April 18, 1949, to December 15, 1949. The action in which said attachment was issued terminated in favor of plaintiffs herein, and they thereupon instituted the present action to recover, upon the written undertaking, the damages sustained by them by reason of the attachment. One of the items of damages alleged in the amended complaint herein was \$1,820.76, representing interest at the rate of seven percent per annum on \$39,398.05 from April 18, 1949 to December 15, 1949, plus interest at seven percent on said \$1,820.76 from December 15, 1949. The trial court, sitting without a jury, found the interest to be the amount alleged and accordingly rendered judgment for plaintiffs for \$1,820.76, together with interest thereon at seven percent from December 15, 1949, to the date of the entry of judgment. Defendant's motion for a new trial was denied and defendant has appealed from the judgment and from the order denying its motion for a new trial.

The principal contention of appellant is that there is no evidentiary support for the judgment because respondents offered no proof as to what interest or profit could have been realized from the \$39,398.05 if it had not been attached. Respondents admit that no evidence was offered to prove the value of the use of the attached money but contend that it was not necessary to do so as the legal rate of interest is fixed by our State constitution and by statute and they were entitled to said legal rate of seven percent as damages for the detention of their money.

We agree with this contention of respondents. The precise question was before the Supreme Court in the early case of *Heyman v. Landers*, 12 Cal. 107. In that case evidence was admitted tending to show that during the time the money was detained in court it was worth two percent per month,

and the trial court in its judgment allowed that amount as damages. Upon appeal the court, speaking through Mr. Justice Field, held that only the then legal rate of ten percent per annum fixed by statute could be recovered. The court said at page 111:

"* * * The only damages which the law allows for the detention of money under its process is the legal interest. The rule of damages, in such cases, like the one which obtains in actions upon promissory notes, is a fixed and arbitrary one. The actual loss occasioned may be much greater than the interest, but the consequences beyond that the law does not inquire into (*Sedgwick on Damages*, chap. 8). It would indeed often be impossible to determine the actual damages resulting from the detention of money; the party entitled to it may in consequence have been compelled to borrow on ruinous rates of interest; he may have become embarrassed in his business operations, ruined in credit, and perhaps driven into insolvency; but of these possible consequences the Courts cannot take notice. The legal interest in such cases is the only measure which can be followed with certainty, and, as a general rule, with safety."

And in *Lally v. Wise*, 28 Cal. 539, the court said at page 543:

"At the trial the plaintiff offered to prove that money was worth one and a half per cent per month during the time that the payment of it was restrained by the injunction. The defendants objected to the evidence; the objection was overruled and the defendants excepted.

"The question of the admissibility of the evidence is concluded by *Heyman v. Landers*, 12 Cal. 107. It is now more than six years since that decision was made, and it has been steadily followed during the interval as a correct exposition of the law. We are far from being convinced by the very able argument submitted by counsel for the respondent, that the decision is errone-

ous; but, if it be so, the rule which it establishes must be changed, if at all, by the Legislature."

The rule announced in these early cases is followed in the case of *Heine v. Wright*, 76 Cal.App. 338, 244 P. 955. In that case, \$7,000 was attached belonging to the Heines. This money was in the Heines' savings deposit account and the bank continued to pay interest during the period of attachment. A judgment was rendered in favor of the Heines, and the Heines then brought this action for wrongful attachment on the undertaking of attachment. The trial court rendered a judgment for the Heines against the sureties and this was affirmed. The damages represented the accrued interest on the sum attached (\$7,000) at the legal rate from the date of the levy until the release. The opinion states at page 341 of 76 Cal.App., at page 956 of 244 P.:

"* * * * Thereupon Heine and wife brought these two suits for damages, one against A. L. and G. A. M. Wright as sureties on the second attachment bond, and recovered a judgment therein for the sum of \$239.20, which represented the accrued interest on said sum of \$7,000 at the legal rate, from the date of the levy of said attachment thereon until the entry of judgment, less the amount of interest paid Heine and wife by the bank on said deposit for the same period of time at the rate of four per cent. The other was commenced against the Anglo-American Land Company, as principal, and Annie L. and C. W. Wright, as sureties on the appeal bond, which was given to continue said second attachment in force pending appeal, and a judgment therein was given in favor of Heine and wife for the sum of \$485.60 and costs, which represented the accrued interest on said bank deposit, at legal rate, from the date of the entry of judgment in the trial court to the date of the affirmance on appeal, less the amount of interest paid on said deposit by the bank."

See also *Albertsworth v. Glens Falls Indemnity Co.*, 84 Cal.App.2d 816, 825, 826,

192 P.2d 66; 111 A.L.R. 1299, 1303; 5 Am. Jur. p. 211.

Section 22 of Article XX of our State constitution provides:

"The rate of interest upon the loan or forbearance of any money, goods or things in action, or on accounts after demand or judgment rendered in any court of the State, shall be 7 percent per annum."

Section 1 of Act 3757 of Deering's General Laws reads:

"Legal rate of interest: Contract rate. The rate of interest upon the loan or forbearance of any money, goods or things in action or on accounts after demand or judgments rendered in any court of this state, shall be seven dollars upon the one hundred dollars for one year and at that rate for a greater or less sum or for a longer or shorter time."

Section 1915 of the Civil Code states:

"[Interest, what.] Interest is the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money."

[1] As stated in *Atlas Development Company v. National Surety Company*, 190 Cal. 329, at page 332, 212 P. 196, at page 197:

"There is no ground to question that a proper and recognized measure of damages for the wrongful taking or detention of personal property is the reasonable value of the use of the property during the period of detention. [Citing cases.]"

[2] And as stated in the recent case of *Finn v. Witherbee*, 126 Cal.App.2d 45, at pages 47, 48, 271 P.2d 606, at page 608:

"* * * * Whoever takes and holds the property of another without right, is liable to the owner for the reasonable value of its use during such detention. *Atlas Development Company v. National Surety Company*, 190 Cal. 329, 332, 212 P. 196. * * * Whether personal property, unjustly taken, is put to use or placed in storage, its

reasonable rental value is just the same. It belongs to its owner and he is entitled to the value of its use. * * * Neither the fact that an owner had other plans for disposing of his chattel by a speculative sale or for lending it gratis to a friend is ground for denial of his recovering its reasonable market value for the period of its detention. *Atlas Development Company v. National Surety Company*, 190 Cal. 329, 333, 212 P. 196."

[3,4] Respondents were certainly entitled to recover from appellant surety company under the terms of the bond the damages they had sustained by reason of the detention of their money under the attachment. According to the authorities hereinbefore cited it appears to be settled that the reasonable value of the use of money is the legal rate of interest thereon during the period of detention. As hereinbefore set forth the legal rate of interest in California is seven percent per annum and no evidence was necessary to establish this fact as no evidence introduced could change the legal rate of interest as established by law.

[5-7] There is no merit in appellant's contention that respondents should have minimized their damages by securing the release of their attached money by posting a bond pursuant to section 555 of the Code of Civil Procedure. Their failure to take advantage of the statutory privilege accorded them cannot relieve appellant from the obligation of its undertaking. It is true that in some cases there may be a duty to so mitigate damages where the attached personalty has an exceptionally high rental or use value. *Radley v. Raymond*, 34 Wash. 2d 475, 209 P.2d 305, 310; *W. B. Moses & Sons v. Lockwood*, 54 App.D.C. 115, 295 F. 936, 33 A.L.R. 1479. However, the better reasoned opinion appears to be that a right to recover damages for a wrongful attachment is not lost by the owner's failure to avail himself of his statutory right to regain possession of the property during the pendency of the action but that under some circumstances such failure may be considered in determining the amount of damages recoverable. 164 A.L.R. 758, 759.

Moreover, an owner is under no duty to secure the release of an attachment if he is financially unable to do so. The only evidence in this respect herein was Mr. Gray's testimony that he and his son did not "have any other money at all in the world other than this item of money that was over there under attachment" and that their only other asset was a little ranch from which they received \$200 rent. In any event, if respondents should have mitigated damages by procuring a release of the attached money, the burden of so proving was upon appellant. *Dutra v. Cabral*, 80 Cal.App.2d 114, 120-121, 181 P.2d 26; *Buswell v. City and County of San Francisco*, 89 Cal.App.2d 123, 130-131, 200 P.2d 115.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



129 Cal.App.2d 671

Charles F. STOKER, Plaintiff and Appellant,
v.

Fletcher BOWRON, as Mayor of the City of Los Angeles; William H. Parker, as Chief of Police of the City of Los Angeles et al., Defendants and Respondents.

Civ. 20349.

District Court of Appeal, Second District,
Division 1, California.

Dec. 20, 1954.

Hearing Denied Feb. 16, 1955.

Suit by discharged police officer for writ of mandate compelling defendants to reinstate him to position and to compensate him for his services. The Superior Court, Los Angeles County, Arnold Praeger, J., sustained demurrer without leave to amend and dismissed petition, and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that officer was required to show compliance with Los Angeles City Charter requirement that demand for reinstatement be made with Board of Civil Service Commissioners.

Appeal from order dismissed; judgment affirmed.

1. Mandamus ☞168(2)

Police officer who sought mandamus to compel his reinstatement to position and compensation for services was required to show compliance with Los Angeles City Charter requirement that demand for reinstatement be made with Board of Civil Service Commissioners. St.1935, pp. 2341, § 135, 2347, § 202(16); St.1937, p. 2858, § 112½; St.1945, p. 3097.

2. Appeal and Error ☞102, 870(5)

An order sustaining a demurrer without leave to amend is not appealable, but may be reviewed on appeal from judgment.

George E. Cryer and R. Alston Jones, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., George W. Adams and Walter Carrington, Dep. City Attys., Los Angeles, for respondents.

DRAPEAU, Justice.

By the instant proceeding plaintiff sought a peremptory writ of mandate commanding defendants to reinstate him to the position of sergeant of the Los Angeles Police Department and to compensate him for his services as such.

The petition alleges the employment of plaintiff as a police officer from May 25, 1942 until December 14, 1949, when he was discharged by the Chief of Police.

In a verified complaint dated July 7, 1949, plaintiff was charged with conduct unbecoming an officer and insubordination. On July 15, a Board of Rights was convened pursuant to section 202, Article XIX of the Charter of the City of Los Angeles, St.1935, p. 2347. On December 12th, said Board found plaintiff guilty as charged. On December 14, 1949, the Chief of Police ordered plaintiff removed from his position with total loss of pay from the date of the complaint.

Pursuant to subdivision 16, section 202, supra, plaintiff on March 23, 1951, filed with the Chief of Police his request for a rehearing. This was denied April 19, 1951.

The instant petition, filed on December 12, 1952, further alleges that the action of the Board of Rights and the Chief of Police "was and is arbitrary, capricious, wrongful, unlawful and not supported by the evidence."

Defendants demurred to the petition on the ground it was barred by laches. And argued in support thereof "that petitioner has failed to allege compliance with the requirements of section 112½ of the Los Angeles City Charter."

Plaintiff appeals from the judgment of dismissal and from the order sustaining defendants' demurrer without leave to amend.

Appellant states the question for decision here as follows: Must section 112½ be read into section 202 as a part of the procedure for removal of appellant from his position in the police department?

Section 112½ of Article IX of the Charter of the City of Los Angeles, Stats.1937, p. 2858, provides in part as follows:

"Whenever it is claimed by any person that he has been unlawfully suspended, laid off or discharged, and that such lay-off, suspension or discharge is ineffective for any reason, any claim for compensation must be made and a demand for reinstatement must be presented in writing within ninety days following the date on which it is claimed that such person was first illegally, wrongfully or invalidly laid off, suspended or discharged. Such demand for reinstatement must be filed with the Board of Civil Service Commissioners and such claim for compensation for such allegedly wrongful, illegal or erroneous discharge must be filed with the City Clerk. Failure to file such demand for reinstatement within the time herein specified shall be a bar to any action to compel such reinstatement and proof of filing such a demand for reinstatement must be completed and proved a condition precedent to the maintenance of any action for reinstatement."

The instant proceeding was initiated by appellant upon the theory that the Charter provides two separate and distinct methods of prosecuting charges of misconduct against employees in the classified service

of the City. Under the first method, the employee is entitled to a hearing before the Civil Service Commission as provided in section 112 of the Charter, St.1945, p. 3097. This section applies to all employees except firemen and policemen.

The second method is set forth in section 135 of the Charter, St.1935, p. 2341 (applying to firemen), and in section 202, applying to policemen. These two sections which are practically identical, provide a complete procedure for trial and punishment by a Board of Rights, consisting of higher officers in the department chosen for the purpose of trying the charges against accused. When a police officer is discharged under the provisions of section 202, he may at any time within three years thereafter apply to the chief of police for a hearing under the provisions of subsection (16). From the foregoing, appellant asserts that since the Civil Service Commission has no jurisdiction over disciplinary proceedings against firemen and policemen, and has no authority to grant a rehearing, it necessarily follows that section 112½ has no application to them.

In *Varela v. Board of Police Commissioners*, 107 Cal.App.2d 816, 820, 238 P.2d 62, 64, it was asserted that appellant Varela could not maintain a proceeding in mandamus to compel his reinstatement as sergeant in the Los Angeles police force, "without having first made a demand upon the Board of Civil Service Commissioners for reinstatement, which he failed to do within the time prescribed by section 112½ of the City Charter."

The court there stated: "Appellant tacitly admits that he was required to file a demand for reinstatement as required by section 112½. It was so held in [*Moreno v. Cairns*] 20 Cal.2d 531, 127 P.2d 914, supra, a case which involved a fireman who claimed his resignation had been obtained unlawfully. Following this decision, we hold that compliance with section 112½ was a prerequisite to the maintenance of the present action, although the Board of Civil Service Commissioners has no jurisdiction to reinstate or refuse to reinstate a member of the police or fire departments who has been suspended or discharged. * * *

"It is true that section 202 does not provide for the trial of the question whether one who has resigned under duress should be reinstated, but the board (Board of Rights) nevertheless has that power. It is the only body authorized by the charter to sustain an order of suspension or, removal or to vacate it. It is the only body invested with the power to remove a member of the police force or to otherwise separate him from the service. Either the authority must be implied or it does not exist in any officer or body. There is an express provision in section 112 which deprives the Civil Service Commission of all authority with respect to the removal or reinstatement of members of the police and fire departments. * * *

"We hold, therefore, that appellant's action was barred by his failure to comply with section 112½ of the charter under the facts alleged, which facts clearly establish a failure upon his part to prosecute his claims with the diligence which the circumstances demanded. The demurrer of respondents was properly sustained without leave to amend."

See also, *Lorenson v. City of Los Angeles*, 41 Cal.2d 334, 341, 260 P.2d 49, 53, an action for balance of salary due police officer while temporarily relieved from duty. In the course of its opinion, the Supreme Court stated:

"Other charter provisions which the city also urges as requiring reversal of the judgment clearly do not apply. For instance, with respect to section 112½, *plaintiff* has not claimed that he was illegally, wrongfully or invalidly 'suspended, laid off or discharged'. Rather, he has at all times protested his belief, and his right to believe, that the order of the chief of police temporarily relieving him from duty, although unjust and unfounded in ultimate truth, was legal and valid until such time as the board of rights had disposed of the charge against him. It has been defendant city which has attempted to claim—and this only since dismissal of the charge by the board of rights—that the relief from duty was illegal and wholly void from the time it was ordered, a claim which, for the reasons already discussed hereinabove, the

city is estopped to make. Since plaintiff has not made the claim which is essential to the applicability of section 112½ we do not reach the question as to whether being temporarily 'relieved from duty' under section 202 is encompassed within the expression 'suspended, laid off or discharged' as the latter terms are used in section 112½." (Emphasis included.)

[1] Here appellant alleged a wrongful discharge. In the circumstances presented by the record, compliance with said section 112½ of the city charter was a prerequisite to the maintenance of the instant action.

[2] The appeal from the order sustaining respondent's demurrer without leave to amend is dismissed. Such order is not appealable, but may be reviewed on appeal from the judgment. *Steiner v. Darby*, 88 Cal.App.2d 481, 498, 199 P.2d 429.

The judgment of dismissal is affirmed.

WHITE, P. J., and DORAN, J., concur.



128 Cal.App.2d 797

CALIFORNIA COMPENSATION INSURANCE COMPANY, a corporation,
Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION
OF the State of CALIFORNIA, and
Badge Moore, Respondents.

Civ. 20416.

District Court of Appeal, Second District,
Division 2, California.
Dec. 17, 1954.

Workmen's compensation proceeding wherein Industrial Accident Commission awarded temporary partial disability compensation consisting of 65% of difference between \$53.85 and the "amount earned" during the period of disability. The District Court of Appeal, Fox, J., 276 P.2d 148, held that the amount of the award should

have been reduced by the sum of unemployment benefits the claimant had received for the same period. On filing of the Commission's petition for rehearing, the Court reaffirmed its position and held that the award was not supported by sufficient findings.

Rehearing denied.

1. Workmen's Compensation ⇨907

Amount of workmen's compensation award for temporary partial disability should have been reduced by amount of unemployment insurance benefits claimant received for same period, notwithstanding Industrial Accident Commission's contention it could have allowed lien for latter benefits to Department of Employment, as though in case of temporary total disability on ground injured employee was in "odd-lot" category. Labor Code, §§ 4903(g), 4905.

2. Workmen's Compensation ⇨1733

It is duty of Industrial Accident Commission to make findings on all facts involved in a controversy and specific findings on all material issues presented in a claim for compensation. Labor Code, § 5313.

3. Workmen's Compensation ⇨1756

Industrial Accident Commission's finding, in claim for compensation, that injury caused temporary partial disability and that claimant was and would be entitled to compensation consistent of 65% of difference between \$53.85 per week and amount earned in said week or weeks was insufficient to meet requirements of statute prescribing that award in such cases shall consist of difference between average weekly earnings and weekly amount which injured employee would probably be able to earn during disability. Labor Code, §§ 4657, 5313.

4. Workmen's Compensation ⇨1756

Though statute which prescribes criteria for determining award of workmen's compensation for temporary partial disability may be difficult to apply, such difficulty does not excuse compliance and an award for temporary partial disability must be supported by a finding as to effect of injury on probable income or earning ability in ac-

cordance with criteria and formulae set out in statute. Labor Code, §§ 4657, 5313.

5. Workmen's Compensation § 1756

Industrial Accident Commission was free to exercise its independent judgment in evaluating evidence and making findings as to degree of workmen's compensation claimant's disability and his probable earnings, if any, irrespective of any determination thereof which Department of Employment might have made in allowing his claim for unemployment compensation for same period. Labor Code, § 5313.

Kearney, Scott & Clopton, Los Angeles, for petitioner.

Everett A. Corten, San Francisco, and Gordon Winbigler, Los Angeles, for respondents.

PER CURIAM.

[1] In its petition for rehearing, the Commission has made two significant changes in its position: First, it has receded from its prior contention that the fact Moore received unemployment insurance benefits is completely immaterial in arriving at its award of workmen's compensation benefits. Second, it concedes that although it had previously argued that the compensation law does not provide for a lien in favor of the Department of Employment against temporary *partial* disability benefits, it has since reevaluated its position in the light of the particular facts of this case. Thus, it now agrees that "the employee is not entitled to both the maxim temporary partial disability indemnity and the unemployment insurance benefits for the same period of unemployment," but urges for the first time that a lien against the workmen's compensation benefits paid to Moore was allowable to the Department of Employment under section 4903(g) of the Labor Code. It points out that a lien may be allowed on the Commission's own motion in a proper case, Labor Code, § 4905. In order to satisfy the language of section 4903(g), which authorizes a lien to the Department of Employment for benefits paid in a period during which the employee has received workmen's compensation for temporary *total*

disability, the Commission reasons that the facts herein establish that Moore, although found only to be temporarily *partially* disabled, was in effect an "odd-lot" and was thus entitled to his award of disability benefits "as though for temporary total disability." Hence, argues the Commission, the Department of Employment had erroneously paid Moore unemployment insurance benefits and was entitled to a lien. We need not here undertake to consider either the validity or implications of this ingenious interpretation of the statute, since the record shows no lien was ever requested by or awarded to, the Department of Employment and the issue was never before this court. Nonetheless, the new position adopted by the Commission serves to emphasize that the award as made cannot stand, and that the cause must be remanded for further proceedings to enable the Commission to make adequate findings of fact and a correct award.

[2] The Commission's new position serves also to buttress our conclusion that its findings, as made, were deficient in failing to find on material facts. If the Commission's theory that the Department of Employment is here entitled to a lien is to prevail (assuming, but without deciding, that it is tenable), findings would be necessary that Moore was, in fact, unavailable for work and that the unemployment insurance benefits paid him were consequently erroneous. But as has been pointed out, the Commission failed to make findings "upon all facts involved in the controversy", Labor Code, § 5313, though it was under a statutory duty to make specific findings on all material issues presented in a claim for compensation. *Pierson v. Industrial Acc. Comm.*, 98 Cal.App.2d 598, 601, 220 P.2d 794; *California Shipbuilding Corp. v. Industrial Acc. Comm.*, 85 Cal.App.2d 435, 436, 193 P.2d 61.

[3,4] The fallacy of the Commission's contention that the general finding it made necessarily implies that Moore was in the "odd-lot" category is apparent from an examination of that finding, which reads:

"3. Said injury further caused temporary partial disability beginning October 17,

1953, to and including February 16, 1954, and thereafter, entitling the applicant to compensation on a wage loss basis. For any week or weeks beginning on and after October 17, 1953, and until the termination of temporary partial disability herein or further order of the commission in which week or weeks applicant's earnings fall below \$53.85 per week, he is and shall be entitled to compensation consisting of 65 percent of the difference between \$53.85 and the amount earned in said week or weeks. Jurisdiction is reserved to find thereon in the event the parties are unable to adjust said matter."

It can hardly be said that this finding, even by implication, responds to the particular issues posed. It purports only to find that Moore's injury caused a temporary partial disability and then indulges in a conclusion of law as to the amount of the award to which Moore shall be entitled in a week when his "earnings fall below \$53.85 per week." This language is the very opposite of an implication that Moore was an "odd-lot"; rather, the finding is pregnant with suggestion that Moore could obtain earnings, although of a fluctuating character. There is therefore no basis for an implication that in any week when Moore was not working or had no earnings it was purely ascribable to the fact that Moore's physical condition was that of an "odd-lot" rather than to the vicissitudes of the industrial market. What the finding does indicate is that the Commission was oblivious to its responsibilities under section 4657 of the Labor Code, which was patently ignored. While that section may be difficult to apply, administrative inconvenience does not excuse compliance with the legislative mandate. Petitioner was entitled to a finding as to the effect of Moore's injury on his probable income or earning ability in accordance with the criteria and formulae therein set out. An award cannot be allowed to stand where there is a failure to find on material issues. *General Acc. Fire & Life Assur. Corp., Limited, of Perth, Scotland v. Industrial Acc. Comm.*, 196 Cal. 179, 191, 237 P. 33; *California Casualty Indemnity Exch. v. Industrial Acc. Comm.*,

190 Cal. 433, 213 P. 257; *Pierson v. Industrial Acc. Comm.*, supra; *Moore Shipbuilding Co. v. Industrial Acc. Comm.*, 70 Cal. App. 495, 233 P. 392.

[5] Because of certain observations made by the Commission in its petition for rehearing, we reiterate, as we have taken pains to emphasize heretofore, that upon remand the Commission is, of course, free to exercise its independent judgment in evaluating the evidence as to the degree of Moore's temporary partial disability and his probable earnings, if any, irrespective of any determination thereof which the Department of Employment may have made.

Rehearing denied.



129 Cal.App.2d 482

Lucille Helen McGUIGAN, as Administratrix of the Estate of James J. McGulgan, deceased, Plaintiff and Respondent,

v.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant and Appellant.

Civ. 16046.

District Court of Appeal, First District,
Division 1, California.

Dec. 13, 1954.

Rehearing Denied Jan. 12, 1955.

Hearing Denied Feb. 11, 1955.

Action was brought under the Federal Employer's Liability Act against railroad for death of herder, who had been given leave of three months because of heart condition, but who, before end of leave, was returned to work, and who had a fatal heart attack at work. The Superior Court of the City and County of San Francisco, California, William F. Traverso, J., entered judgment adverse to railroad, and railroad appealed. The District Court of Appeal, Peters, P. J., held that where hospital was supported by joint contributions of railroad and employees and was under joint control of railroad and em-

ployees, but railroad derived direct financial benefits from operation of the hospital because hospital examined railroad's employees without charge to determine their physical fitness for duty, and because railroad obtained treatment for it employees for injuries on the job at one-half actual cost of such care, hospital and its doctors were "agents" of railroad within meaning of the Federal Employers' Liability Act and not "independent contractors," and that railroad was liable for negligence, if any, of hospital and doctors.

Judgment affirmed.

1. Master and Servant ⇨276(2)

In action against railroad for death of herder, who had been given sick leave of three months because of heart condition, but who, before end of leave, was returned to work as herder and suffered a fatal heart attack at work, evidence sustained implied finding of jury that work performed by herder proximately caused his death. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

2. Master and Servant ⇨278(1)

In action against railroad for death of herder, who had been given sick leave of three months because of heart condition, but who, before end of leave, was returned to work as herder and suffered a fatal heart attack at work, evidence sustained implied finding of jury that railroad was negligent in sending herder back to work. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

3. Master and Servant ⇨276(1, 2)

In action against railroad for death of herder, who had been given sick leave of three months because of heart condition, but who, before end of leave, was returned to work as herder and suffered a fatal heart attack at work, evidence was sufficient to support implied finding of jury that doctors at hospital, which was supported by joint contributions of railroad and employees, were guilty of negligence proximately contributing to death of herder. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

4. Master and Servant ⇨315

Ordinarily, one is not liable for the negligent acts of an independent contractor.

5. Master and Servant ⇨315

Where hospital was supported by joint contributions of railroad and employees and was under joint control of railroad and employees, but railroad derived direct financial benefits from operation of the hospital because hospital examined railroad's employees without charge to determine their physical fitness for duty, and because railroad obtained treatment for its employees for injuries on the job at one-half actual cost of such care, hospital and its doctors were "agents" of railroad within meaning of the Federal Employers' Liability Act and not "independent contractors," and railroad was liable for negligence, if any, of hospital and doctors. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Agent" and "Independent Contractors".

6. Master and Servant ⇨92(1)

Generally, employer who undertakes gratuitously to furnish medical attention to his employees is liable only if he is negligent in the selection of the physician, and is not liable for negligence of doctor.

7. Master and Servant ⇨92(1)

Where medical services are furnished under circumstances that a direct benefit to the employer results, the employer is liable for the negligence of the doctors

8. Master and Servant ⇨92(1)

If an employer makes a profit out of operation of a medical department, or operates the medical department itself, the rule of respondeat superior applies.

9. Master and Servant ⇨92(1)

Where duty assumed by employer to furnish medical services may be limited by contract, express or implied, or may be simply to secure competent medical aid, liability of employer for negligence of doctor is limited to negligence in selection of doctor.

10. Master and Servant ⇨92(1)

Though hospital may be an independent contractor in many respects, if financial benefit accrues to employer by operation of the hospital, employer is liable for negligence of doctors at hospital in performing duty assumed by employer.

11. Appeal and Error ⇨1064(1)

In action against railroad for death of herder, who had been given sick leave of three months because of heart condition, but who, before end of leave, was returned to work as herder and suffered a fatal heart attack at work, wherein uncontradicted evidence established, as a matter of law, a case of respondeat superior with respect to railroad and hospital, which was supported by joint contributions of railroad and its employees, and at which herder was examined and treated, instruction, which may have been erroneous in telling jury that if jury found hospital to be an independent contractor, railroad would nevertheless be liable under circumstances set forth in instruction, was not prejudicially erroneous. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

12. Master and Servant ⇨90

Generally, employer has no duty to ascertain if employee is physically fit for his job, but if employer assumes such duty, it is liable if it performs such duty negligently.

13. Master and Servant ⇨293(1)

In action against railroad for death of herder, who had been given sick leave of three months because of heart condition, but who, before end of leave, was returned to work as herder and suffered a fatal heart attack at work, instruction which, in effect, told jury that if railroad knew that herder was in such poor physical condition as not to be able to handle the job of herder without danger to his health, and herder was ignorant of those limitations, railroad was under duty to have herder examined, was proper. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

Robert L. Lamb, San Francisco, for appellant.

Cosgriff, Carr, McClellan & Ingersoll, Luther M. Carr, Burlingame, Frank A. Dutton, San Mateo, for respondent.

PETERS, Presiding Justice.

James J. McGuigan, while working at his job of herder for the Southern Pacific Company, suffered a heart attack from which he died. His widow brought this action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., to recover damages for the death of her husband, it being claimed that the death resulted from the negligence of the employer, or from the negligence of others for whom the employer was liable. The sole defendant named is the employer, the Southern Pacific Company.

The action has been twice tried. On the first trial the defendant's motion for a nonsuit was granted. This judgment of nonsuit was reversed. *McGuigan v. Southern Pac. Co.*, 112 Cal.App.2d 704, 247 P.2d 415. On the second trial a jury verdict against defendant in the sum of \$16,005 was returned. From the judgment entered on that verdict the defendant appeals.

Appellant concedes that, with unimportant minor exceptions, the evidence on the two trials was substantially the same. The facts, generally, are as follows:

On October 20, 1947, the decedent who had been employed by appellant for some 28 years, pursuant to the prevailing rules and practices of the employment, entered the Southern Pacific Hospital and remained there as an in-patient until November 8, 1947. His entrance report states that he then suffered from obesity, auricular fibrillation, and possible left coronary occlusion. Diagnosis and electrocardiograms disclosed evidence consistent with left coronary artery occlusion and auricular fibrillation, hypertrophy of the heart, and a widespread coronary artery pathology consistent with arteriosclerosis. Dr. Kaufman, the heart specialist at the hospital who had examined decedent, testified that he then suffered, in addition, from hypertension. The decedent told the doctor that he had been hypertensive for a period of at least 10 years.

Arthur B. Dunne, R. Mitchell, S. Boyd, Dunne, Dunne & Phelps, San Francisco,

Decedent's discharge report stated that, while in the hospital, decedent had lost 16 pounds, and there was, upon discharge, "no evidence clinically of cardiac inefficiency," although the doctor had also written that the "electrocardiogram shows evidence consistent with left coronary artery occlusion and auricular fibrillation."

After discharge from the hospital on November 8, 1947, decedent returned to work as a yardman. On February 13, 1948, the office of the chief surgeon of the hospital informed decedent by letter that, because of his medical history, he should "report to General Hospital every 90 days for recheck," and should there see Dr. Kaufman, the heart specialist. Copies of this letter were sent to the general manager of the appellant and to the superintendent of its coast division. As a result of this letter the decedent reported to the hospital on February 20, 1948, and remained there again as an in-patient until discharged March 19, 1948.

During this period further diagnosis, including the taking of electrocardiograms, disclosed some early cyanotic changes, some shortness of breath, and tremor of the hands. Dr. Kaufman testified that on March 19, 1948, he determined that, because of decedent's then physical condition, he should not return to his duties as yardman for 90 days. His medical report as of that date indicated the nature of decedent's then illness to be auricular fibrillation, right coronary artery; dyspnea; cyanosis; a widespread coronary artery pathology, and generalized hypertrophy of the heart muscle. Dr. Kaufman did not examine the decedent again after March 19th, and could not recall whether he had informed him of any of his specific ailments. He told him, in layman's language, that he had a bad heart condition. He was advised to keep his weight down and to continue the medication given him. Under dates of March 19, and March 26, 1948, the chief surgeon advised the superintendent of the coast division of the appellant that decedent should be granted 3 months' sick leave, and then it would be determined if he could return to work.

Dr. Kaufman terminated the sick leave before the 90 days had expired. He testified that sometime after March 19, 1948, he discussed with Dr. Washburn, the chief surgeon, the advisability of letting decedent return to work as a herder. Dr. Kaufman stated that he was personally aware of a herder's duties and "could see no physical basis where it would not be fair to him [McGuigan] to go back to work as a herder." Moreover, since the decedent did not get in touch with him, as he had done previously when ill, he presumed his physical condition was such that he was able to do the work. Dr. Kaufman also testified that he knew a herder was not required to mount moving equipment, but could if he wanted to, and that the herder controlled the engine.

This decision to let decedent return to work was made after an exchange of letters between Dr. Washburn and J. J. Jordan, the coast division superintendent of appellant. Dr. Kaufman knew of this correspondence and relied upon it in making his decision. This correspondence, according to Dr. Washburn, was the result of conversations he had had with the decedent and Mr. Katz, also a witness at this trial. Katz was the representative and grievance man of the decedent's brotherhood. Katz told Washburn that decedent was upset because he was idle and was very anxious to get back to work on the daylight shift, and that decedent was so restless that he had visited the railroad yards a number of times. The decedent, because of his seniority, was entitled to his choice of any job in the San Francisco terminal for which he was qualified.

Under date of April 14, 1948, the chief surgeon wrote to the superintendent of the appellant stating that he had been informed by the brotherhood representative that decedent wanted to go back to work as herder in the San Francisco yard of the company, and had been informed that decedent's "duties as such would consist only of 'cutting off' locomotives as they arrive at the station and 'coupling' engines to passenger trains for departure; that he would have no physical effort to put forth, nor

would he at any time have to jump on or off moving equipment.

"Before further considering him for such assignment I will appreciate your advising whether his duties would be limited to the extent cited." This letter was written because of the admitted rule of operation of appellant that the determination of fitness for duty must be made by the hospital staff. An employee on sick leave cannot be taken back on the job without a certification from the hospital.

The superintendent, who was thoroughly familiar with the duties of a herder in the San Francisco yard, under date of April 20, 1948, replied to the above letter as follows: "If Mr. McGuigan were assigned as herder his duties would consist merely of cutting off inbound engines and coupling on outbound engines. There would be no mounting or dismounting of moving equipment involved, nor would there be any riding of equipment to be done."

It should also be mentioned that the office of J. W. Corbett, the vice-president in charge of operations of the appellant, delivered a communication to Dr. Washburn dated April 29, 1948, to the effect that he had no objections to the chief surgeon "advising Superintendent Jordan that McGuigan may be restricted to herder's duties under the conditions described." Under these circumstances the hospital signed a release authorizing the company to hire the decedent as a herder, and the general manager of appellant authorized decedent's resumption of work as herder.

The actual duties of a herder were described by several operating employees of appellant. These descriptions differed in several material respects from those portrayed in the correspondence. Specifically, the duties with reference to one train, the "Lark," were detailed by an engine foreman as follows:

"When the Lark pulls in, the herder generally stands where he cuts the engine off, and there will be a car man there, and he takes and cuts the steam hose and the air, and the electrician cuts off the electric line; he disconnects the electricity, and then when everything is all cut they tell

him, 'All right,' and the herder will have the slack taken off; if the slack is not off he calls for the engine to back a little, and then he pulls the pin and gives the signal to go ahead.

"Q. And jumps on? A. Just as it moves the herder gets on and rides across, and then when he gets on the other side of Third Street there is the cellar switch, and when the engine goes over that he walks behind down on the other side, on the fireman's side, and lifts up the lid to throw the switch, and walks back to the other side and gives the signal to back up. And then when the engine goes he gets on the tender to ride over. I generally ride over toward Fourth Street, the switch over there, it being around the curve, I would ride over there and as soon as I could see that and I figured everything was clear for him, the other switch, get off."

While the job was described as "easy and monotonous" the evidence was definite that it was the custom of the herders to ride the moving equipment and to lift the heavy cellar switch.

The decedent went back to work at 6:30 a.m. on May 1, 1948. Upon arrival he told the yardmaster that the new job was "duck soup" and that he could "last a long while doing this." There were two herders on duty at the terminal, one coupling outgoing engines, the other, the decedent in this instance, uncoupling incoming engines. Between 6:30 a.m. and 9 a.m. decedent uncoupled some 13 engines. The Lark arrived at about 9 a.m. Decedent uncoupled the engine and gave the engineer the signal to go ahead, and then rode across Third Street on the tender, a distance of about 324 feet. To accomplish this decedent jumped onto a step on the tender located about a foot from the ground, and then held onto a vertical hand rail running to the top of the tank. His hands necessarily grasped the pole at about the level of his head. After crossing Third Street, decedent dismounted in order to throw the cellar switch there located. This switch is below the level of the ground and is covered by an iron lid about $\frac{1}{2}$ inch thick, 3 feet long and about 1 foot wide. The

engine foreman judged that the cover weighed between 30 and 40 pounds. The herder is required to lift this cover, reach down 6 to 8 inches below the surface of the ground and pull up the switch handle. Decedent performed this operation, crossed behind the engine, and signalled the engineer to back up across Third Street on the track leading to the roundhouse toward Fourth Street. Decedent then remounted the moving equipment, resuming his former position. As was customary, he rode the backing equipment approximately half way to Fourth Street. On that track there is another switch, which has a target light, for whose alignment the herder is responsible. This target light is so located that the herder can see it some distance before arriving at Fourth Street. On the trip in question, the engine had gone about half-way to Fourth Street at a speed estimated at 3 to 6 miles per hour when decedent must have observed that the target switch was aligned, as he did not signal the engineer to stop. Decedent jumped off the moving train when it was going about 3 or 4 miles per hour, made a half turn, and then fell on his back. His lips turned blue, he gasped and quivered, and apparently died soon thereafter.

The autopsy surgeon fixed the cause of death as "Hypertensive arteriosclerotic heart disease with acute coronary thrombosis and nephrosclerosis." He testified, in elaboration, that the coronary arteries showed marked hardening, and that the left artery was occluded completely by a firm red thrombus. The heart was greatly enlarged, caused by increased resistance of the arteries to the blood flow in general. The hardening of the arteries of the type here existing, which he found to be widespread throughout the arterial system, interferes with the heart's functions, particularly when there is exertion. The immediate cause of death was a thrombus, or clot, which could have occurred within a few minutes of death or up to several days before death. He was quite sure that it had occurred within 12 hours of death.

A heart specialist, Dr. Rose, testified as a witness for the plaintiff. In response to a

long hypothetical question outlining decedent's medical history and his activities on the fatal morning of May 1, 1948, the witness testified that the activity of the last 5 or 10 minutes prior to decedent's death, in her opinion, "precipitated the acute coronary artery thrombosis and therefore caused his death." A man with a heart condition such as decedent, in this witness' opinion, should have had a sedentary job. In answer to what specially produced the coronary thrombosis, the doctor answered that lifting his own weight of 174 pounds onto the side of the tender could have been enough, but that "the combination—I think everything that he did on that day was contributory."

The defense produced Dr. Bruck as a qualified medical expert. It was his opinion that the thrombosis did not result from any physical activities engaged in that morning, because the thrombosis could not have been formed in a few minutes. In the opinion of this doctor the exertion by decedent of lifting his own weight would be no more than ordinary exercise. Such moderate exercise would not be objectionable to a patient in decedent's condition.

Some reference must be made to the relationship between the Southern Pacific, the hospital, and decedent. This relationship was described as follows in our earlier opinion, 112 Cal.App.2d 704, 712, 247 P.2d 415, 419:

"The hospital here involved is referred to as the hospital department, which was created in 1945 pursuant to an arbitration award rendered under the Railway Labor Act, 45 U.S.C.A. § 151 et seq. This department is operated by a thirteen-member board of managers, six selected by the railroad brotherhoods, one by fourteen other unions, and six by the S. P. Under the award the S. P. is empowered to nominate the chief surgeon, but such nomination, before it is effective, must be approved by the board of managers. The board fixes the chief surgeon's salary. The chief surgeon makes rules and regulations for the operation of the hospital, and appoints and fixes the salaries of the professional staff, all subject to the approval of the board. The

title to the lands and buildings involved is vested in the S. P., but the hospital department pays the taxes thereon.

"The hospital gets its income from various sources. Each employee of the S. P. has deducted from his salary a fixed sum per month which goes to the hospital. This entitles the employee to medical care and hospitalization for non-industrial injuries or diseases. In addition, the S. P. pays the hospital for treating employees injured in the course and scope of their employment. Twenty other companies with payroll deduction plans also use and pay for the facilities of this hospital. From these sources the hospital department is operated. There is usually a small yearly cash surplus which is carried over for emergency purposes. The S. P. furnishes the hospital with transportation of its supplies, the use of its communication facilities, advice from its engineering and purchasing departments, and with some accounting services. The S. P. derives direct financial benefits from these arrangements." Not only does it obtain treatment for its employees for injuries on the job at one-half the actual cost of such care, but without charge the hospital examines railroad employees to determine their physical fitness for duty and certifies the result of such examination to the employer. According to the chief surgeon this function was assumed by the hospital without the adoption of a formal rule, it being his opinion that it was a normal function of the hospital for the benefit of the employer to safeguard the health of the employees and to protect the public.

[1] The first contention made by appellant is that, regardless of whether it or the hospital doctors were negligent in sending decedent back to work, there is no substantial evidence to support a finding that the work decedent performed on the morning in question proximately caused his death. This point requires but scant consideration. It was discussed at some length in our prior opinion, and that discussion need not be repeated here. It was there held that there was sufficient evidence to go to the jury on the issue of proximate cause. That same evidence is ample to support the implied finding of the jury on the issue.

In making the contention that there is nothing in the evidence to indicate that the job caused the death, appellant not only necessarily disregards much of what was said in our prior opinion, but distorts the testimony of respondent's witness, Dr. Rose, by emphasizing a very small part of her testimony, by considering that part out of context, and by then contending that her testimony was based on a misconception of the facts. According to appellant's analysis of Dr. Rose's testimony she is supposed to have admitted that decedent could have safely performed all of his required duties except one, that is, climbing hurriedly to the top of the engine after stepping up 3 or 4 feet to the first rung of the ladder. Of course, the record shows that decedent performed no such acts. Therefore, says appellant, there is no evidence that any required or performed duty contributed to the death. Appellant also spends much time pointing out minor variances in the testimony of the doctor on the two trials. The basic question on this phase of the case was, did the duties performed that morning proximately contribute to the death? On this question Dr. Rose was most clear and direct. There was submitted to her a hypothetical question which included a correct summary of decedent's physical condition and an accurate résumé of the duties performed by him on the day of his death. In response to this question Dr. Rose testified that, in her opinion, "the activity within the last five or ten minutes prior to his death precipitated the acute coronary artery thrombosis and therefore caused his death." The doctor also opined that a man in decedent's condition could precipitate a coronary thrombosis by simply pulling his weight up while mounting the ladder on the tender. She stated that everything he did that morning contributed to the thrombosis. Any conflicts in the testimony between the witnesses, or in the testimony of any witness, whether there were variances in the testimony of any witness on the two trials, and the effect to be given to such variances were jury questions. A fair reading of the record demonstrates that there is ample medical testimony to sustain the implied finding of causation.

[2] The next question is to determine whether anyone was negligent in sending decedent back to work. The appellant was obviously negligent, independently of any negligence on the part of the hospital staff. It knew of its employee's heart condition. It knew that the doctors had ordered the employee to take a 90-day sick leave because of that condition. It knew that the employee could not go back to work even then without a clearance from the doctors. It knew that the doctors were making inquiry of it to ascertain in general the nature of a herder's duties, and, in particular, whether "physical effort" was required on the job and whether "he at any time [would] have to jump on or off moving equipment." It knew or should have known that those questions were being asked because if such duties were required the doctors would not permit the decedent to perform them—in other words, that the doctors believed such duties would be dangerous to the health and life of decedent. With such knowledge, and knowing the duties of a herder included these acts, the employer carelessly, negligently and falsely represented the nature of those duties by stating that "there would be no mounting or dismounting of moving equipment involved, nor would there be any riding of equipment to be done." This was, to say the least, negligence that proximately contributed to the death. This point was considered at length in our prior opinion, and what was there said need not be here restated.

Appellant does not seriously question the sufficiency of the evidence to sustain the implied finding that the above acts constituted negligence on its part, but, as a foundation for a point later made, urges that there is no evidence to support a finding that the hospital doctors were negligent. The issue of the doctors' negligence was submitted to the jury. Appellant claims that, at most, the record shows nothing more than a possible wrong diagnosis on the part of the doctors, and a wrong diagnosis or a difference of opinion between doctors does not constitute negligence. See *De Zon v. American President Lines*, 318 U.S. 660, 671, 63 S.Ct. 814, 87 L.Ed. 1065.

[3] While the negligence of the doctors is not as obvious as that of appellant, there is ample and substantial evidence that, independently of any possible wrong diagnosis, would support a finding that the doctors, in several respects, were negligent. Both doctors knew of decedent's condition. They had ordered him to take a 90-day leave of absence because of that condition. Nevertheless, they failed to re-examine him between March 19, 1948, the date on which they had determined that his condition required at least a 90-day leave, and May 1, 1948, the day they permitted him to return to work, after cutting the 90-day leave short. No attempt was made to determine whether his heart condition had improved or become worse or remained static in the meantime. Moreover, the doctors not only failed to tell decedent the nature of his condition, but they failed to tell him that lifting his weight by grabbing onto a vertical bar, and mounting and dismounting moving equipment would be dangerous, and that he was to be re-employed only on condition that he was not to do these things. Moreover, Dr. Rose testified that a man in decedent's condition should have been permitted to perform only sedentary work, and should not have been permitted to perform any of the duties of herder. This evidence is sufficient to support an implied finding that the doctors were guilty of negligence proximately contributing to the death.

Thus, under the evidence, and the instructions, the jury could have found that either or both the appellant and the doctors were negligent. Of course, if the jury found appellant was guilty of negligence it would be immaterial whether it also found that the doctors were or were not negligent, because the appellant would then be liable at least as a joint tortfeasor. But if the jury found (in view of the evidence this seems highly unlikely) that appellant was not guilty of any independent negligence but that the doctors were negligent, then appellant could be held liable for the doctors' negligence only if the jury also found that some relationship existed between appellant and the doctors so as to

make the former liable for the negligence of the latter. Under the provisions of the Federal Employers' Liability Act, responsibility of the employer is limited to cases where the negligent third person is an officer, agent or employee of the employer.

The jury was instructed at length that if the doctors were found to be agents of the appellant to determine the physical fitness of the employer's employees, and if the doctors were negligent, the appellant would be liable. These instructions correctly defined agency, scope of authority, and necessity for right of control. These instructions are attacked by appellant on the theory that even if an agency existed, the doctors being licensed professionals, the principal, a non-professional, cannot be held liable for their negligence. This point need not be discussed at length. If an agency relationship existed it seems clear to us that the normal rules of agency apply. This being so, these instructions correctly stated the law.

These instructions were followed by an instruction to the effect that, even if the jury found appellant not independently negligent, appellant would still be liable if the doctors were negligent whether the doctors were agents or independent contractors. This instruction reads as follows: "In the event you find that neither the hospital department of the Southern Pacific, nor the physicians employed therein were agents of the defendant carrier on May 1, 1948, or in their dealings with plaintiff's intestate, but were acting as independent contractors by agreement with the Southern Pacific Company, then you are instructed that if you find that defendant voluntarily assumed the duty to ascertain the physical fitness of its employees for employment, it was the duty of the defendant carrier to protect the plaintiff's intestate McGuigan from being employed in a job for which he was physically unfit or incapable, and even though this duty was delegated to said hospital department and its doctors as an independent contractor, the defendant carrier is responsible for the negligent conduct of said independent contractor, and its servants and employees, if any, in performing such duty."

[4, 5] Of course, a defendant is not normally liable for the negligent acts of an independent contractor. But that rule is not here applicable, because it is our opinion that, as a matter of law, the hospital and its doctors were "agents" of the appellant within the meaning of the Federal Employers' Liability Act. This hospital undoubtedly, in many respects, may be considered an independent agency. But insofar as it operates by performing the duties assigned by the employer to examine employees to determine their fitness for work, and such operations benefit the employer, the doctrine of *respondeat superior* applies.

The relationship between the hospital and the appellant has already been fully described in this opinion. From that description it appears that the hospital is supported by joint contributions of the employer and employees, the hospital has a separate accounting system, and the control of the board of managers is a joint control. The employer selects the chief surgeon who selects the staff doctors, subject to approval of the managers. From these operations "The S. P. derives direct financial benefits" 112 Cal.App.2d at page 712, 247 P.2d at page 420, which have already been described.

The evidence as to these facts is uncontradicted. Under such circumstances, insofar as the hospital operates to perform the duty assumed by the appellant of examining employees to determine their fitness for work for the direct benefit of the employer, the doctrine of *respondeat superior* applies as a matter of law.

[6, 7] The cases on this subject are not clear-cut. It seems to be the general rule that an employer who undertakes gratuitously to furnish medical attention to his employees is liable only if he is negligent in the selection of the physician, and is not liable for the negligence of the doctor, although there are cases to the contrary. See cases on both sides of this question 56 C.J.S., Master and Servant § 165, p. 820. This same limitation on the liability of the employer probably exists where the employer, without profit to himself, administers a

medical service fund for the benefit of the employees, with deductions made from employee's salaries. *Id.*, p. 821. But where the medical services are furnished under circumstances that a direct benefit to the employer results, the employer is liable for the negligence of the doctors. *Id.*, p. 822. One statement of this rule, supported by several cases, is set forth as follows in 35 *Am.Jur.* p. 540, § 112: "A relief department which is supported by the mutual contributions of a corporation and its employees, and maintained for the sole purpose of giving relief to the latter, is a charity, in the administration of which the only duty devolving upon the company is to use reasonable care in the selection of physicians and surgeons who are reasonably competent; and having exercised this duty, the company is not responsible for their want of skill. But, according to some authorities, if an employer derives some pecuniary benefit from a hospital which he maintains for his employees, or if he contracts for a consideration to treat them when ill or injured, he is liable for the malpractice of a physician or surgeon whom he employs, notwithstanding he exercises due care in the selection of such person."

[8] The cases cited in support of these texts establish the rule to be that if the employer makes a profit out of the operation of a medical department, or operates it himself, the rule of *respondeat superior* applies. See also *Rannard v. Lockheed Aircraft Corp.*, 26 *Cal.2d* 149, 157 *P.2d* 1; *Jones v. Tri-State Telephone & Telegraph Co.*, 118 *Minn.* 217, 136 *N.W.* 741, 40 *L.R.A.,N.S.*, 485.

[9] Of course, in some cases, the duty assumed by the employer may be limited by contract, express or implied, and it may be simply to secure competent medical aid, in which case liability is limited to negligence in the selection. *Socony-Vacuum Oil Co. v. Premeaux*, *Tex.Civ.App.*, 187 *S.W.2d* 690; *Metzger v. Western Maryland Ry. Co.*, 4 *Cir.*, 30 *F.2d* 50.

The key test as to the extent of the employer's duty seems to be whether the employer secures a financial benefit from the operation of the hospital. Thus, in

Illinois Cent. R. Co. v. Buchanan, 126 *Ky.* 288, 103 *S.W.* 272, 11 *L.R.A.,N.S.*, 711, the railroad established a hospital and incorporated it as a separate entity. No financial gain accrued to the railroad from the operation. The court held that in such a case the railroad was only liable for negligence in selecting doctors and not for their negligence. But, significantly, the court stated, 103 *S.W.* at page 274: "Of course, this view is based on the assumption that the railroad company does not derive any pecuniary profit or gain from the conduct of the institution. If such were the case, a different standard of responsibility would be established." See also *Sawdey v. Spokane Falls & N. Ry. Co.*, 30 *Wash.* 349, 70 *P.* 972.

[10] Thus, although the hospital may be an independent contractor in many respects, if a financial benefit accrues to the employer by the operation, the latter is liable for the negligence of the doctors in performing a duty assumed by the employer. That is this case.

Prior to the arbitration award of 1945 under which the hospital is now operated, it was held that, as a matter of law, this very hospital was the agent of the Southern Pacific so as to make that company liable for the negligence of the doctors. Prior to 1945 the hospital was supported, as now, by joint contributions of employer and employee. Nevertheless, the court held, after stating the rule that where the hospital is not operated to the financial benefit of the employer no liability for negligence of the doctors attaches, *Bowman v. Southern Pac. Co.*, 55 *Cal.App.* 734, 739, 204 *P.* 403, 405: "But there are well-reasoned cases which hold that, where a railroad company, under circumstances like those indicated by the evidence here, conducts a hospital as part of a relief department, such relief department is a business arrangement on the part of the company; that the hospital is not a charity; that the contributions of the railroad employees are not voluntary; and that the physicians and attendants of the hospitals are agents of the company. Consequently, it is further held that the company is

liable for the negligent acts of the physicians employed."

The only difference between that case and the present one is that now, under the arbitration award, the employer does not exercise complete control but exercises joint control, it appointing 6 of the 13 members of the board of managers. But the financial benefits to the appellant from the hospital operation are the same now as they were then. The particular function being performed by the hospital doctors in the instant case was the performance of the duty assumed by appellant to determine the fitness of decedent for his duties. If the facts set forth in the Bowman case were sufficient to characterize the relationship as an agency as a matter of law, so in the instant case, where the contributions and benefits are the same but the control is divided, the relationship is one of agency. Financial benefit is the same in both cases. We think financial benefit is the key to the problem. But even if control were the key, if the appellant is liable for the negligence of the doctors when it was solely in control, it must follow that when it shares control it simply shares responsibility, and is at least a joint tortfeasor who can be held liable for the total damage.

[11] Thus, although the challenged instruction may have been erroneous in telling the jury that if it found the hospital to be an independent contractor nevertheless appellant would be liable under the circumstances set forth in the instruction, such error could not have been prejudicial because, as a matter of law, the uncontradicted evidence establishes a case of *respondeat superior*.

The appellant also complains of the following instruction: "If you find that the defendant through one or more of its officers, agents, servants or employees knew of the weakened physical condition of plaintiff's intestate, and while then and there knowing of his weakened condition permitted and authorized him to assume duties in the employ of defendant carrier for which he was then and there physically unsuited and incapable, and knowing that he was ignorant of the limitations that should be placed on his activities,

without first securing competent medical opinion approving such permission or authorization, or after having prevented such medical men from giving a competent opinion as to the suitability or capability of plaintiff's intestate by reason of the failure by an officer, agent, servant or employee of defendant carrier to correctly and fully describe and detail to said medical men the duties that would be required of plaintiff's intestate or incidental to the position of herder which he was permitted or authorized to assume, then you may find the defendant guilty of negligence, and if you further find that plaintiff's intestate's death was the proximate result of this negligence on the part of the defendant, then you will find for the plaintiff in such amount as will reasonably compensate the plaintiff under and subject to the rules I am giving you elsewhere in these instructions."

[12, 13] It is claimed that by this instruction a liability was imposed on appellant for failing in its duty to ascertain if decedent was physically fit for the job. No such duty generally exists. *Potter Title & Trust Co. v. Ohio Barge Line*, 3 Cir., 184 F.2d 432; *Ducombs v. Lykes Bros. S. S. Co.*, La.App., 1 So.2d 114. In our prior opinion we held the law to be that no such duty exists, but where the employer assumes the duty it is liable if it performs such duty negligently. The challenged instruction, contrary to appellant's contention, did not tell the jury that it, as employer, was under a duty to examine employees to determine their fitness for a job. Although rather inartfully phrased, it told the jury that if the employer knew that McGuigan was in such poor physical condition as not to be able to handle the job of herder without danger to his health, and the decedent was ignorant of these limitations, the appellant was under a duty to have him examined. This is a correct statement of the law, and is in accord with common sense. See annotation 175 A.L.R. 982.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; EDMONDS, SCHAUER and SPENCE, JJ., dissenting.

129 Cal.App.2d 500

Walter RANSOM, Ab Waxman, William Burroughs, Bernard Jackson, Louise Morehouse, Elyse Byler and Marie Long, On Behalf of Themselves and All Other Taxpayers of the Los Angeles City High School District, County of Los Angeles, State of California, Plaintiffs and Appellants,

v.

The LOS ANGELES CITY HIGH SCHOOL DISTRICT OF the COUNTY OF LOS ANGELES, State of California, and Dr. Hugh C. Willett, Arthur F. Gardner, Harry H. Hillman, Paul Burke, Mrs. Edith K. Stafford and Mrs. Ruth C. Cole, as members of the Board of Education for said District, Defendants and Respondents.

Civ. 20231.

**District Court of Appeal, Second District,
Division 3, California.**

Dec. 13, 1954.**Hearing Denied Feb. 10, 1955.**

Taxpayers' suit to enjoin high school district from dedicating school land for road. The Superior Court, Los Angeles County, Frank G. Swain, J., sustained school board's demurrer. Taxpayers appealed. The District Court of Appeal, Shinn, P. J., held that school district did not exceed its power nor abuse its discretion in dedicating land for road.

Judgment affirmed.

1. Administrative Law and Procedure**↪761, 763**

Courts will not interfere with the actions of administrative boards in the absence of fraud, collusion, bad faith or manifest abuse of discretion.

2. Schools and School Districts ↪20

School board has broad discretion in determination of public interest and benefit to the district from its action and courts cannot interfere with its action unless the board is exceeding its legislative powers, or its judgment or discretion is being fraudulently or corruptly exercised.

3. Appeal and Error ↪909(6)

Where school board dedicated school land for road, on appeal it was presumed that all the matters alleged in the complaint which it was claimed would operate to the

detriment of the district were considered by the board before it took action, and that dedication would be consistent with proper use of the property for school purposes.

4. States ↪119

Under provision of Constitution prohibiting Legislature from making any gift of any public money or thing of value to any individual, municipal or other corporation, if public property is to be used for public purpose it does not fall within the prohibition, provided the appropriation will be beneficial to the entity which is making the appropriation authorizing its use. Const. art. 4, § 31.

5. States ↪119

Section of the Constitution prohibiting the Legislature from making any gift of any public money or thing of value to any individual, municipal or other corporation, is inapplicable to action which may benefit the public directly or incidentally. Const. art. 4, § 31.

6. States ↪119

Under constitutional provision prohibiting state from making gift of any public money or thing of value to any individual, municipal or other corporation, where school board dedicated school land for road, and school district had obtained city's consent to use land for school purposes by agreeing to such dedication, dedication was for public purpose and not prohibited. Const. art. 4, § 31.

7. Judgment ↪336, 403, 485**New Trial ↪1**

Trial court may not vacate its judgment except on motion for new trial, on motion where conclusions of law are inconsistent with findings, or judgment is inconsistent with special verdict, on motion to vacate judgment at any time where judgment is void on its face, by an independent suit in equity, whether judgment is regular on its face but extrinsically void for want of jurisdiction or by reason of fraud or mistake, or on motion under statute providing that judgment may be set aside because taken against defendant through mistake, inadvertence, surprise or excusable neglect. Code Civ.Proc. § 473.

8. Schools and School Districts ⇨65

Although statute authorizing school board to dedicate land for road purposes requires a public hearing before board makes such dedication, the public hearing is not a judicial hearing but merely a mode for ascertaining the public interest. Education Code, §§ 18671, 18672.

9. Schools and School Districts ⇨65

Under statute providing that before ordering the dedication of any property, school board shall adopt a resolution declaring its intention to dedicate the property, describing the property, and fixing a time, not less than ten days thereafter, for a public hearing, where board adopted resolution and gave two weeks' notice, that taxpayers would have difficulty in procuring 33,000 signatures they alleged would be necessary for effective protest within two weeks was not ground for invalidating board's action. Education Code, § 18672.

10. Schools and School Districts ⇨20, 65

Legislature has plenary power as to school districts, and school board, in authorizing dedication of school lands pursuant to statutes, performs an administrative function as provided by the Legislature, as it is public property that is dedicated and taxpayers have no right to be heard in the matter except as the right is given by statute. Education Code, §§ 18671, 18675.

11. Constitutional Law ⇨318**Schools and School Districts** ⇨65

Where school board dedicated school land for road under statute providing for such dedication, dedication was an administrative function, the exercise of which did not affect taxpayers' rights, and action of board did not come within the constitutional protection of due process clause as to notice and hearing. Education Code, §§ 18671, 18672.

12. Pleading ⇨225(1)

Demurrer should not be sustained without leave to amend complaint, unless it appears that complaint cannot be amended to state a cause of action.

13. Pleading ⇨225(1)

In action to enjoin high school district from dedicating school land for road where

school board demurred to complaint, and court sustained demurrer, but proposed amended complaint would not state a cause of action, taxpayers were not entitled to leave to amend complaint.

Axelrad & Sevilla, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Clarence H. Langstaff, Deputy County Counsel, Los Angeles, for respondents.

Roger Arnebergh, City Atty., Charles F. Reiche, Asst. City Atty., Spencer L. Halverson, Deputy City Atty., Los Angeles, for City of Los Angeles, amicus curiae in support of respondents.

SHINN, Presiding Justice.

The plaintiffs appeal from a judgment of dismissal of a taxpayers' suit brought to enjoin the intended dedication of a right of way by defendant Los Angeles City High School District, and to enjoin the intended expenditure of funds by defendant district for improvement of the same.

The plaintiffs, Walter Ransom, Ab Waxman, William Burroughs, Bernard Jackson, Louise Morehouse, Elyse Byler and Marie Long are resident taxpayers in Los Angeles City High School District. The defendants are the district and the individual members of the Board of Education for said district.

On July 30, 1953, the defendant board, by resolution, declared its intention to dedicate to the City of Los Angeles a portion of the Palms Junior High School property as a right of way for public street purposes. The right of way would extend Ocean Park Avenue through the middle of the present Junior High School site. On August 3, 1953, certain expenditures in connection with the dedication and improvement of this street were approved by the board. The appellants seek to enjoin this dedication and expenditure of funds therewith.

Palms Junior High School is one of the schools operated by the district, and is located in the Palms community of the City of Los Angeles. The school site is rectangular in shape, being bounded on its northern

property line by Woodbine Street, and on its southern property line by the Charnock Elementary School, there being no street on the southern boundary of the site in question. The site is bounded on the east by Midvale Avenue and on the west by Kelton Avenue; midway on the eastern and western boundary lines of the site, Ocean Park Avenue dead-ends at the school property. The intended dedication and improvement of this right of way by the school board therefore is for the purpose of connecting the two portions of the already existing Ocean Park Avenue. This connecting street, to be 84 feet in width, would bisect the school grounds into two approximately equal portions. Included in the intended plans is an underpass which is to connect the bisected portions of the grounds.

The district acquired this property in 1941, and in 1946 a bond issue was approved and construction of a junior high school on this site was proposed. Also, in 1946, Los Angeles City adopted a Comprehensive Zoning Ordinance with provisions that before any land located in the City of Los Angeles could be used for school purposes, a "conditional use" permit must be obtained from the Los Angeles City Planning Commission. On June 26, 1947, the board filed its application for a "conditional use" permit to use the property for a junior high school. On July 24, 1947, the commission granted the permit subject to the conditions that all the requirements of the Comprehensive Zoning Ordinance be observed in the development of the site for public school purposes, and that the board file and record a tract map of said property "in order to clear the public records" and make provision for extension, widening and improvement of the boundary streets in a manner satisfactory to the City Engineer, said map to be filed and recorded within a period of one year from

the date of the conditional approval. In October of 1948, the board filed a tentative tract map with the commission which showed the property which the board now intends to dedicate as a separate lot on the tract and not as a street. On October 14, 1948, the commission recommended approval of the map to the city council on the condition that two boundary streets be widened, and that Ocean Park Avenue be opened through the tract in the presently proposed fashion to an 84 foot width and that the board improve the street and construct a pedestrian tunnel under it. On November 23, 1948, the council approved the recommendation of the commission and notified the board and the commission. On January 17, 1949, the board agreed to the conditions and on January 19th sent a letter of agreement to the council agreeing to dedicate and improve the 84 foot strip of land through the school site, "if, as and when required by the city council."

Subsequently due notice was given and a hearing held regarding the dedication and improvement of the *boundary* streets, and the same were dedicated and later improved.

The proceedings leading up to this petition for an injunction began on May 18, 1953, when the council requested the respondent district to immediately dedicate and improve the 84 foot right of way and construct a pedestrian tunnel underneath it. On June 11th, the board advised the council that there were insufficient funds then available to make the said improvements and asked clarification of the request of May 18th. July 3, 1953, the council requested the district to begin said dedication and improvement, and stated that 180 days from May 18th would be a reasonable time for completion. The board, acting pursuant to sections 18671 and 18672¹ of the Education Code, then adopted a resolution declaring

1. "The governing board of any school district may, pursuant to this article, dedicate or convey to the State, or any political subdivision or municipal corporation thereof, for public street or highway purposes, either with or without consideration and without a vote of the electors of the district first being taken, any real property belonging to the district, either

in fee or any lesser estate or interest therein, including abutter's right of access to any public street or highway; and may dedicate to any public corporation without a vote of the electors of the district first being taken and with or without consideration, an easement to lay, construct, maintain, and operate water, sewer, or storm drain pipes or ditches

its intent to dedicate the right of way in question, and fixed August 13, 1953 as the date when a public hearing would be held. The filing of the original complaint on August 7, 1953, seeking a temporary injunction restraining this intended action was precipitated by board approval on August 3, 1953, of \$3,250 for engineering plans for the improvement, and \$320 to the Los Angeles City Engineer for checking the plans.

In the complaint the appellants alleged with considerable elaboration that the intended action of the board would interfere with teaching, impose a traffic hazard, introduce a flood danger, impose difficult administrative problems, deprive the school of badly needed space, introduce new problems of morals, materially depreciate taxpayers' property and consume school funds needed for school purposes.

The demurrer of the defendants was sustained without leave to amend and the appellants in this proceeding appeal from a judgment of dismissal. In substance, the contentions of the appellants are the following: (1) Sections 18671 and 18004² and related sections of the Education Code do not authorize the dedication or improvement of property in a manner that would be detrimental to its use for school purposes; (2) The threatened dedication would constitute an abuse of discretion on the part of the board; (3) It would constitute a gift of the money and property of the district in violation of Article IV, section 31, and

Article IX, section 1, of the State Constitution; (4) It was an abuse of discretion for the court to refuse the plaintiffs a right to file an amended and supplemental complaint.

[1,2] The essence of plaintiffs' argument on the first and second points is that if the facts alleged in the complaint be taken as true, it follows that the proposed dedication and improvement of the right of way were not in furtherance of school purposes, and therefore such action would be in excess of the powers of the board. The answer to these contentions is found in the familiar rule that courts will not interfere with the actions of administrative boards in the absence of fraud, collusion, bad faith or manifest abuse of discretion. The most that was charged was error of judgment and the court has no power to substitute its judgment for that of the administrative board. The board has broad discretion in determination of the public interest and benefit to the district from its action and as the court said in *Butler v. Compton Junior College Dist.*, 77 Cal.App.2d 719, at page 727, 176 P.2d 417, at page 423, quoting the case of *Berkeley High School Dist. v. Coit*, 7 Cal.2d 132, 59 P.2d 992: "* * * the courts 'cannot enter the board room * * * nor interfere at all with its action unless the board is exceeding its legislative powers, or its judgment or discretion is being fraudulently or corruptly exercised.'" *Nickerson v. San Bernardino County*, 179 Cal. 518, 177 P. 465 [467]. See also Lin-

over and upon any land belonging to the school district."

"Before ordering the dedication or conveyance of any property the governing board shall in regular open meeting by a two-thirds vote of all its members adopt a resolution declaring its intention to dedicate or convey the property. The resolution shall describe the property proposed to be dedicated or conveyed in such manner as to identify it, and shall specify the purposes for which and the terms upon which it will be dedicated or conveyed, and shall fix a time not less than 10 days thereafter for a public meeting of the governing board to be held at its regular place of meeting for a public hearing upon the question of making the dedication or conveyance."

2. "The governing board of any school district may grade, pave, construct sewers, or otherwise improve streets and other public places in front of real property owned or controlled by it, and also may construct in immediate proximity to any school of the district, pedestrian tunnels, sewers and water pipes when required for school purposes, and may appropriate money to pay the cost and expense of the improvements, whether made by the board under contract executed by the board, or under contracts made in pursuance of any of the general laws of the State respecting street improvements, or under other contracts made in pursuance of the charter of any county or municipality."

dell Co. v. Board of Permit Appeals, 23 Cal.2d 303, 315, 144 P.2d 4; Cramer v. County of Los Angeles, 96 Cal.App.2d 255, 256-257, 215 P.2d 497.

[3] It must be presumed that all the matters alleged in the complaint which it is claimed would operate to the detriment of the district were considered by the board before it took its action and that the dedication and improvement, although entailing some disadvantages, would be consistent with a proper use of the property for school purposes.

[4, 5] The third contention of the appellants that this is a gift of public money or thing of value within the prohibition of Article IV, section 31, of the Constitution, is not well-taken. The section states: "The Legislature shall have no power * * * to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; * * *" The public purpose doctrine is a well-settled test which has been used in determining whether an appropriation comes within the restriction. The section applies only to the use of public property for private purposes. If the public property is to be used for public purposes it does not fall within the section, provided the appropriation will be beneficial to the entity which is making the appropriation or authorizing its use. These tests are well-stated in the case of *City of Oakland v. Garrison*, 194 Cal. 298, 228 P. 433, where it was held that an expenditure of county funds for improving an Oakland City street was for a public purpose and would be beneficial to the county itself. See also *Sacramento, etc., Drainage Dist. v. Riley*, 199 Cal. 668, 251 P. 207; *County of San Diego v. Hammond*, 6 Cal.2d 709, 59 P.2d 478, 105 A.L.R. 1155. The courts have held that the constitutional prohibition is inapplicable to action which may benefit the public directly or incidentally. *Allied Architects' Ass'n v. Payne*, 192 Cal. 431, 221 P. 209, 30 A.L.R. 1029 (erection of memorial hall for war veterans); *Patrick v. Riley*, 209 Cal. 350, 287 P. 455 (compensation for destruction of tubercular cattle);

The Housing Authority v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794 (slum clearance).

[6] It was necessary for the board to obtain the consent of the city to the improvement of the site and its use for school purposes. Certainly it was of benefit to the district that the city give its consent. The district acquired the right to use the site by complying with the demands of the city rather than dispose of the property and locate its school elsewhere. There may have been attendant disadvantages, as alleged by plaintiffs, but it was for the board and not for the court to say whether these were outweighed by the advantages. The tests of public purpose and benefit to the appropriating entity were satisfied. The constitutional prohibitions were not violated.

The fourth and last contention of the appellants that they should have been granted leave to amend and file a supplemental complaint is not well-taken. The demurrer to the original complaint was argued August 19 and was sustained without leave to amend and a judgment of dismissal was entered August 26, 1953. On September 11, the plaintiffs gave notice of a motion to vacate the judgment and permit filing of an amended and supplemental complaint. By the supplemental complaint the plaintiffs made an attack upon the proceedings of the board had and taken subsequent to the institution of the action, namely, at the meeting of August 13. It was alleged that August 13, 1953, was fixed as the time for a public meeting and that the plaintiffs were not allowed a sufficient time to prepare and present to the board their opposition to the board's proposed action, namely, a protest signed by at least 10 per cent of the qualified electors of the district pursuant to section 18675 of the Education Code which protest would have halted the proceedings unless and until the proposed dedication received the approval of the superintendent of schools.

[7] The motion to vacate the judgment was properly denied. The court may not vacate its judgment except under (1) motion for a new trial, (2) on motion where the conclusions of law are inconsistent

with the findings, or the judgment is inconsistent with the special verdict, (3) a motion under the provisions of section 473 of the Code of Civil Procedure, where application is made to set it aside within six months, (4) by motion therefor at any time where the judgment is void on its face, or (5) by an independent suit in equity, where the judgment is regular on its face but extrinsically void for want of jurisdiction or by reason of fraud or mistake. *Levy v. Brill*, 107 Cal.App.2d 204, 236 P.2d 603; *Fisch & Co., Ltd. v. Superior Court*, 6 Cal. App.2d 21, 23, 43 P.2d 855; *Biggs v. Biggs*, 103 Cal.App.2d 741, 742, 230 P.2d 32; *Barlow v. City Council of City of Inglewood*, 32 Cal.2d 688, 197 P.2d 721.

The proposed amended and supplemental complaint failed to state a cause of action. Section 18672 of the Education Code prescribes that before a dedication of school property be made, a resolution of intention shall be adopted by two-thirds of the members of the board describing the property to be dedicated and fixing a time not less than 10 days thereafter for a hearing. Section 18673 provides that notice shall be given not less than 10 days before the meeting by posting and not less than 5 days by publication. The resolution of the board was adopted July 30, 1953, and two weeks were allowed for the preparation and presentation of a protest. It was alleged that the signatures of 33,000 qualified voters were the minimum number required for an effective protest and that the same could not be obtained in the allowed time.

[8, 9] Although the statute allows a public hearing after the adoption of the resolution, the "public hearing" would not be a judicial hearing but merely a mode for ascertaining the public interest. *Brown v. Board of Supervisors*, 124 Cal. 274, 279, 57 P. 82; *Lindell Co. v. Board of Permit Appeals*, 23 Cal.2d 303, 315, 144 P.2d 4, *supra*. The board allowed more than the statutory time for the presentation of protest, and the fact that it would have been difficult to procure signatures of 10 per cent of the electors within two weeks' time would not be a ground for invalidating its action. The proceeding was not one to deprive the plaintiff taxpayers or other property owners of

their property or rights. Appellants have incorrectly referred to the property as "taxpayers' property," but admit that the school district holds the property in fee as a trustee for the beneficial owner, the state.

[10, 11] The legislature has plenary power as to school districts, and the school board in authorizing dedication pursuant to Education Code sections 18671 to 18675 performs an administrative function as provided by the legislature. *Butler v. Compton Junior College Dist.*, 77 Cal.App.2d 719, 176 P.2d 417, *supra*; *Stone v. City of Los Angeles*, 114 Cal.App. 192, 204-205, 299 P. 838. It is public property that is dedicated and the taxpayers have no right to be heard in the matter except as the right is given by the statute. Therefore, being an administrative function, the exercise of which would not affect the plaintiffs' rights, the action of the board did not come within the constitutional protection of the due process clause as to notice and hearing. As there is no right to notice and a hearing except under the statutory provision, the same is a privilege extended by the legislature, and appellants cannot be heard to complain they have been deprived of constitutional rights in violation of substantive or procedural due process. *Dominguiz Land Corp. v. Daugherty*, 196 Cal. 468, 482, 238 P. 703.

It was alleged in the proposed supplemental complaint that at the hearing on August 13, evidence was introduced by the opponents of the proposed dedication which tended to prove the dedication would impair school operations and prejudice the welfare and the best interests of the school children. Plaintiffs see only the imperfections in the plan. Plaintiffs argue that in view of this evidence it was an abuse of discretion for the board to proceed further in the matter. They overlook the fact that if the board had not acquiesced in the conditions imposed by the city there would be no school on the property. That, alone, was sufficient to prove that the dedication would be of real benefit to the district, despite its disadvantages.

[12, 13] At the time the demurrer was heard, the board had already held its meet-

ing of August 13. Plaintiffs could then have amended to challenge the proceedings which they sought to attack by their amended and supplemental complaint. The demurrer should not have been sustained without leave to amend unless it appeared that the complaint could not be amended to state a cause of action. *Wight v. Hubbard*, 111 Cal.App.2d 606, 245 P.2d 64. Had plaintiffs amended or sought leave to amend in accordance with the amendment which they proposed later, their complaint would still have failed to state a cause of action. Therefore, it was not error to refuse leave to amend.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.



129 Cal.App.2d 542

ORANGE COUNTY MACHINE WORKS,
Plaintiff, Cross-Defendant and
Appellant,

v.

REPUBLIC HEATER CORPORATION, De-
fendant, Cross-Complainant and
Respondent.

Civ. 5031.

District Court of Appeal, Fourth District,
California.

Dec. 14, 1954.

Action for balance due on open book account by plaintiff who had fabricated heater parts and manufactured certain dies for defendant. Defendant cross-complained for sums allegedly expended to make dies operable and for value of scrap metal, to which defendant claimed title, left over from fabrication of heater parts. The Superior Court of Orange County, John P. McMurray, J., entered judgment for plaintiff for balance due and entered judgment for defendant on both counts of cross-complaint, and plaintiff appealed. The District

Court of Appeal, Mussell, J., held, *inter alia*, that evidence on issue of whether dies were operable supported judgment for defendant.

Judgment affirmed.

1. Estoppel ⇨70(1)

Where plaintiff and defendant entered into contract under which plaintiff was to fabricate certain heater parts for defendant and defendant was to furnish metal therefor and no provision was made in contract as to scrap metal left over from fabrication, facts that several months after fabrication, plaintiff refused to turn over scrap to defendant and that defendant did nothing further about scrap metal until conclusion of business arrangement several months later did not serve to place interpretation on contract that metal belonged to plaintiff and did not estop defendant from denying plaintiff's title to scrap.

2. Appeal and Error ⇨173(9)

Where estoppel was not alleged or proved at trial, it could not be considered on appeal.

3. Contracts ⇨322(3)

In action to recover balance due on open book account brought by plaintiff who manufactured heater parts and dies for defendant, wherein defendant filed cross-complaint for damages allegedly incurred by defendant in making operable certain dies purchased from plaintiff, evidence on issue of whether dies were operable supported judgment for defendant for sum expended for repair of dies.

4. Appeal and Error ⇨931(1)

In reviewing evidence on appeal, all conflicts must be resolved in favor of respondent and all legitimate and reasonable inferences indulged in to uphold judgment if possible.

5. Appeal and Error ⇨989

Where court's findings are attacked as not supported by evidence, reviewing court's power begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by trial court.

6. Appeal and Error ⇐996

Where two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of trial court.

Lindsay & Smedegaard and John D. Cochran, Santa Ana, for appellant.

Kaufman & Leland, Los Angeles, for respondent.

MUSSELL, Justice.

This is an action to recover a balance of \$886.91 due on an open book account for goods, wares, merchandise and labor furnished defendant corporation by plaintiff. Defendant filed an answer and cross-complaint in which it is alleged that plaintiff appropriated to its own use 100.85 tons of scrap steel which was the property of cross-complainant, to cross-complainant's damage in the sum of \$2,304.28; that cross-complainant purchased from plaintiff machine works certain dies, which, by the terms of a written contract, were to be "operable and complete"; that said dies when delivered were not as specified in the agreement and cross-complainant was damaged in the sums necessarily expended in making them "operable and complete".

The trial court rendered judgment for plaintiff on the complaint for \$886.91 and costs, judgment for the sum of \$2,304.28 in favor of cross-complainant for the value of the scrap metal, and the sum of \$1,601.76 expended by cross-complainant for making 12 and 14 inch dies operable. Plaintiff appeals from the judgment in favor of the cross-complainant.

In March, 1951, plaintiff Orange County Machine Works, which was engaged in the manufacture of tank heads and with the processing of steel (hereinafter referred to as "Machine Works"), agreed to fabricate heater heads and bottoms for defendant Republic Heater Corporation (hereinafter referred to as "Republic"). Republic agreed to and did furnish the steel necessary for the fabrication of these products. Both parties to this agreement knew that there would be a certain amount of scrap steel or

"clippings" resulting from the fabrication. However, there was no discussion as to the disposition of this scrap steel until a few months after the first purchase order was received, when Mr. Coombs, president of Machine Works, received a telephone call from Mr. Rountree, purchasing agent for Republic, informing him that Mr. Stevens, president of Republic, wanted the scrap from the tank heads. Mr. Coombs then stated that Stevens was not entitled to it; that it was not the general practice and "it wasn't in the agreement at all that he should get the scrap". Coombs refused to deliver the scrap to Republic and subsequently sold it. There was testimony that the reasonable value of the scrap steel involved was \$2,304.28 and there seems to be no dispute as to this valuation or as to the quantity of such steel being 100.85 tons.

[1, 2] Appellant argues that the trial court's finding that plaintiff appropriated the steel to its own use and that it was at all times the property of Republic is not supported or established by the evidence. While it is true that after Republic's first demand for the scrap, it made no further demand therefor for some time after the delivery of materials by Machine Works had ceased in 1952, there is nothing in the record indicating that Republic transferred title to this scrap and there was evidence given by a dealer in such scrap that customarily the scrap belonged to the person who furnished the sheet steel. It also appears from invoices furnished by Machine Works that the heater heads and bottoms were made from "customer" material. Appellant contends that the parties adopted a practical construction of the agreement and that by reason thereof any scrap metal belonged to Machine Works. The fact that Republic did nothing further about the scrap steel after the telephone conversation until the conclusion of their business arrangements in March, 1952, does not in our opinion amount to an estoppel or an agreement to transfer title to the scrap to the Machine Works. Estoppel was not alleged or proved and cannot be here considered. *Bruner v. Van's Markets*, 103 Cal.App.2d 135, 143, 229 P.2d 56.

[3] It is next contended by appellant that the trial court's findings of fact and conclusions of law to the effect that the 12 and 14 inch dies were not operable and complete and is not supported or established by the evidence. This contention is likewise without merit. It appears from the record that in March, 1952, plaintiff Machine Works agreed in writing to sell to defendant Republic dies, operable and complete, with component and interchangeable parts, for the production of tank heads and bottoms for the sum of \$5,000, itemization of which was contained in an inventory attached. These dies were inspected by Mr. Stevens and were delivered to Republic and paid for by it. Mr. Reginald King, an expert tool and die maker, testified that he saw the dies furnished by Machine Works; "that unless the tooling is apart, it is impossible to say if it is operable and workable"; that "the only way you can tell whether they will function is to put them in a press and try them"; that he found the dies involved were not operable; that "they would make a part but not a good part"; that on the 12 and 14 inch dies the outside blanking rings were in bad condition and had to be replaced; that his firm repaired these dies and the fair and reasonable price charged and billed to Republic for the work was \$773.76 on the 12 inch heads and \$828 on the 14 inch heads; that these sums were paid by Republic; and that he would say that "if the customer was satisfied with their product, it was operable".

[4-6] The criticized findings are supported by substantial evidence and cannot be here disturbed. As was said in *Mattoon v. Steiff*, 123 Cal.App.2d 512, 513, 266 P.2d 920, 922:

"In reviewing the evidence, all conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences must be indulged in to uphold the judgment if possible. The power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court. When two or more inferences can be reasonably

deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689."

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



129 Cal.App.2d 463

Thomas EISTRAT, Plaintiff and Appellant,
v.

William I. HUMISTON, Defendant and Respondent.
Civ. 20395.

District Court of Appeal, Second District,
Division 2, California.

Dec. 9, 1954.

Hearing Denied Feb. 2, 1955.

Action, on note, wherein defendant filed cross-complaint. The Superior Court of Los Angeles County, John J. Ford, J., entered order denying plaintiff's motion for change of venue, and plaintiff appealed. The District Court of Appeal, McComb, J., held, inter alia, that plaintiff, by demurring to cross-complaint before he filed his motion for change of venue, and by not filing affidavit of merits with application for change of venue waived right to change of venue.

Order affirmed and appeal dismissed.

1. Venue ⇐77

Plaintiff, by demurring to cross-complaint before he filed his motion for change of venue, and by not filing affidavit of merits with application for change of venue, waived right to change of venue. Code Civ. Proc. § 396b.

2. Appeal and Error ⇐105

Order denying motion to dismiss action, before any evidence is offered, is not appealable.

Thomas Eistrat, Alhambra, in propria persona.

Francis B. Cobb and W. Floyd Cobb, Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal by plaintiff from an order denying his motion for change of venue. There is also a purported appeal from the order of the trial court denying his motion to dismiss.

I

The order denying the motion for change of venue.

June 3, 1953, plaintiff filed an action in the superior court of Los Angeles County to recover on a promissory note in the amount of \$30,000.00. At the time plaintiff filed the action there was pending in the superior court of Tulare County an action by plaintiff against defendant in respect to a timber contract for which the note of \$30,000.00 was the major consideration.

Thereafter, defendant filed an answer and cross-complaint to the action filed in Los Angeles County. On August 10, 1953, plaintiff filed a demurrer to the cross-complaint which was overruled, and on November 18, 1953, filed a notice of motion for change of venue. No affidavit of merits accompanied this motion. A notice of motion to dismiss the cross-complaint was also filed.

[1] Since plaintiff demurred to the cross-complaint without filing a motion for change of venue on any of the statutory grounds he waived his right to have the motion granted. (Cook v. Pendergast, 61 Cal. 72, 75 et seq.; Wadleigh v. Phelps, 147 Cal. 541, 542, 82 P. 200.)

It is also true that since plaintiff did not file an affidavit of merits as required by section 396(b) of the Code of Civil Procedure, he waived his right to have the motion for change of venue granted. (Noland v. Noland, 52 Cal.App.2d 58 [1], 125 P.2d 847.)

II

The motion to dismiss.

[2] An order denying a motion to dismiss an action before any evidence is offered is not an appealable order. (Parker v. Owen, 83 Cal.App.2d 474, 189 P.2d 81.) Hence, the purported appeal from such order must be dismissed.

The order denying the motion for change of venue is affirmed. The appeal from the order denying the motion to dismiss the action in the trial court is dismissed.

MOORE, P. J., and FOX, J., concur.



129 Cal.App.2d 558:

Gladys S. CONE, Plaintiff and Appellant,
v.

UNION OIL COMPANY OF CALIFORNIA,
Defendant and Respondent.

Civ. 20325.

District Court of Appeal, Second District,
Division 2, California.

Dec. 15, 1954.

Action against employer for alleged breach of collective bargaining agreement. From adverse judgment of the Superior Court of Los Angeles County, George Francis, J., the plaintiff appealed. The District Court of Appeal, Fox, J., held that where plaintiff and union of which she was a member admittedly failed to complete and exhaust grievance and arbitration procedures contained in collective bargaining agreement, plaintiff had no cause of action against employer for alleged breach of collective bargaining agreement in failing to employ her in accordance with terms and conditions of the agreement.

Judgment affirmed.

1. Judgment \Rightarrow 186

While summary judgment proceeding is not a substitute for a regular trial and

does not authorize trial of bona fide issues of fact which affidavits may reveal, it permits court to pierce allegations of pleadings to ascertain whether a genuine cause of action in fact exists or whether defense interposed is sham or feigned.

2. Judgment ⇨185.2(8)

If affidavits disclose no triable issue of fact and affidavits in support of motion for summary judgment state facts which, if proved, would support a judgment in favor of moving party, then summary judgment is proper. Code Civ.Proc. § 437c.

3. Judgment ⇨185.2(8)

The propriety of granting or denying a motion for summary judgment depends upon sufficiency of affidavits that have been filed. Code Civ.Proc. § 437c.

4. Judgment ⇨185.2(7)

Where plaintiff failed to file any affidavit in opposition to defendant's affidavit filed in support of motion for summary judgment, court was entitled to accept as true facts therein stated, which were within personal knowledge of affiant and to which affiant could competently testify. Code Civ. Proc. § 437c.

5. Judgment ⇨185.2(9)

Plaintiff's failure to file counter affidavits to defendant's affidavits submitted in support of motion for summary judgment could not be remedied by resort to the pleadings. Code Civ.Proc. § 437c

6. Labor Relations ⇨416

Where plaintiff and union of which she was a member admittedly failed to complete and exhaust grievance and arbitration procedures contained in collective bargaining agreement, plaintiff had no cause of action against employer for alleged breach of collective bargaining agreement in failing to employ her in accordance with terms and conditions of the agreement.

7. Labor Relations ⇨416

A party to a collective bargaining contract which provides grievance and arbitration machinery for settlement of dispute within scope of such contract must exhaust those internal remedies before re-

sorting to courts in absence of facts which would excuse pursuance of such remedy.

8. Judgment ⇨185.3(13)

Affidavit submitted in support of motion for summary judgment disclosing that affiant had been in charge of and personally conducted negotiations with union on behalf of company during all times mentioned in affidavit was a sufficient showing of affiant's competency to testify to facts stated in the affidavit.

Thomas D. Griffin, Long Beach, for appellant.

L. A. Gibbons, Douglas C. Gregg, A. Andrew Hauk, Sheldon C. Houts, Los Angeles, Ball, Hunt & Hart, Long Beach, for respondent.

FOX, Justice.

This is an appeal by plaintiff from a summary judgment in favor of the defendant Union Oil Company.

Plaintiff seeks to recover damages for the alleged violation by the defendant of a collective bargaining agreement between the Company and Local No. 128, Oil Workers International Union, C.I.O. Plaintiff claims that the Company breached certain agreements settling a strike that began in September, 1948, and ended on January 10, 1949. She alleges that the Company's breach consists of failing to employ her in accordance with the terms and conditions of this agreement and of employing others having less seniority than she had in job openings for which she could qualify. Plaintiff bases her suit on Exhibit A to the complaint, which is the strike settlement agreement with an addendum thereto. Plaintiff prays for wages allegedly accrued from January 10, 1949, to the date of filing her complaint and in addition for prospective loss of wages.

The Company, in its answer, denies liability and alleges that it has scrupulously abided by all the terms and conditions of the strike settlement. The Company also alleges that Exhibit A to plaintiff's complaint does not contain all of the addenda

which were a part of the strike settlement agreement of January 10, 1949. The Company also pleads that the failure of the plaintiff to perform certain conditions precedent in the strike settlement agreement and addenda bars the maintenance of this action.

Defendant moved for summary judgment. In support of the motion it submitted the affidavit of Kenneth E. Kingman, its vice president, who conducted all negotiations with the Union at all times involved herein. The Kingman affidavit discloses that:

1. The collective bargaining agreement upon which plaintiff seeks recovery consists of the strike settlement agreement dated January 9, 1949 (effective January 10th), and three separate addenda thereto, all of which are attached as exhibits to the affidavit.

2. By agreement between the Union, of which plaintiff was a member and which was authorized to represent her as her collective bargaining agent, and the Company the grievance procedures set up in Article VII of the prior collective bargaining agreement between the parties dated March 4, 1946, were incorporated in the strike settlement agreement for use in settling disputes.

3. These grievance procedures consisted of seven detailed and specific steps, from initiation of the grievance to final arbitration in the event settlement of the dispute should not be effected or decision rendered in the intermediate steps.

4. Plaintiff initiated grievance No. 13, raising the identical matters set forth in her complaint herein, and the grievance procedure was pursued through the first six steps.

5. Step seven of the grievance procedure provided as follows: "If the grievance is not decided by the procedure in paragraph 6 above, the representatives above mentioned shall stipulate the issues to be decided by an arbiter. The two representatives shall select a third person agreeable to both parties to decide the dispute. Should the two representatives fail to agree on a third party within seven (7) days then either party shall have the right to request the

conciliation service of the U. S. Department of Labor to assign a third party to act as arbiter. The decision of the arbiter shall be final and binding upon both the Company and the Union. In no case shall the decision of an arbiter change or modify the terms of this agreement. The expense and compensation of the arbiter shall be shared equally by the Company and the Union."

6. Although the grievance was not settled or decided in the first six steps, neither plaintiff nor the Union on her behalf requested the selection of a third arbiter to decide the dispute, nor did plaintiff or the Union on her behalf request the conciliation service of the U. S. Department of Labor to assign a third party to act as arbiter.

7. Plaintiff, and the Union on her behalf, failed and neglected to exhaust the grievance procedures incorporated in the strike settlement agreement, and particularly those contained in said Article VII of the 1946 collective bargaining agreement, in that plaintiff, and the Union on her behalf, failed and neglected to pursue or utilize the seventh step in these grievance procedures. Furthermore, at no time did she, or the Union on her behalf, present or submit to defendant any other grievance arising out of the application to her of any of the terms or provisions of the strike settlement agreement.

8. An additional procedure for the settlement of grievances, based upon the application of paragraphs 9 and 10 of the strike settlement agreement, was provided in paragraph 13 of that document, namely, reference of complaints to a special Union-Management Committee, but at no time did plaintiff or the Union, on her behalf, refer any complaint to this special committee.

9. Finally, at no time did the defendant ever fail, refuse or neglect to cooperate with plaintiff, or the Union, with respect to exhausting, pursuing, continuing or complying with the grievance and arbitration procedures.

Plaintiff does not allege in her complaint that she ever made any demand on the

Union to exhaust, pursue or continue with the arbitration of said grievance, or any other grievance, on her behalf, either pursuant to the grievance and arbitration procedure provided in Article VII of the 1946 agreement, or pursuant to the additional grievance procedure provided in paragraph 13 of the strike settlement agreement. Neither does she allege in her complaint that the defendant has refused to pursue or comply with the aforesaid grievance and arbitration procedures, nor does she charge that the Company has ever failed, refused or neglected to cooperate with her or with the Union in the pursuit or continuance of said grievance and arbitration procedures.

Plaintiff did not file any counter-affidavit, nor was any such affidavit filed on her behalf.

It is thus undisputed that plaintiff and the Union on her behalf have failed and neglected to pursue and exhaust the remedies given by the collective bargaining agreement, namely, the grievance and arbitration procedures provided therein, and that the Company was in no way in default or at fault in this regard.

[1] The obvious purpose to be served by the summary judgment procedure is to expedite litigation by avoiding needless trials. While it is not a substitute for a regular trial and does not authorize the trial of any bona fide issues of fact which the affidavits may reveal, it permits the court to pierce the allegations of the pleadings to ascertain whether a genuine cause of action in fact exists or whether the defense interposed is sham or feigned. *Kelly v. Liddicoat*, 35 Cal.App.2d 559, 561, 562, 96 P.2d 186.

[2,3] Section 437c, Code of Civil Procedure, provides, *inter alia*, that if it is claimed that an action has no merit the defendant may, upon proper notice, make a motion, supported by an affidavit of any person having knowledge of the facts, that the complaint be dismissed and judgment entered. The plaintiff, however, "by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact." If it appears from an examina-

tion of the affidavits that no triable issue of fact exists, and that the affidavits in support of the motion state facts which, if proved, would support a judgment in favor of the moving party, then summary judgment is proper. *Coyne v. Krempels*, 36 Cal.2d 257, 261, 223 P.2d 244. It is thus apparent that the propriety of granting or denying the motion depends upon the sufficiency of the affidavits that have been filed. *Kimber v. Jones*, 122 Cal.App.2d 914, 918, 265 P.2d 922; *McComsey v. Leaf*, 36 Cal. App.2d 132, 133, 97 P.2d 242; *Poochigian v. Layne*, 120 Cal.App.2d 757, 760, 261 P.2d 738.

[4,5] Since plaintiff failed to file any affidavit in opposition to the affidavit filed on behalf of the defendant, the court was entitled to accept as true the facts therein stated, which were within the personal knowledge of the affiant and to which the affiant could competently testify. *Coyne v. Krempels*, *supra*, 36 Cal.2d at pages 261-262, 223 P.2d 244; see *Holland v. Lansdowne-Moody Co.*, Tex.Civ.App., 269 S. W.2d 478, 481. Plaintiff urges, however, that the pleadings herein raise particular issues of fact which preclude the granting of a motion for summary judgment. Plaintiff has fallen into the error of relying on her complaint as a means of disputing the affidavit filed on behalf of defendant. The fallacy of this position is demonstrated in *Coyne v. Krempels*, *supra*, and *Hardware Mut. Ins. Co. v. Valentine*, 119 Cal.App.2d 125, 129, 259 P.2d 70, which lay down the rule that the failure to file counter-affidavits cannot be remedied by resort to the pleadings. As pointed out in the careful analysis of this question in the *Coyne* case, the sufficiency of the allegations of a complaint do not determine the motion for a summary judgment. Rather, it must be determined from the affidavits whether there exists a genuine issue as to any material fact. Often there is no genuine issue of fact, although such an issue is raised by the formal pleadings. Absent a genuine issue of fact as disclosed by the affidavits, a party is not entitled to proceed to trial and the court, applying the law to the uncontroverted material facts, may render a summary judgment. The sole question then

is, Is the defendant entitled to a summary judgment on the basis of the undisputed facts in the affidavit it filed in support of its motion? This question must be answered in the affirmative.

[6-8] As appears from the above facts, the correlative rights and obligations of the parties are governed by the strike settlement agreement and addenda which incorporated the grievance and arbitration procedures of Article VII of the prior collective bargaining agreement dated March 4, 1946. Plaintiff, and the Union as her collective bargaining agent, have admittedly failed to complete and exhaust such grievance and arbitration procedures. She is therefore precluded from maintaining the present action. It is the general rule that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust these internal remedies before resorting to the courts in the absence of facts which would excuse him from pursuing such remedies. *Barker v. Southern Pac. Co.*, 9 Cir., 214 F.2d 918; *Wallace v. Southern Pac. Co.*, D.C.N.D.Cal., 106 F.Supp. 742; *Buberl v. Southern Pac. Co.*, D.C.N.D.Cal., 94 F.Supp. 11; *Ringle v. Transcontinental & Western Air, D.C.*, 113 F.Supp. 897, 899; *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653, 73 S.Ct. 906, 97 L.Ed. 1325; *Reed v. St. Louis S. W. R. Co.*, Mo.App., 95 S.W.2d 887; *Glass v. Hoblitzelle*, Tex.Civ.App., 83 S.W.2d 796; *In the Matter of Consolidated Aircraft Corp.* etc., 47 N.L.R.B. 694, 705-706; 31 Am.Jur., Labor, p. 881, sec. 123. This rule, which is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts (2 Cal.Jur.2d 304, sec. 184), is based on a practical approach to the myriad problems, complaints and grievances that arise under a collective bargaining agreement. It makes possible the settlement of

such matters by a simple, expeditious and inexpensive procedure, and by persons who, generally, are intimately familiar therewith. *Utah Construction Co. v. Western Pacific Ry. Co.*, 174 Cal. 156, 159, 162 P. 631. The use of these internal remedies for the adjustment of grievances is designed not only to promote settlement thereof but also to foster more harmonious employee-employer relations. *Myers v. Richfield Oil Corp.*, 98 Cal.App.2d 667, 671, 220 P.2d 973. Such procedures, which have been worked out and adopted by the parties themselves, must be pursued to their conclusion before judicial action may be instituted unless circumstances exist which would excuse the failure to follow through with the contract remedies. *Barker v. Southern Pac. Co.*, supra; *Wallace v. Southern Pac. Co.*, supra; *Buberl v. Southern Pac. Co.*, supra; *Transcontinental & Western Air, Inc. v. Koppal*, supra; *Reed v. St. Louis S. W. R. Co.*, supra. In the instant case, plaintiff gives no facts or reasons for her failure to follow through the agreed procedure for settling her grievance. There is no denial that the matters involved in her grievance No. 13 are the same and identical with the matters which form the basis of her complaint in this suit. An examination of Kingman's affidavit discloses that he had been in charge of and personally conducted all negotiations with the Union on behalf of the Company during all the times mentioned in his affidavit. He thus made a sufficient showing of his competency to testify to the facts stated therein.

The trial court, correctly applying the law to the uncontroverted facts before it, properly granted defendant's motion for summary judgment. *Coyne v. Krempels*, 36 Cal.2d 257, 263, 223 P.2d 244; *Hardware Mut. Ins. Co. v. Valentine*, 119 Cal.App.2d 125, 129, 259 P.2d 70.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

In the Matter of the ESTATE of Cecil J.
EGGLESTON, Deceased.

Felicitas CECHOVIN, Petitioner and
Respondent,

Allen F. Frel, Executor and Respondent,

Allen F. Frel, G. L. Pitsenberger,
Legatees and Respondents,

v.

Chester Richard EGGLESTON, Contestant
and Appellant.

Civ. 20317.

District Court of Appeal, Second District,
Division 3, California.

Dec. 17, 1954.

Rehearing Denied Jan. 10, 1955.

Hearing Denied Feb. 10, 1955.

Probate proceeding. The Superior Court, Los Angeles County, John Gee Clark, J., rendered decree determining who were entitled to distribution, and a claimant appealed. The District Court of Appeal, Vallée, J., held, inter alia, that will wherein testator made gift of annuity to beneficiary and subsequently directed that if administrator could not trace beneficiary within one year, he should trace testator's son and "buy him the same treatment," disclosed an intention that beneficiary would take if she appeared prior to distribution, and failure to discover beneficiary within one year, although she was discovered prior to distribution, did not defeat the bequest.

Affirmed.

1. Wills ⇨439

In the interpretation of a will, ascertainment of testator's intention is cardinal rule of construction to which all other rules must yield. Probate Code, § 101.

2. Wills ⇨471

A clear and distinct devise or bequest cannot be affected by any other words not equally clear and distinct, or by inference or arguments from other parts of the instrument. Probate Code, § 104.

3. Wills ⇨439, 466

A will is to be examined with a view toward discovering decedent's testa-

mentary scheme or general intention, and meaning of particular words, phrases, and provisions shall be subordinated to such scheme, plan, or dominant purpose.

4. Wills ⇨470

Will would be considered from its four corners.

5. Wills ⇨639

A condition will not be implied from indefinite language.

6. Wills ⇨455

Where will was drawn by testator, without legal aid, he would not be supposed to have used the same niceties of descriptive language as would be employed by an expert draftsman.

7. Wills ⇨656

Will wherein testator gave annuity to beneficiary and subsequently directed that if administrator could not trace beneficiary within one year, he should trace testator's son and "buy him the same treatment," disclosed an intention that beneficiary would take if she appeared prior to distribution, and failure to discover beneficiary within one year, although she was discovered prior to distribution, did not defeat the bequest.

8. Descent and Distribution ⇨47(2)

Under statute relating to pretermitted heirs, an heir is intentionally omitted from a will if it appears that testator had the omitted person in mind, and having him in mind, omitted him from provisions of the will. Probate Code, § 90.

9. Descent and Distribution ⇨47(2)

Where will made gift to beneficiary and provided, in effect, that if beneficiary were not discovered prior to distribution, gift should pass to testator's son, son was intentionally omitted in case beneficiary was located, and he was not a pretermitted heir. Probate Code, § 90.

Maury, Larsen & Hunt, Steiner A. Larsen, Los Angeles, Joseph Matsen, and Clyde R. Cory, Jr., Seattle, Wash., for appellant.

Watson, Hart & Mieras, Montgomery G. Rice, and Ernest R. Utley, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal from a decree determining who are entitled to distribution of an estate under a will. Prob.Code, §§ 1080-1082.

On May 3, 1951, Cecil J. Eggleston and his wife Kay made a homicide and suicide pact by which they agreed that he would first take her life and immediately thereafter take his own. The same day Cecil executed two instruments which were admitted to probate as his holographic will. The first instrument reads:

"May———1951

"To Whom it May Concern—

"Our love has brought us to these conclusions. Kay will leave me by my own hand and I will join her a few minutes latter.

"Our last will and testament We leave our insurance and worldly goods in the Hands of Allen Frie as administrator with instructions in a separate letter this date in my handwriting. C Jay Eggleston

"My interest in any Phillopine Island business or the mercury holdings in Mexico are to be the sole possions of Howard J Kane

"Longbeach 908515

"C Jay Eggleston

"Witness Kay Eggleston

"Notify Allen Frei at once

"c/o Federal Bureau of Investigation
"Beaumont Texas"

The second instrument reads:

"Thursday—

"Wednesday May 3—51

"Dear Al—

"Well old goat it seems we are about to impose on you once more. You will favor us by acting as receiver for our estate. Inclosed find list of debts that should be paid.

"Here are two life Ins Policys with Massachusetts Mutual one for 10,000⁰⁰ which should clean up the bills and leave you something for the Trouble. The

other for 50,000⁰⁰ we want you to earnestly work on. Kays sister

"Felicitas or Phyllis Checkovin last address known to her was

5305 Wetzel Ave

Cleveland Ohio

should receive \$40,000⁰⁰ in the form of a dissapating annuity to

[Page 2]

No. 2

be paid in monthly installments. In the event of her death previous to this date the same amount divided among ~~her~~ the children of her body equally, and in the same way—annuities to be paid by the month.

"The balance of \$10,000⁰⁰ you should devide equally between yourself and Lt G. L. Pitsenberger to be used any way you please, as token of our friendship.

"We have also 2700⁰⁰ in E Bonds that belong to Pits please see that he gets them.

"Thanks & Swell Sailing

"Jay & Kay

"see page No. 3"

[Page 3]

No. 3

"In the event you can not trace Kays sister in one year. then try to trace my son Chester Richard Eggleston Born to Cecil Jessie Eggleston and Beulah Penny Eggleston in Sioux City Iowa

"St Joseph Hospital

"March

"Dr Gillespie in 1924 or 25 and buy him the same treatment.

"Cremate us with a very inexpensive ~~funeral~~ & scatter us in Apple Valley.

"Kays sickness has become unbearable and my back has kept me ready for a long time.

"Make it fun not sorrow.

"Jay—"

The compact was carried out and Cecil died that day. The "Al" referred to is Allen F. Frei, who was appointed executor of the will. The \$50,000 policy was not payable in the form of annuities.

Felicitas Checkovin was not located until April 1953, about 22 months after the will was admitted to probate. The son was located in January 1953.

The court found: the bequest to Felicitas had not lapsed; the testator intended to, and did, name Felicitas as the specific beneficiary of a \$40,000 "dissipating annuity"; by the use of the language, "In the event you can not trace Kays sister in one year then try to trace my son * * *," the testator did not, nor did he intend to, establish a condition terminating the bequest to Felicitas in the event she was not traced within one year; said language is not equally as clear as the bequest; the testator intended by that language only to fix a time when an effort to trace the son should commence; there is no language in the will cutting off the clear bequest to Felicitas; the general testamentary plan of the testator contemplated that the bequest should be paid to Felicitas in the event she could be traced before distribution of the estate, and in the event of her death, to the children of of her body, if any, equally. Among the conclusions of law was one that the son is not a pretermitted heir.

The court decreed that the estate was bequeathed and devised four-fifths to Felicitas Checkovin, and one-fifth equally between Allen F. Frei and G. L. Pitsenberger. Chester Richard Eggleston, son of the deceased, appeals.

Appellant claims the trial court's interpretation of the will is contrary to the intention of the testator and unreasonable. He says the testator obviously intended to make a bequest of \$10,000 to be divided between Frei and Pitsenberger and a bequest of an annuity to his sister-in-law "provided, however, that she be located within one year, and if she was not located within one year the bequest of said annuity go to his son." He argues that the bequest to the sister-in-law was a conditional bequest; that it was a valid condition; and since it was not fulfilled, the sister-in-law not having been located within one year, it failed. We are in accord with the trial court's construction of the will.

[1-6] In the interpretation of a will, ascertainment of the intention of the tes-

tator is the cardinal rule of construction, to which all other rules must yield. Prob. Code, § 101; *In re Estate of Salmonski*, 38 Cal.2d 199, 209, 238 P.2d 966; *In re Estate of Lawrence*, 17 Cal.2d 1, 6, 108 P.2d 893. *In re Estate of Foley*, 126 Cal.App.2d 810, 273 P.2d 26. A clear and distinct devise or bequest cannot be affected by any other words not equally clear and distinct, or by inference or arguments from other parts of the instrument. Prob.Code, § 104; *In re Estate of Salmonski*, supra, 38 Cal.2d 199, 209, 238 P.2d 966; *In re Estate of Moorehouse*, 64 Cal.App.2d 210, 215, 148 P.2d 385. The instrument is to be examined with a view of discovering the decedent's testamentary scheme or general intention; and the meaning of particular words, phrases, and provisions shall be subordinated to such scheme, plan, or dominant purpose. *In re Estate of Raymond*, 96 Cal.App.2d 808, 814, 216 P.2d 515. Another rule to be applied is: Did the testator intend by the language used, considering the will "from its four corners," to make locating Felicitas within one year a condition precedent to her receiving the bequest? Cf. *In re Estate of Taylor*, 119 Cal.App.2d 574, 259 P.2d 1014. A condition will not be implied from indefinite language. *Id.*, 119 Cal.App.2d 581, 259 P.2d 1014; *Buttram v. Finley*, 37 Cal. App.2d 459, 464, 99 P.2d 1093. And since the will was drawn by the testator, obviously without legal aid, "he may not be supposed to have used the same niceties of descriptive language as would be employed by an expert draftsman." *In re Estate of Soulie*, 72 Cal.App.2d 332, 334, 164 P.2d 565, 567.

There is no doubt but that Cecil and Kay intended that the will should express their mutual intentions. The first instrument says, "Our love has brought us to these conclusions," and "We leave our insurance and worldly goods in the Hands of Allen Frei * * *." The second instrument says to Frei, "* * * we are about to impose on you once more. You will favor us by acting as receiver for our estate," and "The other for \$50,000.00 we want you to earnestly work on."

The will is to be construed with these expressions in mind. For reasons which do not appear, the instruments were not admitted to probate as Kay's will.

The will clearly makes an absolute bequest to Kay's sister Felicitas of \$40,000 from a \$50,000 insurance policy in the form of a dissipating annuity to be paid in monthly installments. This bequest is followed by the provision that in the event of the death of Felicitas prior to the date of the will the same amount is to be divided among the children of her body equally, and in the same way. Following these provisions there is a bequest of the balance of the \$50,000 insurance, a statement about some "E Bonds," and the signatures "Jay & Kay." Apparently as an afterthought, the testator wrote on a separate page the provision about tracing Felicitas.

There is nothing in the latter provision reflecting a clear change of intent with respect to the bequest to Felicitas. There is no expression which would suggest that the testator intended that the absolute bequest to her should be subject to the condition that she be located within one year. The language, "In the event you can not trace Kays sister in one year then try to trace my son," is merely a direction to the executor. It says to him—trace Felicitas; if you have not traced her within one year, then try to trace the son. It merely directs that a search be commenced for the son if Felicitas is not located within a year. It does not say, "stop looking for Felicitas." The executor is only to "buy him [the son] the same treatment" if Felicitas is not traced. It does not, as appellant says, state that Felicitas was to be traced in one year nor does it bequeath the \$40,000 annuity to Felicitas "provided, however, that she be located within one year, and if she was not located within one year the bequest of said annuity go to his son."

Appellant's contention ignores the fact that the will provides that should Felicitas have predeceased the testator the bequest was to go to her children. The will is silent as to the length of time the executor may have within which to lo-

cate the children of Felicitas if she was not living. If Felicitas was not living, the children, if they were in existence, not the testator's son, would have been entitled to their mother's share. The dominant intent is clearly evidenced that Felicitas should receive the bequest if she were alive at the time the will was made, and if she were not, that her children should receive it.

[7] As the learned trial judge stated, the provision for the wife's sister was the principal and primary consideration of the decedent. The bequest to Felicitas is clear and distinct. It cannot be affected by the tracing provision which is not equally clear and distinct. The testator did not evidence an intention that if she was not located within a year she lost the bequest. A reasonable construction of the will in its entirety is that it was his intention that if she appeared prior to distribution she would receive the bequest, and it was only in the event she was not traced during administration that she would not take.

[8,9] Appellant contends that in the event it is held that Felicitas takes under the will he is a pretermitted heir and entitled to distribution of the entire estate. Probate Code, section 90, provides: "When a testator omits to provide in his will for any of his children, * * * and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate." It clearly appears from the will that the omission was intentional. Under the statute an heir is intentionally omitted from a will if it appears from the will that the testator had the omitted person in mind, and having him in his mind, has omitted him from the provisions of the will. In re Estate of Trickett, 197 Cal. 20, 23, 239 P. 406; In re Estate of Talmage, 114 Cal.App.2d 18, 21, 249 P.2d 345; In re Estate of Cochems,

112 Cal.App.2d 634, 637, 247 P.2d 131. As we have seen, the will bequeathed part of the insurance to Felicitas and in effect provides that appellant shall take that bequest if Felicitas is not located prior to distribution of the estate. Thus the testator had appellant in mind, and having him in mind intentionally omitted to provide for him should Felicitas be located. Further, in his reply brief, appellant appears to have abandoned this contention. He says, "Respondent's Point IV is that no question of pretermission arises in this case. We are inclined to agree."

We conclude that the probate court correctly construed the will.

Affirmed.

SHINN, F. J., and PARKER WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.



129 Cal.App.2d 536

HART AND BURNS, Inc., a corporation,
Plaintiff and Appellant,

v.

J. L. ROBINSON, Individually and J. L. Robinson, doing business under the fictitious name and style of Circle J-R Ranch, Defendant and Respondent.

Civ. 5030.

District Court of Appeal, Fourth District,
California.

Dec. 14, 1954.

Action by seller to recover balance due on price of paint. Buyer counterclaimed and cross-complained for damages for breach of warranty. The Superior Court, Riverside County, O. K. Morton, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that evidence was sufficient to support finding that oral statements by seller's agent amounted to an

express warranty that paint would stand up for at least three years.

Judgment affirmed.

1. Sales ⇨441(2)

In action for damages for breach of warranty concerning paint, evidence was sufficient to support finding that oral statements by seller's agents amounted to an express warranty that paint would stand up for at least three years.

2. Sales ⇨448

In breach of warranty action, wherein issue was whether the paint sold had been properly applied, trial court's reference, at conclusion of trial, to evidence that application had been partly under direction of seller's agent did not constitute a finding of negligence on agent's part, and did not subject judgment to objection of being based on this agent's negligence, an issue not pleaded.

3. Sales ⇨442(1)

Statute relating to damages allowable for breach of warranty of quality did not govern damages allowable in action for breach of warranty that paint would stand up for three years. Civ.Code, § 1789(7).

4. Sales ⇨442(6)

Where paint, which had been warranted durable for three years, failed to stand up, buyer could recover amount paid, cost of labor and rental of spray rig used in applying paint, and cost of removing the paint. Civ.Code, § 1789(6).

5. Sales ⇨441(4)

In action by buyer of paint to recover damages for breach of warranty that paint would stand up for three years, evidence supported award of amount paid, cost of labor and rental of spray rig and cost of removing paint.

Best, Best & Krieger, Enos C. Reid, Riverside, for appellant.

Welch & McFarland, John D. McFarland, Riverside, for respondent.

BARNARD, Presiding Justice.

The plaintiff was engaged in the manufacture and sale of paints in Riverside

County. The defendant owned a ranch on which he was raising horses. In dividing the land into paddocks and other enclosures he built about five miles of fencing. The fences were made of wood, except for a small piece of metal fence. Beginning in July, 1948, the plaintiff furnished paint which was applied to this fencing. The defendant paid the bill for the first batch of paint amounting to \$1018.70. The defendant made some complaint about the paint but was persuaded by the agents of the plaintiff, in January, 1949, to order a second batch of paint amounting to \$1115.72, for the purpose of painting the remainder of this fencing.

The plaintiff brought this action on October 4, 1949, seeking to recover this \$1115.72, which the defendant had refused to pay. The defendant filed an answer and counterclaim, and also filed a cross-complaint alleging damage in various amounts. He alleged both a verbal and a written warranty of the paint, and a breach of those warranties. The plaintiff answered the cross-complaint denying any breach of warranty. After a trial, the court found in favor of the defendant as to all material facts and entered a judgment denying any recovery to the plaintiff, and awarding the defendant \$4695.69 on his cross-complaint. The plaintiff has appealed from that judgment.

The respondent testified that before buying any of this paint he had several conversations with Mr. Mitchell, the appellant's Vice President in charge of sales, and with Mr. Hedgepeth, appellant's district salesman; that they approached him for the order saying they wanted to make this a fine job which they could show to other prospective customers; that Mr. Mitchell said he would guarantee the paint to last three years, but was sure it would last better than five; and that Mr. Mitchell told him this paint would be specially made for him and would be purposely made for outdoor fencing. This was confirmed by the testimony of Mr. Hedgepeth, who testified that Mr. Mitchell told the respondent that he would guarantee the paint to be made of top-grade material and would guarantee that under normal conditions it

would last from three to five years; and that he himself told the respondent "It is a five-year paint" and under normal conditions would last in the neighborhood of five years. Before the first paint was applied, the respondent was given a letter dated July 20, 1948, and signed by Mr. Mitchell as Vice President, which reads:

"This is to notify you that the special lead-free primer and top coat paint which we have manufactured especially for the Circle J-R Ranch, contains only top quality materials and is manufactured as a top quality, first line product. If properly applied with a minimum of two coats, and preferably three, it will give satisfactory performance for a minimum period of three years under normal conditions and with normal wear taken into consideration."

In January, 1949, Hedgepeth induced the respondent to take a second batch of paint to finish the painting on the remainder of the fencing, assuring the respondent of an adjustment on the paint already applied, and telling him that "Now, we have a new chemist" and that "I am going to see that everything is all right"; and further assuring the respondent that he would have no trouble with the new paint. This paint was applied to the remainder of the fencing. The evidence rather conclusively shows that this entire paint job turned out to be practically worthless. Within a few months the paint chipped, curled and peeled, and came off in large flakes. The failure of the paint was amply shown by the respondent's evidence and, to a large extent, was freely admitted by the appellant's own witnesses, some of whom made an unsatisfactory attempt to ascribe the failure to the condition of the wood. Mr. Hedgepeth said in his deposition: "It looks like hell". Practically, if not literally, this conclusion is corroborated by some twenty photographs which were admitted in evidence. If the evidence was sufficient to show a warranty, a breach of that warranty was shown beyond question.

[1] The appellant first contends that the court erred in finding that certain oral statements made to the respondent by Mr.

Mitchell and Mr. Hedgepeth amounted to an express warranty whereby appellant guaranteed that its paint would stand up for at least three years. It is argued that the only warranty given or relied on consisted of the statement in the letter of July 20, 1948; that this related to the first batch of paint only; that the oral statements made by Mitchell and Hedgepeth amounted to "sales talk" only; that the respondent did not rely on this sales talk as shown by the fact that he asked for and received this letter; and that there was no evidence disclosing any breach of warranty as to either batch of paint since the warranty was that the paint contained only "top quality materials and is manufactured as a top quality, first line product", and two of the appellant's paint experts testified that the formula which the appellant claimed to have used was in accordance with the best formulas used by paint manufacturers. While these paint experts testified that this formula was a good formula one of them, who had had many years' experience with one of the large paint companies, testified, after examining an exhibit consisting of a large quantity of flakes of paint taken from these fences, "There is something awful haywire here, but I don't know what it is." When asked, "Looking at these particular paint chips, would you say the condition is not what should be expected, based upon these particular formulas?", he replied: "Very definitely not. Both formulas should show up very well on exposure." Moreover, the warranty in the letter was not confined to the statement that only top quality materials would be used. There was a further statement that if properly applied with two coats it would give satisfactory performance for a minimum period of three years. Two coats were here applied and there was ample evidence not only that the paint was properly applied, but that it was applied under the supervision of Mr. Hedgepeth, appellant's district salesman. The evidence amply supports the finding that there were verbal warranties in addition to the letter and that these verbal warranties were also relied upon by the respondent. This evidence,

with the further evidence as to what was said by appellant's agents to induce respondent to go on with the job after some complaint had been made, sufficiently support the finding and conclusion that the warranties given applied to both batches of paint. The statements made by appellant's agents were sufficient to constitute warranties and do not constitute mere "sales talk", as was held under different circumstances in the cases cited by appellant. There was ample evidence that the further representation that this paint would be specially prepared or manufactured for this particular use was breached. That representation was made on several different occasions and was included in the letter of July 20, 1948, which refers to the "paint which we have manufactured especially for the Circle J-R Ranch". Mr. Burns, appellant's Vice President in charge of production, testified that this paint was prepared in accordance with their standard formula, that no changes were made by way of a chemical nature or by the admission or omission of other ingredients, and that the only difference was in giving the respondent the color he asked for. Appellant's production superintendent testified that he mixed the paint in accordance with their standard formula and that he was not concerned with the proposed use to which the paint would be put, or the surface to which it was to be applied.

[2] It is next contended that the court erred in basing its findings upon the claimed negligence of one of appellant's agents when the pleadings alleged a breach of warranty only. This is based upon the court's remarks at the conclusion of the trial in which he stated that Hedgepeth "took the responsibility of mixing the paint, telling them how to apply it and so forth", and in which the court quoted from Hedgepeth's testimony as to his service and supervision in connection with the application of the paint. There is evidence that Hedgepeth was present when the painting was first started by two employees of the respondent; that he mixed a number of batches of paint for them and told them how to proceed; that he was there fre-

quently during the first few weeks of painting; that he procured a spray gun, helped with the operation thereof, and came out when there was trouble with the spray gun; that he finally suggested that they have professional painters; that the ones he recommended were hired and finished the work, using a larger spray gun; and that he came out less frequently to inspect the work while the professional painters were at work. This evidence was introduced for the purpose of showing that the paint was properly applied, as was specified in the warranties, and not for the purpose of showing any negligence on the part of appellant's agents. The findings were based entirely upon breach of warranty, and not upon any such negligence.

Finally, it is contended that the damages awarded were based upon issues not properly before the court, and that they were not sufficiently supported by the evidence. It is argued that the damages allowed could not reasonably be supposed to have been within the contemplation of the parties at the time of entering into the agreement; that under Subdivision (7) of Section 1789 of the Civil Code the damages should have been measured by the difference in the value of the paint as delivered and its value had it answered to the warranty; that the cost of renting the spray rigs and cost of applying the paint could not have been within the contemplation of the parties since the problem of applying the paint was the buyer's problem; that the cost of removing this paint could not be a damage flowing from the breach of any warranty; and that this element of damage was not allowable because the evidence failed to show that the respondent had already had the paint scraped off the fence.

[3] The proper measure of damages here is that set forth in Subdivision (6) of Section 1789 of the Civil Code, which provides: "The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events from the breach of warranty." Subdivision (7) of that section does not fit such circumstances as here appear, as pointed out in the

decision in *Shearer v. Park Nursery Co.*, 103 Cal. 415, 37 P. 412.

[4, 5] The items of damage allowed here consisted of the \$1018.70 which the respondent had already paid to the appellant, the cost of labor and rental of spray rigs used in applying the paint, and the sum of \$2353.60 which was shown by the evidence to be the cost of removing the paint, and to be necessary before other paint could be applied. The cost of removing the paint was an item of general damage, *Kincaid v. Dunn*, 26 Cal.App. 686, 148 P. 235, and the amounts paid for the paint and for applying it to the fences were losses which would directly and naturally result in the ordinary course of events from the breach of the warranties. All of these items would reasonably be supposed to have been within the contemplation of the parties at the time of entering into the agreement, and the court was justified in so holding. The evidence sufficiently supports the allowance of these items of damages. There is no merit in appellant's further contentions, in this connection, that the court failed to allow it any credit because of some advantage to the respondent in that the paint would probably preserve the wood to a certain extent, and that the evidence disclosed that the paint on the metal fencing remained in good condition. The metal fencing was an insignificant portion of the total fencing involved and the appellant, relying on its defense that there had been no breach of warranty, brought out no evidence upon which a credit allowance could be computed. Moreover, the evidence would have justified the allowance of a larger amount for removing the paint, and it does not definitely appear that the court did not thereby make some allowance for the small amount of paint which appears to have been satisfactory. The evidence discloses that in all practical effect this entire painting job was a complete loss to the respondent.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

129 Cal.App.2d 519

John Winston McDONALD and Gladys Williams, Plaintiffs, Cross Defendants, Appellants,
v.

Bueford JONES, Floreda Jones, Robert B. Newman, Gertrude B. Newman, Mutual Mortgage Company, a Corporation, John 1, John 2, Jane 1, Jane 2, A and B, a copartnership, and Black Co., a Corporation, Defendants,

Bueford Jones, Floreda Jones, and Robert B. Newman, Cross Complainants, Respondents.

Civ. 20066.

District Court of Appeal, Second District,
Division 2, California.

Dec. 14, 1954.

Rehearing Denied Jan. 3, 1955.

Hearing Denied Feb. 10, 1955.

Action for alleged conspiracy to defraud plaintiffs of their interest in a lot by assignment of defaulted trust deed and notes to co-defendants who foreclosed and purchased the property at the foreclosure sale. From a judgment in the Superior Court for Los Angeles County, Philbrick McCoy, J., for the defendants the plaintiffs appeal. The District Court of Appeal, Moore, P. J., held that there were no prejudicial trial errors and that the plaintiffs failed to establish a cause of action.

Affirmed.

1. Conspiracy ⇐19

Where plaintiffs alleged that defendant assigned trust deed on which they were in default to co-defendants without plaintiffs' consent pursuant to a conspiracy allegedly to defraud the plaintiffs, proof of a confidential relationship between plaintiffs and defendants was properly limited to the immediate transaction and other transactions were irrelevant and proof of friendliness and social relation between the parties was not proof of confidential relations.

2. Fraud ⇐7

In the absence of proof of the exercise of undue influence, mere friendship is not a confidential relationship.

3. Trusts ⇐107

To sustain a presumption of constructive fraud in establishing a trust, more is

required than mere confidence in another's integrity.

4. Conspiracy ⇐19

Fraud ⇐28

Where money was loaned by defendant to plaintiffs on their application and defendant assigned the plaintiffs' notes secured by trust deed to co-defendants, that defendant did not notify the plaintiffs of his assignment of the notes to the co-defendants did not constitute fraud and that co-defendants declared plaintiffs in default and purchased property at foreclosure sale did not prove fraud or conspiracy.

5. Evidence ⇐130

In suit to establish an alleged conspiracy to defraud the plaintiffs by assignment of their secured notes and trust deeds to co-defendants who purchased at a foreclosure sale exclusion of a third deed of trust was proper as res inter alios acta.

6. Evidence ⇐130

Quietting Title ⇐44(2)

In suit to establish alleged conspiracy to defraud plaintiffs of their title in lot by assignment of their defaulted secured notes and trust deeds to co-defendants who purchased at foreclosure sale of the property, where co-defendants filed a cross-complaint to quiet title to the lot only the written documents proving the debts and trust deeds securing them were relevant, and affairs between other parties were irrelevant.

7. Conspiracy ⇐18

In suit for alleged conspiracy to defraud plaintiffs of their title in a lot by assignment of defaulted trust deed and notes to co-defendants and the foreclosure and sale thereof, an assignment not related to the trust deed under which the property was sold was properly excluded, and the fact that the pleading referred to it, did not make it relevant.

8. Conspiracy ⇐19

In suit for alleged conspiracy to defraud plaintiffs of their title in a lot by assignment of defaulted trust deed and notes to co-defendants who foreclosed and purchased the property at a sale, evidence that plaintiffs attempted to refinance the second trust deed and that they had received a

memorandum of loan commitments or the amount of money required to pay off the encumbrances was properly excluded as immaterial.

9. Evidence ⇨318(7)

In suit for alleged conspiracy to defraud plaintiffs of their title in a lot by assignment of defaulted trust deed and notes to co-defendants who foreclosed and purchased the property, exclusion of an affidavit of a party not shown to be a wrongful actor related to the sale was proper as hearsay.

10. Conspiracy ⇨19

In suit for alleged conspiracy to defraud plaintiffs of their title to a lot by assignment of defaulted trust deed and notes to co-defendants who foreclosed and purchased at sale, question to plaintiff whether he trusted the co-defendants was properly excluded on the ground that plaintiffs had not established a basis for confidential relationship.

11. Appeal and Error ⇨743(1)

Assignment of error as to an inquiry by the trial court was not required to be considered where no citation to the transcript was given.

12. New Trial ⇨13

A new trial is not to be granted merely because of the disappointment of the defeated party.

A. V. Falcone, Los Angeles, for appellants.

Thomas G. Neusom, Los Angeles, for respondents.

MOORE, Presiding Justice.

Plaintiffs appeal from the judgment which determines that they have no title to or interest in lot 67 of Granada Tract. The court found that on December 21, 1951, respondents Jones became the owners of such lot; that appellants have no title or

right thereto and concluded that Bueford and Floreda Jones, cross complainants, are owners in fee simple, and entitled to the possession of lot 67 subject to the lien of a trust deed in favor of the Broadway Federal Savings and Loan Association and that such owners are entitled to judgment quieting their title to the lot against appellants.

It appears that prior to February 24, 1950 appellant McDonald as owner of lot 67 had borrowed \$3,000 from Robert and Gertrude Newman and conveyed the lot by a second trust deed to the Liberty Escrow Company to secure their promissory note in the sum of \$3,000.¹ On February 24, 1950 appellants made a new loan from the Newmans and delivered a new note for \$3,000 and a new second trust deed conveying lot 67 to secure the debt. The latter instrument was executed also in favor of Liberty Escrow Company, trustee for the benefit of the Newmans. It was thereafter assigned to the Joneses. By reason of default in the payments required by the note, the trustee declared default, its election to sell, recordation of the notice and thereafter sold the property at public sale and Bueford and Floreda Jones bid it in. Appellants' alleged grievance arises out of that sale.

As grounds for reversal, appellants assert: (1) a proper determination was impossible because of "considerable confusion"; (2) exclusion of evidence of confidential relations; (3) misapplication of the law of conspiracy; (4) the court's prejudicial criticisms of appellants' counsel; (5) erroneous rulings on the admissibility of evidence.

No such confusion appears to have occurred as would have led or as did lead the court into error. Counsel who appeared for appellants at the trial² was not prompt or orderly in presenting his evidence and erroneously offered incompetent or irrelevant proof. The court patiently advised the counsel to improve his own knowledge of

1. Such trust deed was junior to another by appellant McDonald in favor of the Broadway Federal Savings and Loan Association as security for a loan of \$9,700 on February 17, 1950. Inasmuch as this note for \$9,700 and its trust deed secur-

ing it are not involved in this controversy and remains unimpaired, further mention thereof will not be necessary.

2. Such counsel is not appellants' attorney on appeal.

the case and explained the difficulties encountered. Claim is now advanced that the court found appellants were not in default on their second note. Such contention is without support. By their own admission there was due a total of \$2,448.40 on such note and trust deed and \$1,849.77 due on their first trust deed, a total of \$4,298.17. The record of the trial discloses no confusion except that of appellants' trial attorney.

In their second amended complaint appellants allege that defendants entered into a wrongful conspiracy to defraud appellants of their title and interest in lot 67 and that pursuant to such conspiracy Newman assigned the trust deed dated February 24, 1950, to Bueford and Floreda Jones "without plaintiffs' consent," then defendants "conspired to defraud plaintiffs, and orally stated to plaintiffs that if they would persuade Eva Gordon, as holder of the \$10,000 trust deed," to assign it to Bueford Jones as security, and that defendants would hold same as additional security and that if plaintiffs would pay \$50 as incidental costs, defendants would make additional advances from time to time to prevent the first trust deed's foreclosure and would grant plaintiffs a year to refinance the property and repay all sums due defendants.

[1-4] Pursuant to such pleading, appellants attempted to establish their confidential relationship with defendants, especially with Mr. Newman. They now complain that the court excluded their offers of proof of such relations. The court correctly ruled that evidence of such relationship was limited to the immediate transaction; that other transactions were irrelevant; that friendliness and social relations were not proof of confidential relations. Appellants were, indeed, nothing more than debtors first of Newman, then by virtue of the latter's assignment, of Jones. In the absence of proof of the exercise of undue influence, mere friendship is not a confidential relationship. To sustain the presumption of constructive fraud, more is required than mere confidence in another's integrity. *Hausfelder v. Security First National Bank*, 77 Cal.App.2d 478, 482, 176 P.2d

84; *Mead v. Smith*, 106 Cal.App.2d 1, 5, 234 P.2d 705; *Jackson v. Gorham*, 98 Cal. App. 112, 116, 276 P. 391. In no instance cited by appellants does it appear that the court misunderstood either the law of confidential relations or of conspiracy. Nothing in the record shows any fraudulent act of respondents. The money was loaned by Newman to appellants on their application. Newman assigned the notes to Jones who thought maybe they should be paid. Appellants did not pay them according to their terms. There is no reason why Newman should have notified appellants of his assignment to Jones. That he did not do so is not fraud. That Newman, as a broker, served Jones; that Jones declared appellants in default on their notes; that he declared a default and caused a sale and purchased the property—these are innocent acts, done every day many times. They do not prove a fraud or a conspiracy. No showing was made that defendants or any of them combined to accomplish by concerted action a criminal purpose, or a lawful purpose by a criminal means. See *Wells v. Lloyd*, 6 Cal.2d 70, 72, 56 P.2d 517; *Rose v. Ames*, 53 Cal.App.2d 583, 588, 128 P.2d 65; *Lynch v. Rheinschild*, 86 Cal.App.2d 672, 676, 195 P.2d 448.

[5] Appellants complain of rulings on the admission of writings and testimony, viz.:

1. The exclusion of a third deed of trust. It was *res inter alios acta*.

[6] 2. Permitting McDonald to testify that he had given a deed to his sister, Eva Gordon, who at McDonald's request, had signed several documents. Neither those rulings nor any others disclose a prejudicial error. The issues were rather simple. The affairs between other parties were not relevant. Only the written documents proving the debts and the trust deeds securing them were material, pertinent or competent as to the cross complaint. The rulings on the issues of fraud and conspiracy raised by the second amended complaint were all correct.

Now with reference to the assignments of miscellaneous rulings:

[7] (1) Appellants' offer in evidence of an assignment by Eva Gordon to Bueford

Jones was properly rejected. That instrument was not related to the trust deed under which the property was sold. The fact that the pleading referred to it did not make it relevant. Eva's assignment was not alleged as a conspiratorial transaction.

(2) McDonald's "answer as to his \$50 payments he made to defendants" was that they were "to be used as payments to Mr. Newman concerning the foreclosure" and was stricken as immaterial and speculative.

[8] (3) Appellants' attempt to prove that in the spring of 1952 they took steps to refinance the second trust deed was abortive. The court required them to show first, "what went on in 1950 and 1951 * * * prove your case in an orderly fashion." No later offer was made. Their attempt to prove they had received a memorandum of loan commitments or the amount of money required to pay off the encumbrances were not material.

[9] (4) The exclusion of the affidavit of Gladys Williams as hearsay was a proper ruling. It was not shown to be a wrongful act or related to the sale. The record is not entirely clean so far as concerns appellant McDonald. He had recorded the trust deed for \$10,000 in favor of Eva Gordon without consideration and later conveyed legal title to Gladys Williams.

[10] (5) The question to McDonald, to wit, "Did you trust Bueford Jones and Robert Newman?" was properly excluded on the ground that appellants had not established "a basis for confidential relationship." The allegation "that plaintiffs trusted defendants" and relied on their promises, was not sufficient to warrant the evidence that McDonald trusted Jones and Newman. No conspiracy was proved.

(6) Appellants' attempt to prove McDonald's relationship with defendants failed because no bases for their counsel's questions had been established.

(7) Questions to McDonald regarding Newman's use of Jones' name in property transactions were excluded because of the forms of the questions. After the court had explained the errors in counsel's questions, the latter did not repeat his attempts.

There is no justification for the suggestion that McDonald was prevented from questioning Jones "regarding the details."

[11] (8) The assignment that the court inquired how McDonald's license as a broker was terminated was prejudicial fails for the reason that no citation to the transcript is given. Appellants say "the court inquired." Respondents imply that appellants' counsel asked the question.

(9) Appellants say that although the court "was satisfied from the evidence plaintiffs were not in default it gave them no relief." Nothing is found in the record that the court was ever satisfied that appellants were not at fault. Respondents had advanced on the debt secured by the first trust deed \$1,849.77 as a protection to their note secured by the second trust deed then delinquent.

(10) Complaint is made that as to the \$10,000 note and third trust deed the court was in error and that it did not completely dispose of all matters. What the error was and what issues were not completely disposed of were not particularized and are unknown to this court. The court below found that McDonald was in default on his note and that its security should be foreclosed; that respondents did not commit any fraud against appellants; that no conspiracy was formed to cheat McDonald or Mrs. Williams; that the amount bid at the sale of lot 67 was due by appellants on their indebtedness; that the sale was regular and legal.

(11) Appellants' allusion to the status of Gladys Williams is a correct statement. It does not assert error. The court in response to counsel's argument said: "I haven't found any testimony to show she [Gladys Williams] had any interest whatsoever in the property or that she was in any wise harmed." No mention of her name appears in the finding except that she claims an interest in and to lot 67 adverse to respondents but that it is without right; she has no estate or interest in lot 67 or in any part thereof.

(12) There was no proof of a resulting trust in lot 67 in favor of appellants.

[12] (13) No substantial grounds for a new trial were presented. Of course such motions are "important" but the duty of a court to grant one is determined by well defined legal concepts which must be satisfied before they are granted. A new trial is not allowable merely because of the disappointment of the defeated party.

Finally, the complaint that the trial court "repeatedly interrupted plaintiffs' case often with erroneous rulings, caustically criticized plaintiffs' counsel" resulting "in plaintiffs' prejudice" is not borne out by the transcript. The court was painstaking and patient. No ruling has been found to have prejudiced appellants.

Affirmed.

McCOMB and FOX, JJ., concur.



129 Cal.App.2d 676

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Luis J. LEON and Jimmy Carroll,
Defendants,

Jimmy Carroll, Defendant and Appellant.
Cr. 5178.

District Court of Appeal, Second District,
Division 2, California.
Dec. 20, 1954.

Defendant was convicted of first degree murder. The Superior Court, Los Angeles County, David Coleman, J., rendered judgment and denied motion for new trial, and defendant appealed. The District Court of Appeal, Fox, J., held that evidence whether victim had been killed while defendant and the person who killed victim were perpetrating a robbery sustained conviction for first degree murder.

Judgment and order affirmed.

277 P.2d—31

1. Homicide ☞235

In prosecution for murder, evidence whether victim had been killed while defendant and the person who killed victim were perpetrating a robbery sustained conviction for first-degree murder. Pen.Code, §§ 31, 187, 189.

2. Homicide ☞308(5)

Where evidence showed that defendant, if guilty at all, was guilty of murder in the first degree, in that homicide took place during perpetration of a robbery, instruction on second-degree murder was properly refused. Pen.Code, §§ 31, 187, 189, 211a.

3. Homicide ☞228(1)

Elements of corpus delicti which must be shown in a homicide case are identity of body of the deceased and fact that he was killed by an unlawful or criminal agency.

4. Homicide ☞228(2)

In murder prosecution, evidence of identity of body of the deceased and evidence whether he had been killed by an unlawful or criminal agency sufficiently established the corpus delicti.

Lowell Lyons, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

FOX, Justice.

The district attorney filed an information accusing Luis J. Leon and Jimmy Carroll of a violation of Penal Code section 187, in that on August 8, 1953, they murdered Vincent M. Ortiz. The case was tried before a jury which returned a verdict finding both defendants guilty of murder in the first degree, and fixed the penalty at life imprisonment. Carroll appeals from the judgment of conviction and from the order denying his motion for a new trial.

Vincent M. Ortiz owned and operated a pharmacy on the corner of Gage Avenue and Hammel Street (5800 Hammel) in Los Angeles. On the morning of August 8th, when Mr. Ortiz left his home to go to his drug store, he had in his possession a smooth, tan leather wallet.

The Ortiz pharmacy was divided into two portions; the front portion contained the soda fountain, stools, display windows and counters; the rear portion of the store was separated from the front section by a wall and swinging doors. There were two cash registers in the drug store, one on the west end of the soda fountain and the other on the rear counter. Carroll met his co-defendant, Leon, at Chiquita's Cafe on South Soto Street, Los Angeles. They spent the day driving around the East Los Angeles district in Carroll's car. During the course of their travels in the evening they passed the Ortiz pharmacy. Having observed there was only one man inside, they returned at once to the pharmaceutical establishment. They parked in the rear, on Hammel Street. Both Carroll and Leon entered the drug store. Leon led the way with Carroll a few feet behind. When the latter turned to look out of the door to see if anyone was approaching he heard a shot. Ortiz, who was on the opposite side of the counter from Leon, began to run toward the rear. Carroll started to run out of the drug store, but Leon called him back. He returned, climbed over the counter, and looked into the rear part of the store where he saw Leon standing near Ortiz who was lying on the floor. He heard Ortiz ask Leon to get him a doctor, quick. But Leon did nothing and made no reply.

Leon ordered Carroll to get the money from the cash registers. When the cash register on the rear counter failed to open, Carroll advised Leon of his difficulty and the latter, with a handkerchief in his hand, opened it. Carroll took the money out of this cash register and proceeded to the other at the soda fountain from which he took all the paper money and part of the silver. He then left the store and returned to his car. In a few seconds Leon followed and the two men drove away.

While defendants were leaving the scene, Carroll saw Leon take some money out of a light tan wallet which he knew did not belong to Leon. Defendants drove to Ramona Gardens where Carroll's girl friend, Alice, lived. There defendants split the proceeds of the Ortiz robbery, each getting approximately \$46. Leon there dis-

posed of Ortiz' wallet by throwing it into the incinerator.

At approximately 11:00 p.m., on August 8th, Mary Torres, who was visiting her mother who lived on Hammel Street, directly to the rear of the Ortiz drug store, saw a car drive up and park in front of her mother's home. The car did not have its headlights on. A few minutes later Mary heard a gunshot which she thought came from the corner drug store. On looking out the window she saw two men approaching the parked car from the drug store. Although she gave a general description of the men, she was not able to identify either of them.

Shortly after 11:00 p.m., Rudy Gutierrez went into the Ortiz drug store to buy some cigarettes. There was no one in the front part of the store. After waiting, he knocked on a table, but no one came. As he stood there reading the paper two other men entered. When a further knocking failed to bring any response the three men went to the rear of the drug store where they found Ortiz lying face down on the floor, apparently dead. He was wearing a druggist's smock which was turned up over the belt line; his left rear pants pocket was partially turned out; his wallet was gone. There was blood on the smock and on the floor. There was a hole in the smock which appeared to have been made by a bullet. An autopsy by Dr. Newbarr revealed that Ortiz had been shot in the chest, the bullet, which was retrieved, passing through the heart. There was no evidence of powder burns on the victim or alcohol in his blood. While the doctor could not tell whether or not the wound had been self-inflicted, it was his opinion that the victim would have been in an awkward position to shoot himself. It was the opinion of an expert from the sheriff's crime laboratory that the gun had to be at least 30 inches from the smock in order not to leave powder burns on it. No gun was found on the premises and Mrs. Ortiz testified her husband never kept any firearms at his store.

Carroll was arrested at his home on October 2, 1953, at approximately 5:30 p.m. That evening he made a complete confession, which was taken down by a state-

ment reporter, in which he related all the details of the Ortiz murder and robbery. He then directed the officers to 1048 South Soto Street, pointing out the Chiquita Cafe where he had stated he and Leon met on the eventful day. He also told them the location of the drug store. The next day Leon, after being advised by Carroll that he had told the officers about the Ortiz affair, also made a detailed confession, which was taken down and read to the jury, as was Carroll's statement. Leon claimed that "the druggist had made a grab for the gun and the gun had gone off;" he admitted, *inter alia*, that he removed the wallet from the pocket of the man on the floor; that he opened the cash register for Carroll; and that after leaving the drug store they went to the home of Carroll's girl.

That same day Deputy Sheriff Jones received a .32-caliber chrome colored revolver from Mrs. Josie Perez. The officer then held a conference with Carroll, Leon, Leon's uncle—Carnacion Ramirez—and a man identified as Diaz. Officer Jones showed the gun to Leon and asked him if that was the gun he used to shoot Ortiz. Leon glanced at the gun and answered: "Yes." Leon was asked how he recognized the gun, and he replied: "Well, if you look on the side there will be a slightly rusty spot on the side." The officer turned the gun over, and Leon indicated a place just beneath the hammer where the nickel plate had corroded. Leon said he gave the gun to his uncle Carnacion Ramirez who turned it over to Diaz and that the latter pawned it to Mrs. Josie Perez for \$10.

This weapon was delivered to Mr. Lacy of the sheriff's crime laboratory. The bullet removed from the body of Ortiz by the autopsy surgeon, Dr. Newbarr, was also turned over to Mr. Lacy. He fired test shots from the gun and compared the

slugs with the bullet received from Dr. Newbarr. As a result of his comparisons, Lacy was of the opinion that the bullet which Dr. Newbarr removed from Ortiz had sufficient characteristics to identify it as having been shot from Leon's gun.

[1] Appellant's first point is that "The circumstances were entirely inconsistent with guilt and were consistent with innocence and the court erred in accepting them as consistent with guilt." The simple answer to this point is that the facts are in no way inconsistent with guilt. The evidence which the jury accepted as true was ample to establish that Carroll was a participant in the Ortiz robbery and shooting, and since Ortiz was killed during the perpetration of a robbery he was guilty of murder in the first degree. Penal Code, § 189.¹ True, Carroll did not pull the trigger, Leon having fired the fatal shot. But, because of Carroll's active participation, he was properly classified as a principal, Penal Code, § 31², and therefore equally responsible. A mere reading of the sordid story which we have summarized completely demonstrates the lack of merit in appellant's position.

[2] Appellant's second point is that the court erred in failing to instruct the jury as to second degree murder. There was no basis for such an instruction in this case. The evidence established that the homicide took place during the perpetration of a robbery. It was therefore murder in the first degree. People v. West, 215 Cal. 87, 93, 8 P.2d 463, 465; Penal Code, § 189. There was no evidence in the case which would have justified a verdict of murder in the second degree. "It was not error to refuse an instruction as to second degree murder where the evidence shows that, if guilty at all, the defendant was guilty of murder in the first degree." People v. West, *supra*; People v. Rogers, 163 Cal. 476, 482-483, 126 P. 143. In this

1. Penal Code, section 189 reads in part: "All murder which is * * * committed in the perpetration or attempt to perpetrate * * * robbery, * * * is murder of the first degree; * * *."

2. Penal Code, section 31 reads in part: "All persons concerned in the commission of a crime * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, * * * are principals in any crime so committed."

connection appellant relies on *People v. Perkins*, 37 Cal.2d 62, 230 P.2d 353, 355. That case deals with eligibility for probation, under the 1949 amendment to Penal Code, section 1203, of a party who was convicted of participating in a robbery with other defendants who were armed but who was not "himself" armed with a deadly weapon. While the court holds that such defendant was not thereby rendered ineligible to probation it points out that the fact he was unarmed "does not make him any the less, in a legal sense, guilty of robbery of the first degree * * *" ³ and that he was "guilty of first degree robbery, regardless of the precise acts which he committed personally, because he aided and abetted in its commission (Pen.Code, § 31)." Such is the identical situation in the instant case. Carroll was guilty of murder of the first degree, regardless of the acts which he committed personally, because Ortiz was murdered by appellant's confederate while they were perpetrating a robbery. Pen.Code, § 189.

[3, 4] Appellant's final point is that the evidence is insufficient to establish the corpus delicti apart from his admissions and confession and those of his partner in this criminal venture. There is no merit in this point. The elements of the corpus delicti, which must be shown in a homicide case are: (1) the identity of the body of the deceased; and (2) the fact that he was killed by an unlawful or criminal agency. *People v. Cornett*, 61 Cal.App.2d 98, 105, 141 P.2d 916. There is no question about the identity of the victim, Mr. Ortiz. That he was killed by an unlawful or criminal agency finds ample support in the evidence and the reasonable inferences therefrom. Dr. Newbarr testified that Ortiz died as a result of a gunshot through the heart; that for the wound to be self-inflicted would have required Ortiz to assume an awkward position. The absence of powder burns on his smock, the distance the gun would have had to be from his body to avoid such tell-tale marks, and the fact

that he kept no gun at his drug store and that none was found at the scene after the shooting are indeed significant. Also, Mary Torres heard the shot which came from the direction of the drug store, and then saw two men, coming from that direction, enter a car which had been parked in front of her mother's house. There was evidence that Ortiz had been robbed and that his wallet was missing. The ballistic expert, Mr. Lacy, expressed the opinion that the bullet which had been removed from Ortiz' body was fired from the gun that had belonged to Leon and which was produced by Mrs. Perez. This independent evidence is ample to fully establish the corpus delicti and at the same time to negate the possibility that Ortiz committed suicide.

The judgment and order are affirmed.

MOORE, P. J., and McCOMB, J., concur.



129 Cal.App.2d 575

Tresa A. BOLTER, Plaintiff and Appellant,

v.

Alson CLARK, Defendant and Respondent.

Civ. 20267.

District Court of Appeal, Second District,
Division 3, California.

Dec. 16, 1954.

Guest brought action against driver of automobile for injuries sustained when driver stopped automobile suddenly and guest was thrown from seat. The Superior Court of Los Angeles County, Harold B. Jeffery, J., granted driver's motion for nonsuit and entered judgment for driver, and guest appealed. The District Court of Appeal, Shinn, P. J., held that questions whether driver was intoxicated at time of

3. Penal Code, section 211a reads: "All robbery which is perpetrated by torture or by a person being armed with a dan-

gerous or deadly weapon is robbery in the first degree."

accident within meaning of automobile guest statute and whether driver was negligent and whether his alleged negligence, was reasonably attributable to his alleged intoxication, were questions for jury, but that evidence was insufficient to take case to jury on question whether driver was guilty of wilful misconduct within meaning of automobile guest statute.

Judgment reversed.

1. Automobiles ⇨245(24)

In action by guest against driver of automobile for injuries sustained when driver stopped automobile suddenly and guest was thrown from seat, question whether driver was intoxicated within meaning of automobile guest statute was for jury. Vehicle Code, § 403.

2. Automobiles ⇨245(24)

In action by guest against driver of automobile for injuries sustained when driver stopped automobile suddenly and guest was thrown from seat, questions whether driver was negligent and whether alleged negligence was reasonably attributable to driver's alleged intoxication, within meaning of automobile guest statute, were questions for jury. Vehicle Code, § 403.

3. Automobiles ⇨245(24)

In action by guest against driver of automobile for injuries sustained when driver stopped automobile suddenly and guest was thrown from seat, evidence was insufficient to justify submission to jury of question whether driver was guilty of wilful misconduct within meaning of automobile guest statute. Vehicle Code, § 403.

4. Automobiles ⇨181(1)

"Wilful misconduct" within meaning of automobile guest statute is the intentional doing of something with knowledge that serious injury is a probable, as distinguished from a possible, result, or the intentional doing of an act with a wanton and reckless disregard of its possible result. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Wilful Misconduct".

5. Automobiles ⇨181(1)

Where guest in automobile wore a brace on one leg and used crutches to walk, driver of automobile had a duty of care commensurate with likelihood that careless driving on his part would create an unusual hazard for the guest. Vehicle Code, § 403.

6. Automobiles ⇨181(1)

Automobile guest statute, which allows recovery of damages by guests only for conduct resulting from intoxication or wilful misconduct, is applicable to guest's property damage as well as personal injuries. Vehicle Code, § 403.

Stanley Fleishman, Los Angeles, for appellant.

Crider, Tilson & Ruppé, George O. West, Los Angeles, for respondent.

SHINN, Presiding Justice.

Tresa A. Bolter brought suit against Alson Clark to recover damages for injuries sustained while riding in defendant's automobile. She alleged in one cause of action that she was a passenger and was injured through defendant's negligence; in a second cause of action that she was a passenger and suffered property damage consisting of expenses incurred and wages lost by reason of her injuries; a third cause of action alleged that she was a guest and was injured as a result of defendant's negligence due to his intoxication and due also to his willful misconduct. At the close of plaintiff's evidence the court granted defendant's motion for nonsuit. Plaintiff appeals.

There was evidence of the following facts: Defendant came to plaintiff's apartment about 6:30 p. m., bringing a can of peanuts and a pint bottle of whiskey; his breath exuded alcoholic fumes which plaintiff noticed; defendant had two drinks from the bottle, about half its contents. Plaintiff had none. The parties had known each other about six years. On the evening of the accident they left the apartment together and rode to a drive-in restau-

rant where they had dinner at about 8:00 p. m. They then went for a drive. They stopped at a market where defendant made some purchases. Called as a witness under section 2055 of the Code of Civil Procedure, defendant gave his account of the accident. He was traveling east on Adams Street approaching Raymond at about 9:30 p. m.; an old car was traveling on his left. Defendant was in the outside lane. When he was some 200 feet from Raymond, he realized there was a crosswalk at the intersection. The other car was some 60 feet ahead and obstructed his view of part of the crosswalk. Defendant was going about 25 miles per hour. He had slowed down. The other car also slowed down; defendant put on his brakes gently; he did not then see a pedestrian in the crosswalk. The other car stopped suddenly. Defendant applied his brakes more forcefully. There was a pedestrian in the crosswalk. Defendant was from 25 to 40 feet away, going about 10 miles per hour. When he first saw the pedestrian the latter was moving toward the south side of the street. Defendant did not sound his horn. He uttered no warning; he did not attempt to brace plaintiff; she was thrown from her seat; defendant assisted her to her seat and drove her home and carried her inside. Defendant admitted having telephone conversations with plaintiff; that he said he did not want the matter to go to court; he may have remarked "I had some liquor that night." Mrs. Bolter testified that defendant brought a pint of whiskey to the apartment and drank about half of it in about 20 minutes. Defendant did not deny this testimony. He did testify that two drinks had never had any effect upon him that he was able to observe but he did not testify that he would be unaffected by a half pint of whiskey drunk within 20 minutes.

Plaintiff's contentions are, that giving full credit to the evidence and the inferences most favorable to her, it would have been reasonable for the jury to find that defendant was intoxicated, that he was guilty of negligence as a result of his intoxication and that he was guilty of willful misconduct. We agree with the first

and second contentions and disagree with the third.

[1] The evidence tending to prove intoxication was that defendant had liquor on his breath when he came to the apartment and that he had two large drinks of whiskey some 20 minutes apart. He did not testify to the size of the drinks. Defendant did not deny that he brought a bottle of whiskey to the apartment and drank half of it, although he did testify that two drinks would not affect him. Mrs. Bolter had ridden with defendant before. She was with him some two hours from the time they left the apartment until the accident. During that time they had dinner and drove about until 9:30 p. m. She did not testify that defendant's speech or conduct indicated intoxication or was otherwise than normal. He was driving somewhat faster than usual, she said, and his stops were somewhat more abrupt than usual. Neither the speed nor the stops evoked any complaint or any anxiety on her part. Defendant is correct in saying that in all the cases of intoxication relied upon by plaintiff, *Johnson v. Marquis*, 93 Cal.App.2d 341, 209 P.2d 63; *Erickson v. Vogt*, 27 Cal.App.2d 77, 80 P.2d 533; *Lindemann v. San Joaquin Cotton Oil Co.*, 5 Cal.2d 480, 55 P.2d 870; *Knickrihm v. Hazel*, 3 Cal.App.2d 721, 40 P.2d 305; *Smith v. Baker*, 14 Cal.App.2d 10, 57 P.2d 960, there was not only evidence of drinking but also of conduct of a reckless and irresponsible nature which was indicative of intoxication of the driver. However, defendant does not cite any authority to the proposition, nor argue that it is necessary to prove that one accused of intoxication was driving a car recklessly in order to prove that he was intoxicated. We do not believe that a court could properly hold, as a matter of law, that a half pint of whiskey, consumed over a period of some 20 minutes, would not produce a state of intoxication. The most that defendant would be justified in contending on that score would be that it is a matter upon which reasonable minds might differ. We therefore conclude that the question of Clark's intoxication was for the jury.

[2] Defendant contends further that there was no evidence of negligence, and also that if there was negligence, it was not reasonably attributed to defendant's intoxication. The fact that plaintiff was thrown from her seat indicated that the car was stopped with a violent jerk due to the sudden appearance of a pedestrian in the crosswalk. That was defendant's version of the incident. But, assuming the truth of that statement, would defendant have seen the pedestrian sooner or stopped less abruptly if he had exercised ordinary care or had been sober? These are not questions of law. Who can say that the accident would certainly have happened if Clark had been sober or had been more alert. We cannot, and we think the court should have submitted these questions to the jury. There was sufficient evidence to support findings that defendant failed to exercise ordinary care and that he was so affected by the liquor he had consumed as to be unable to make use of his faculties in a normal manner or to exercise sound and prudent judgment in the circumstances which he encountered. See *Knickrihm v. Hazel*, 3 Cal.App.2d 721, 727, 40 P.2d 305, supra.

[3-5] We have not found in the record any evidence that would have supported a finding of willful misconduct. In *Van Fleet v. Heyler*, 51 Cal.App.2d 719, at page 727, 125 P.2d 586, at page 590, the court stated: "There are conflicting statements in the decisions which undertake to define 'wilful misconduct.' But on consideration of the cases on the subject, and reconciling them as far as possible, we find them to divide 'wilful misconduct' into two distinct lines of action, either of which will render a driver liable to his guest for its results, as follows: first, 'the intentional doing of something * * * with a knowledge that serious injury is a *probable* (as distinguished from a possible) result'; and, second, 'the intentional doing of an act

with a wanton and reckless disregard of its *possible* result.'" Mrs. Bolter wore a brace upon one leg, due to a condition resulting from polio. She walked with crutches. We recognize that defendant had a duty of care commensurate with the likelihood that careless driving upon his part would create an unusual hazard for his guest. It was the sort of care that is required to prevent harm to one who is delicate and peculiarly susceptible to injury. Defendant should have been extremely careful to see that no injury befell plaintiff, but we can point to nothing in his conduct which would indicate that his actions were intentional or that his conduct was wanton or reckless. No doubt the sudden stopping of the car was instinctive. But if defendant was negligent because of his failure to exercise extreme care for the safety of his guest this would fall short of willful misconduct.

[6] Plaintiff's final point is that she suffered property damage consisting of medical expenses incurred, wages lost and impairment of earning ability and that for these she could recover for simple negligence. She says that section 403 of the Vehicle Code which allows the recovery of damages by guests only for conduct resulting from intoxication or willful misconduct does not apply to property damage. The point is not well-taken. In actions for injuries to the person, damages are allowed for expenses necessarily incurred in the care and cure of the injured person, for pain and disability and for loss of time and impairment of earning capacity. 14 Cal.Jur. 2d, §§ 150 to 154. Hence section 403 of the Vehicle Code has application to all damages that are recoverable by a guest in an action for personal injuries. It was error to grant a nonsuit.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ.,
concur.

CHAPMAN COLLEGE, a California corporation, Plaintiff and Appellant,
v.

Russell H. WAGENER, Louise Wessel, David Armstrong, as Executor of the Estate of Anna Armstrong, Deceased, Title Insurance & Trust Company, a corporation, **Rose A. Wagener**, **Alfred Wessel**, Defendants and Respondents.*

Russell H. WAGENER, Louise Wessel, David Armstrong, as Executor of the Estate of Anna Armstrong, Deceased, Cross-Complainants,
v.

CHAPMAN COLLEGE, a California corporation, and Title Insurance & Trust Company, a corporation, Cross-Defendants.
Civ. 20227.

District Court of Appeal, Second District,
Division 2, California.

Dec. 14, 1954.

Hearing Granted Feb. 10, 1955.

Action by purchaser to reform contract for purchase of land. Vendor cross complained, raising issue of no contract. The Superior Court, Los Angeles County, A. A. Scott, J., rendered judgment of rescission, and purchaser appealed. The District Court of Appeal, Moore, P. J., held that where contract for sale of valuable land was carefully considered and clear in material respects, and no fraud, undue influence or mistake were present, dispute as to whether payment should be applied to interest or to principal did not warrant, under the circumstances, rescission without notice.

Judgment reversed with directions.

1. Contracts ⇨318

Equity abhors a forfeiture.

2. Contracts ⇨249

The law of rescission contemplates the concept that one party has by unfair advantage wronged the other, that the injured party may be saved from loss by notice of potential damage to his contractee, and that pursuant to such notice, the latter may restore the contractor to status quo, and avoid loss to himself.

* Opinion vacated 291 P.2d 445.

3. Contracts ⇨9(1)

The law abhors the destruction of contract because of uncertainty in some inferior particular.

4. Contracts ⇨9(1)

If a step in the process of performance of an agreement is indefinite, but is capable of being rendered definite and certain either by internal evidence or by proof aliunde, the contract is enforceable.

5. Contracts ⇨153

When clear, unambiguous language of a contract permits a complete fulfillment of the covenants assumed by the contracting parties and promotes purposes of agreement, that construction is preferable rather than a destruction of the contract or a re-writing of its terms into a new document.

6. Contracts ⇨143

It is not the function of a court to rewrite the clear terms of a lawful contract.

7. Appeal and Error ⇨842(8)

When an appeal depends solely upon the construction of the language of the contract, reviewing court determines its meaning as a matter of law. Civ.Code, § 1639.

8. Vendor and Purchaser ⇨101

Where contract for sale of valuable land was carefully considered and clear in material respects, and no fraud, undue influence or mistake were present, dispute as to whether payments should be applied to interest or to principal did not warrant, under the circumstances, rescission without notice. Civ.Code, §§ 1688, 1689, 1691.

Bromley, Ritter & Lindersmith, A. G. Ritter, Los Angeles, for appellant.

R. D. Sweeney, J. E. Simpson, John R. Y. Lindley, Los Angeles, for respondents.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment of rescission after it had sued to reform a contract for the purchase of land. The cross complaint raised the issue of no contract, alleging that there had been no agreement upon the same thing.

June 15, 1949, appellant by written contract agreed to purchase from respondents 934 acres of land for \$1,500,000, of which \$150,000 was paid in cash. The balance was evidenced by three promissory notes aggregating \$1,350,000 payable to the three sellers, each bearing interest at two per cent per annum on the unpaid principal. The contract provided that (1) the land should be conveyed to a subdivision trust, subdivided and sold; (2) the balance of \$1,350,000 was to be paid by the trustee from a percentage of the proceeds received from the sale of the land; (3) the notes were to provide that *all payments thereon shall first be credited on interest and balance on principal.*

The conveyance of the land to appellant through escrow was simultaneous with the execution and delivery of the promissory notes and deed of trust securing them. The notes as executed did not contain the term above italicized. However, certain sales were made of the subdivided land and the proceeds were apportioned to respondents¹ and appellant. After operations had continued for nine months, a dispute arose. The college claimed that the sums received by it should be applied first toward the payment of interest then toward principal, according to the contract. As the dispute continued, appellant paid to respondents the percentages from sales of parcels as provided by paragraphs (a), (b) and (d) of the contract which payments were to be applied on the purchase price. As they received such moneys, respondents executed requests for reconveyances which effected releases of the parcels from the lien of the deed of trust.

But respondents contended that such sums paid to them should be applied exclusively on the principal of the indebtedness. Also, they insisted that, in addition to such payments of principal, the college should be required to pay interest. After respondents had threatened to declare a default under the three promissory notes and deed of trust, the instant action was commenced.

By its complaint, appellant demanded a reformation of the notes and trust deed on the grounds of mutual mistake (count 1) and a declaration of the rights of the parties under the contract (count 2). By their cross complaint, respondents demanded a rescission of the entire transaction. The court found that there had been no meeting of the minds of the parties on the question of the division and application of the proceeds of the sales. The judgment cancelled the contract, the notes and deed of trust.

Appellant now contends that "the effect of the judgment * * * is to hold that the written contract which was entered into by the parties with the advice and assistance of their attorneys after protracted negotiations, the deed and other written instruments between the contending parties were of no effect whatsoever because the sellers believed that moneys from the subsequent sales of lots should be applied only toward principal of the notes and trust deed owing by the buyer and the buyer believed that the moneys to be paid the sellers should be applied first toward interest and then toward principal." Still another statement of appellant's contention is that "the court held that a misunderstanding as to the application of moneys from sales invalidated the entire agreement and all the written documents between the parties * * * and refused to declare the rights of the parties under the contract or notes * * * refused to interpret the meaning of the written instrument but instead set them all aside in their entirety."

It may serve to clarify and classify certain factual statements hereinafter occurring to interject more of the background. Respondents are the devisees of one H. C. Fryman, deceased. His estate was probated in Los Angeles County. The estate was in need of funds to pay its indebtedness. For that purpose respondents borrowed \$150,000 from the college for the purpose of paying the federal estate tax of the estate and other necessary expenses. The payment of that sum as a loan to the Fryman heirs turned out to be the

1. The notes held by respondents for the \$1,350,000 were as follows: Wagener,

\$900,000; Armstrong, \$225,000; Wessel, \$225,000.

down payment on the purchase price of 934 acres. The balance of \$1,350,000 was to be paid from sales of the lands which were to be subdivided and sold. Until the college should receive back the \$150,000 advanced, it was to pay respondents only 30 per cent of the gross sales price on the tenth day of each month from escrows closed in the preceding month. Thereafter, respondents were to receive monthly the first \$7,500 net resulting from the sale of the real property, and in addition thereto, 30 per cent of the gross proceeds from sales above the \$7,500.

The Findings.

The court found the sale had been made on the terms above recited (second paragraph) and that three notes aggregating \$1,350,000 were executed in favor of respondents. They were secured by a trust deed conveying the land to the Title Insurance and Trust Company as trustee, and were to be paid as follows:

"(a) Until the Buyer shall have received from sales made by it of the real property herein purchased the sum of One Hundred and Fifty Thousand Dollars (\$150,000.00), the Buyer agrees to pay to the Sellers, on the tenth day of each month, thirty per cent (30%) of the gross sales price of said real property for sales fully completed, through escrows closed, in the preceding month.

"(b) Subsequent to the Buyer's recovery of the said sum of One Hundred and Fifty Thousand Dollars (\$150,000.00) in the preceding paragraph (a) referred to, the Buyer shall pay monthly to the Sellers the first Seventy-Five Hundred Dollars (\$7500.00) net received from the sales of said real property so completed by the Buyer, and in addition thereto, the Buyer shall pay to the Sellers, monthly, thirty per cent (30%) of the gross sales price of said real property; provided, however, that said thirty per cent (30%) shall not be paid upon said sum of Seventy-five Hundred Dollars (\$7500.00) net. The said payment of Seventy-five Hundred Dollars (\$7,500.00) and said thirty per cent (30%) of the gross sales price shall be paid to the Sellers on the tenth day of each month

on sales completed, through escrows closed, by the Buyer in the preceding month. 'Net' or 'net received from sales' as herein used is defined to be the gross sales price, less usual and customary real estate brokers' commission paid, escrow fees, and charges and cost of Policy of Title Insurance.

"(c) Notwithstanding the provisions of said paragraphs (a) and (b), all moneys due and payable under said trust deed notes shall become due and payable within fifteen (15) years from the date of said notes.

"(d) Notwithstanding the provisions of (a), (b), and (c) last stated, the Sellers shall receive a minimum of Twenty-Five Hundred Dollars (\$2500.00) per acre for each acre of the said real property sold by the Buyer, herein called 'minimum release price', and the Buyer shall not be entitled to the release of any of the said real property sold by it from the lien of the deed of trust, except on payment to the Sellers of not less than Twenty-five Hundred Dollars (\$2500.00) for each acre of said property sold by the Buyer, except as provided in paragraph 5(b) hereof."

It was further found that the contract provided for the creation of a subdivision trust with the Title Insurance and Trust Company as trustee to provide a method of payment to the sellers of the principal and interest and to relieve both parties of bookkeeping and to assure proper distribution to sellers of the amounts due them; the trust to continue until all sums due sellers shall have been paid; "said trust shall provide that whenever the trustee shall have available funds in said trust resulting from sales made by the buyer, the trustee shall pay interest on said trust deed notes on the first day of each month * * * and if said funds are inadequate to pay in full the interest due on all of said trust deed notes, then such interest as is paid shall be prorated and credited * * * in proportion to the face amount of each note."

The court further found (VII) it to be the contention of plaintiff that the provision of Paragraph 4, subparagraph II of the

contract, reading: "Said notes shall provide that all payments made thereon shall first be credited on interest and the balance on principal" means and was understood by plaintiff to mean and should be interpreted to mean that all payments agreed to be made by plaintiff to sellers should be credited first on interest and then on principal.

"That it is and was at all times herein mentioned the contention and understanding of the said sellers * * * that the said quoted provision of said contract did not apply to the balance of the purchase price of \$1,350,000.00 to be paid * * * as provided in subdivisions (a), (b) and (d) of Paragraph 4, Subdivision II of said contract, and that all moneys to be paid to Sellers on the 10th day of each and every month based upon and being a percentage of the gross or net sales prices of said real property for sales fully completed through escrows closed, and the minimum release price moneys to be paid to Sellers, all as provided in subdivisions (a), (b) and (d) of said Paragraph 4, Subdivision II, of said Exhibit '1', were payments solely upon the purchase price of said \$1,350,000.00, that said purchase price was principal and that all moneys paid to Sellers on said purchase price, as provided in said subdivisions (a), (b) and (d), were to be credited and applied solely upon said principal purchase price and none thereof upon interest; * * * that interest at the rate of two percent per annum was to be paid annually by plaintiff to Sellers whether there were or were not sales of real property, and that interest would be paid monthly to said Sellers by the subdivision Trustee to be designated in accordance with Paragraph 9 of said contract, payable on the first day of each month if the said subdivision Trustee had in its possession funds available from the plaintiff's share of the proceeds derived from said sales available therefor, said monthly interest payments to be made after the payment to said Sellers of the release price moneys to be paid to them on the purchase price as provided in said subdivisions (a), (b) and (d) * * * that the above quoted language relied upon by plaintiff refers and applies only to pay-

ments of moneys to be made by Buyer to Sellers on the anniversary date of the said notes, or to voluntary payments which plaintiff might make but was not required to make from proceeds of sales, and that such payments only were to be first credited on interest and then on principal * * *

"The Court finds that the above referred to provisions of said contract * * * are inconsistent and make the said contract uncertain and ambiguous, and that the provisions respecting the application of payments made were material provisions of said contract.

"The Court finds that by virtue of the foregoing all parties did not agree upon the same thing in the same sense with respect to the application of payments to be made to the Sellers from sales of said parcels of real property as provided in Paragraph 4, Subparagraph II, subdivisions (a), (b) and (d) of said contract, and that there was therefore no meeting of the minds of the parties as to said provisions and no mutual consent of the parties thereto, and that there was no contract between the parties for lack of such mutuality of consent.

"VIII

"That it was the intention, understanding, and belief of the plaintiff in executing said contract, Exhibit '1', that all payments to be made by plaintiff to Sellers on said notes would be first credited to interest and then to principal irrespective of the source from which said funds were derived.

"That it was the intention, understanding and belief of Russell H. Wagener, Louise Wessel and Anna Armstrong that all payments of money to be made to them upon the said principal balance of the purchase price of \$1,350,000.00 as release price moneys to secure the release from the lien of the deed of trust of parcels of said real property so sold as provided in said subdivisions (a), (b) and (d) of Paragraph 4 of Subparagraph II of said Exhibit '1' were to be credited solely on principal * * *

Findings X and XI declare the parties agreed to the elimination of the provision for the formation of a subdivision trust

for the sale of the lands; finding XII recites an agreement to delete from the promissory notes the provisions that payment be credited on interest and the balance on principal and that plaintiff's contention to the effect that the notes and trust deed were all parts of the same transaction were untrue.

Finding XIII declares the promissory notes were drawn by the attorneys of both parties acting together and were approved by both plaintiff and defendants and their attorneys and that the deed of conveyance and the deed of trust were duly executed and deposited with the Title Insurance and Trust Company.

By finding XIV the court determines that the notes and trust deed were not the result of a mutual mistake of plaintiff and the payees nor as a result of a mistake of one of the parties which the other at the time knew or suspected. "There was no meeting of the minds of the parties with respect to the application of the payments to be made as provided in paragraphs (a), (b) and (d) of said promissory notes, and the said promissory notes and deed of trust executed by plaintiff, and the said deeds * * * conveying title to said property to the plaintiff, are void for lack of mutuality of consent of the parties in that the parties did not all agree upon the same thing in the same sense."

The findings then recite the number of sales of the land made, showing 62 were completed prior to October 9, 1952, for the total amount of \$415,671.13. After finding the contract of June 15, 1949, the grant deed to appellant, respondents' quitclaim deed to appellant, the three promissory notes and the trust deed void for lack of mutuality of consent, the findings recite that, after demand and threat served upon plaintiff to pay interest in accordance with the contentions of defendants or the latter would take legal action, appellant instituted the instant action to determine the rights of the parties.

By finding XXV the court determined that defendants gave no notice of rescission of any document, and were not required to do so.

Finally, the court found that except as specifically declared, "it cannot grant plaintiff any relief" under the count for declaratory relief. From such findings the court concluded that all documents relating to the transaction between the parties should be cancelled and the transaction to be void on the ground of mutual mistake.

Rescission Not Justified.

To hold that a dispute between parties to an agreement as to the meaning of some of its terms constitutes ground for adjudging that the agreement is void because the minds of the contracting parties did not meet is a definite retrogression of the law. For what purpose did an enlightened bar through weary years strive for the enactment of the statute providing for declaratory relief? If a genuine controversy exists between the two parties over a contract they made with serious purpose, why should either party surrender valuable rights he holds by virtue of such contract? Merely because contracting parties disagree as to the meaning of one clause in a writing of many covenants, should a court snatch from one signatory all the gains available? To say that a contract should, under the circumstances, become only a "scrap of paper" and the owner thereof penalized by a deprivation of all his rights thereunder is an abuse of the ramparts of equity.

[1] In the instant matter, the parties negotiated for some weeks to effect the transaction in which both took some pride. They had retained honorable and able counsel to advise them. The attorneys collaborated in ironing out the details that were agreed upon. Neither is either party nor any lawyer in their employ suspected of overreaching. Respondents had land to sell and appellant desired to own it. They reached terms in the normal, usual way and operations under their writing proceeded for a number of months. Appellant made no attempt to obviate its obligations. It affirmed the contract in all its provisions. Unable to prevail upon its contractees it presents to the court a straightforward declaration of its claim and of the positions

taken by both in their negotiations. If appellant's contention that certain words should be inserted by the court to express the mutual agreement of the parties, plaintiff was not in default. On the other hand, if the position taken by respondents had appealed to the court as correct, plaintiff should have been directed to comply with a judgment declaring the true terms thereof. If either party had refused to comply with the judgment, the remedy prescribed by the contract, the notes and the trust deeds could have been applied. Respondents had every right protected by their right of foreclosure. Prior to the filing of the cross complaint, rescission had not been suggested. All parties interested considered the documents to be valid and in full force and effect. The dispute did not bring into question the validity or the wisdom of the contract. They differed merely on the manner or order of the application of payments. Instead of advising plaintiff as to a reasonable interpretation of the writings by a declaratory judgment the court declared a forfeiture of all plaintiff's rights in the contract. Equity abhors a forfeiture. But instead of abhorrence, the judgment raises the standard on behalf of forfeiture and condemns the suppliant to "walk the night." If the plaintiff here involved, under the circumstances here outlined, with a valuable contract in operation can be tossed into limbo on so slight an excuse as is presented, what security has any person in the possession of rights gained by contract?

[2] The entire law of rescission contemplates the concept that one party has by unfair advantage wronged the other; that the injured party may be saved from loss by notice of his potential damage to his contractee; that pursuant to such notice, the latter may restore the contractor to *statu quo* and avoid loss to himself. Not a feature of the contract of sale herein was objectionable. Though they did mutually revise it by eliminating the subdivision trust, that change was made without detriment or shock. The details agreed upon were first considered by wise and sagacious counsel. The plan of acquiring the funds with which to make payment for the land

was orthodox. But because appellant's construction of the clause relating to the application of the payments, without even a threat, respondents sue to rescind the entire transaction. There was neither undue influence, fraud, mutual mistake, mistake of fact nor any other occurrence cognizable in equity upon which to base an action for rescission and no opportunity to save itself from total loss of its contract was allowed appellant. No mistake in the preparation of the document was made that went to the vitals of the contract: but only a failure to understand how moneys contracted for, and which were actually paid, should be applied.

[3, 4] Such a disagreement with respect to a mere detail is not sufficient cause for avoiding a contract involving property worth in the raw one and a half million dollars. But on finding two parties, honorable and in good faith, zealously attempting to perform their agreement, the chancellor should have construed the writing by which both parties would then abide. The law abhors the destruction of contracts because of uncertainty in some inferior particular but requires an interpretation that will effect the reasonable intention of the parties. *Bettancourt v. Gilroy Theatre Co. Inc.*, 120 Cal.App.2d 364, 367, 261 P.2d 351. If a step in the process of performance of an agreement is indefinite, but is capable of being rendered definite and certain either by internal evidence or by proof aliunde, the contract is enforceable. *Ibidem*; see *Vierra v. Shaffer*, 113 Cal.App.2d 768, 772, 248 P.2d 992.

[5-7] When the clear, unambiguous language of a contract permits a complete fulfillment of the covenants assumed by the contracting parties and promotes the purposes of the agreement, that construction is preferable rather than a destruction of the contract or a rewriting of its terms into a new document. It is not the function of a court to rewrite the clear terms of a lawful contract. *Nourse v. Kovacevich*, 42 Cal.App.2d 769, 772, 109 P.2d 999; *Mitchel v. Brown*, 43 Cal.App.2d 217, 221, 110 P.2d 456; *Vierra v. Shaffer*, *supra*; 12 Cal.Jur. 2, 325. When an appeal depends solely upon the construction of the language of a con-

tract, the reviewing court determines its meaning as a matter of law. Civ.Code, sec. 1639; *Sass v. Hank*, 108 Cal.App.2d 207, 211, 238 P.2d 652; *Cousins Investment Company v. Hastings Clothing Company*, 45 Cal.App.2d 141, 147, 113 P.2d 878.

There is nothing in the record to justify the conclusion that there was no binding contract. It was not unlawful and the public interest would not have been prejudiced by it. Civ.Code, secs. 3406-3408. It was capable of performance. No doubt existed as to the moneys payable or as to the times of payment. The share due each respondent was clearly ascertainable. The means and method of foreclosure for delinquency were not unknown. It is an elaborate contract worthy of the stupendous subject involved. Moreover, the contracting parties chose their own method of enforcing performance by the buyer of the land, to wit, foreclosure of the trust deed, in event of default in payments due on the notes. By adopting such process, which has been in use from time immemorial, they arranged it so that in the event a payment should become delinquent, several steps were made necessary before the obligor on the notes could be deprived of ownership of the land: (1) demand for performance; (2) declaration of default to the trustee; (3) publication of notice of default and intention to sell the land for the purpose of enforcing payment of the notes; (4) sale by the trustee. At any time prior to the sale, the payor on the notes could have defeated the loss of its title by paying either the disputed items or the entire indebtedness. Notwithstanding the choice by the parties of such arrangement in the trust deed, out of a clear sky respondents demand

a judgment rescinding the contract, the notes and the trust deed and the court found that "under the circumstances of this case defendants were not required to give any notice of rescission or to restore or offer to restore to plaintiff anything they had received." By what facts or law was the court guided to make such finding? No proof was made of respondents' inability to give notice or of appellant's inability to receive and understand its contents. As to the law, the Civil Code provides an elaborate scheme for the extinction of contracts. Secs. 1688-1691. Section 1689 prescribes six conditions, under any one of which "a party to a contract may rescind."² Not only was no notice given by respondents, but no ground for rescission is found in the record. If one existed, still the scheme which the trust deed provided for the benefit of its beneficiaries would prevail over any statutory procedure for the reason it had been adopted by the contracting parties as the means by which the payees of the promissory notes could enforce payment.

If appellant's conclusion at the time of filing its action was correct, namely, that it did not owe anything and that all payments due under the notes were fully paid, surely no action could have prevailed against it; if it had been in error, the court could have so decreed without loss to any one. Appellant might have paid respondents if it had been in error and if it had been correct, respondents would have continued to take their payments in the future, as contended at all times by appellant during the 29 months prior to the filing of the action.

[8] From the facts found, the conclusions made did not necessarily follow. From an interpretation of the contract with

2. Section 1689, Civil Code.

"A party to a contract may rescind the same in the following cases only:

1. If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party;

2. If, through the fault of the party

as to whom he rescinds, the consideration for his obligation fails, in whole or in part;

3. If such consideration becomes entirely void from any cause;

4. If such consideration, before it is rendered to him, fails in a material respect, for any cause;

5. By consent of all the other parties; or,

6. Under the circumstances provided for in sections 1785 and 1789 of this code."

or without the aid of evidence aliunde, it was competent for the court to determine the covenants agreed upon. The parties agreed, one way or the other: either as appellant contends or as respondents affirm. If upon another trial, the court should determine that the interpretation of the agreement is in accordance with appellant's thesis, it will so adjudge and the payments made will be applied in accordance with the terms of the contract. If, on the other hand, the court should find the true interpretation of the contract accords with contention of respondents, it will so adjudge and specify a time within which the college shall make any delinquent payments and upon its failure to comply therewith, it will be subject to the foreclosure provisions of the trust deed.

It is therefore ordered that the judgment is reversed and the court below is directed to try the issue of the proper interpretation of the contract and make appropriate orders in accordance with the views herein expressed.

McCOMB and FOX, JJ., concur.



129 Cal.App.2d 579

Henry PETERSON, Plaintiff and
Respondent,

v.

PERMANENTE STEAMSHIP CORPORATION,
Defendant and Appellant.

Civ. 16034.

District Court of Appeal, First District,
Division 2, California.

Dec. 17, 1954.

As Corrected on Denial of Rehearing
Jan. 14, 1955.

Hearing Denied Feb. 10, 1955.

Action under Jones Act for injuries sustained by seaman who fell while keeping watch in bow of ship which was pitching and pounding. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Nourse, P. J.,

held that evidence sustained finding that employer had been negligent in respect to requiring seaman to keep lookout in the bow while traveling on rough sea.

Judgment affirmed.

1. Seamen ⇨29(2)

The right, and under certain circumstances the duty, to depart from it must be read into Coast Guard regulation requiring that all vessels navigating ocean during nighttime shall have lookout at or near the bow. International Rules, arts. 27, 29, 33 U.S.C.A. §§ 112, 121; Inland Rules, arts. 27, 29, 33 U.S.C.A. §§ 212, 221; Great Lakes Rules, rules 27, 28, 33 U.S.C.A. §§ 292, 293; Red River of the North and Tributaries Rules, rules 24, 26, 33 U.S.C.A. §§ 349, 351.

2. Seamen ⇨29(2)

The rule requiring that a lookout be stationed at the bow is not maintained rigidly when the weather makes another position more suitable.

3. Seamen ⇨29(2)

There is no duty unnecessarily to endanger the life or limbs of a seaman by strictly keeping to the position of the lookout in the bow in situations where the advantage of such position does not justify the risk involved.

4. Seamen ⇨29(2)

Failure to provide a seaman with a safe place to work includes the subjecting of a seaman to risks not justified by the object to be accomplished. Jones Act, 46 U.S.C.A. § 688.

5. Seamen ⇨29(5.14)

In action under Jones Act for injuries sustained by seaman who was thrown against hatch cover while keeping lookout, evidence sustained finding that employer had been negligent in respect to requiring seaman to keep lookout in the bow while traveling on rough sea. Jones Act, 46 U.S.C.A. § 688.

6. Master and Servant ⇨250¼ Seamen ⇨29(5.2)

What should be submitted to the jury in Jones Act and Federal Employers' Liability Act cases is a federal question. Jones

Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

7. Seamen ⇨29(5.16)

In view of fact that rule that lookout should be kept in the bow is not a plain, unfringible rule of law, question of the circumstances under which a reasonable master would deviate and whether these circumstances were present were jury questions in action under Jones Act. Jones Act, 46 U.S.C.A. § 688.

8. Seamen ⇨29(5.2)

In action under Jones Act, question whether court or jury was to decide whether circumstances required deviation from rule that lookout should be kept in bow would be decided according to federal law. Jones Act, 46 U.S.C.A. § 688.

9. Negligence ⇨124(3), 134(1)

Seamen ⇨29(5.13, 5.14)

Evidence as to customary standards of conduct is admissible in cases relating to injury to seaman as well as in other negligence cases, although in neither is such evidence conclusive of the standard of due care in relation to negligence.

10. Negligence ⇨124(3), 134(2)

Custom or usage is a matter of fact to be testified to as such by witnesses qualified by adequate knowledge, and it can be proved by instances or by direct testimony of its existence by such witnesses.

11. Evidence ⇨512

In nautical matters, expert evidence is admissible as to what good seamanship requires under the circumstances of the case.

12. Evidence ⇨512

In a negligence case, evidence of customary standards of conduct can, in trial court's discretion, be admitted as to the ultimate issue where expert opinion as to it is required and cannot practically be restricted to a separate part of it.

13. Appeal and Error ⇨1050(1)

In action under Jones Act, wherein issue was whether master had been negli-

gent in requiring seaman to keep lookout in bow in accordance with general rule, admission of opinion testimony as to custom and usage that when a ship pitches and pounds the lookout should be stationed on the bridge was not prejudicial, even though testimony was not always correctly worded. Jones Act, 46 U.S.C.A. § 688.

14. Appeal and Error ⇨1050(1)

In action under Jones Act for injuries sustained by seaman who fell while keeping lookout in bow while ship was pitching and pounding, meaning of Coast Guard regulation requiring that lookout be kept in bow was a matter of law for court, but, under the circumstances, admission of testimony as to what ordinance meant and how far there was discretion to deviate from it was not prejudicial. Jones Act, 46 U.S.C.A. § 688.

15. Trial ⇨251(8)

In action under Jones Act for injuries sustained by seaman who fell while keeping watch in bow of ship which was pitching and pounding, instruction on duty to furnish a reasonably safe place to work was not outside the issues. Jones Act, 46 U.S.C.A. § 688.

16. Appeal and Error ⇨1064(1)

In action under Jones Act, wherein issue was whether master had been negligent in requiring seaman to keep watch in bow of pitching and pounding ship and wherein instruction was given on Coast Guard regulation requiring that lookout be kept in bow, instruction that jury should consider opinion evidence of experts on issue whether it was custom of sea to keep lookout in bow under the existing circumstances was not prejudicial, in view of fact that the Coast Guard regulation was not an unfringible rule. Jones Act, 46 U.S.C.A. § 688.

17. Appeal and Error ⇨1066

In action under Jones Act, introductory instruction to the effect that act gives action for injuries caused by negligence of employer or his agents or by a defect or insufficiency in appliances, boats and equipment caused by such negligence, was not

prejudicial, even though no defect was involved in case. Jones Act, 46 U.S.C.A. § 688.

John H. Black, Edward R. Kay, Cyril Appel, Appel, Liebermann & Leonard, San Francisco, for appellants.

Albert Michelson, Newell J. Hooley, San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an action for damages for personal injuries under the Jones Act, 46 U.S.C.A. § 688, which makes available such action at law based on negligence of a seaman injured in the course of his employment. The defendant appeals from a judgment on a verdict of \$6,000 for plaintiff.

The complaint alleged in substance that plaintiff on February 28, 1951, when in the course of his employment he was standing lookout watch on the forecastle head of the steamship *Permanente Silverbow*, owned and operated by defendant, was thrown down and against the forepeak hatch cover of said vessel and injured because of the violent pounding of the ship and the sudden rising and falling of the forecastle. Negligence was predicated on negligently ordering plaintiff to stand lookout watch on the forecastle head under conditions then prevailing and on negligently navigating the vessel.

Appellant urges as grounds of appeal:

(1) The evidence does not sustain the allegations of negligence, a directed verdict should have been granted, and the case should not have gone to the jury.

(2) Erroneous admission of testimony as to opinion, custom and usage that when a ship pitches and pounds the lookout should be stationed on the bridge.

(3) Error in instructing the jury (a) to decide from the conflicting expert testimony what the custom of the sea was as to where the lookout should stand, and to find in favor of the expert testimony entitled to the greater weight; (b) that defendant owed plaintiff the duty of furnishing him a reasonably safe place to work, and (c) that the Jones Act allows recovery

for any defect or insufficiency of the employer's appliances, boats or equipment.

[1-4] These grievances are for a large part based on the contention that under section 62.25(a) of the shipping regulations established by the Commandant of the Coast Guard in effect at the time of the accident (46 C.F.R. 62.25(a)) "All vessels navigating the ocean during the nighttime shall have a lookout at all times at or near the bow", that said rule is obligatory, that no departure from it is authorized and that compliance with said rule cannot constitute negligence. In *Griffin on Collision*, p. 262, note, it is said with respect to this provision: "It would seem that this provision as to lookouts is to be regarded as a regulation of the internal discipline of American vessels rather than as a collision rule governing civil liabilities." This statement is to some extent borne out by the fact that no case has been cited to us in which this rule is mentioned with respect to liability for not having the required lookout, notwithstanding the fact that the rule has existed at least since 1931, when it was section 25 of Rule V, General Rules and Regulations, Ocean and Coastwise, Board of Supervising Inspectors (Bureau Marine Inspection and Navigation) of March 2, 1931. But even if it is conceded that said regulation has the force of statutory law influencing civil liability as is accepted in *Belden v. Chase*, 150 U.S. 674, 698, 14 S.Ct. 264, 37 L.Ed. 1218, for navigation rules made by the board of supervising inspectors this would not mean that no departure from this rule can be permitted under special circumstances, even if the right to such departure is not expressly stated. The rule contains a further provision reading: "Nothing in this section shall exonerate any master or officer in command from the consequences of any neglect to keep a proper lookout or the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case." However, such a provision, which is also contained in other statutory navigation rules, the International Rules for Navigation at Sea; the Navigation Rules for Harbors, Rivers and Island Waters, etc., the Great Lakes Rules,

the Western River Rules, (See 33 U.S.C. A. §§ 121, 221, 293 and 351) is construed not as a permit to disregard other express rules, but as requiring under some circumstances additional precaution. The Rules of the Nautical Road, United States Naval Institute, 1954 edition, p. 321; Griffin on Collision, p. 514. The rule which permits such disregarding is in the above statutory rules of navigation expressed as follows (with minor deviation): "In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." See 33 U.S.C.A. §§ 112, 212, 292 and 349. No such provision is contained in the regulation here involved. Nevertheless the right and under certain circumstances the duty to depart from it must be read into said section. Appellant concedes that this must be so in extreme situations, e. g., when seawater pouring over the bow would wash a lookout placed there overboard. But there seems no good reason for such extreme restriction. In the Restatement, Torts, sec. 286, Comment C it is said: "Many statutes and ordinances are so worded as apparently to express a universally obligatory rule of conduct. Such enactments, however, may in view of their purpose and spirit be properly construed as intended to apply only to ordinary situations and to be subject to the qualification that the conduct prohibited thereby is not wrongful if, because of an emergency or the like, the circumstances justify an apparent disobedience to the letter of the enactment. * * * The provisions of statutes, intended to codify and supplement the rules of conduct which are established by a course of judicial decision or by custom, are often construed as subject to the same limitations and exceptions as the rules which they supersede." We think this manner of construction is the only reasonable one also in the situation before us. Although the statutory rules cited before require only the keeping of a proper lookout, and that only by implication, The Rules of the Nautical Road, *supra*, p. 357; Griffin on Collision, p. 262, the cases have without reliance on regulation 62.25(a), *supra*,

long since required the lookout to be stationed as far forward and near the water as possible, to wit, at the bow. The *Manchioneal*, 2 Cir., 243 F. 801, 805; *United States v. The Adrastus*, 2 Cir., 190 F.2d 883, 886; 15 C.J.S., Collision, § 108 d., pp. 114-115; The Rules of the Nautical Road, *supra*, p. 365; Griffin on Collision, 271-272. However, this rule is not maintained rigidly, when the weather makes another position more suitable. *Oriental Trading & Transport Co. v. Gulf Oil Corp.*, 2 Cir., 173 F.2d 108, 111. In *The Kaiserin Maria Theresa*, 2 Cir., 149 F. 97, 99, it was held that the coldness of the spray which flew aboard the steamship to freeze on the forward part of the vessel was a circumstance which justified removal of lookouts from there. Compare also *Puratich v. United States*, 9 Cir., 126 F.2d 914, 916, where the trial court held that under the circumstances there prevailing the lookout's post on the bridge was as good as, if not better than, a position at the bow. It would seem that, even if regulation 62.25(a) governs in this case, there remains the same possibility of departure as under the case law cited. Appellant cites many cases among which *Belden v. Chase*, 150 U.S. 674, 698, 699, 14 S.Ct. 264, *supra*, which requires strict adherence to rules for preventing collision and permit departure only to avoid impending peril. However these cases relate to rules of true navigation on the compliance with which other ships must be able to rely. The same rationale does not apply to the position of the lookout, and we cannot accept that there exists a right or duty unnecessarily to endanger the life or limbs of a seaman by strictly keeping to the position of the lookout in the bow in situations when the advantage of such position does not justify the risk involved for the seaman. The duty to provide a seaman with a reasonably safe place in which to work is enforced under the Jones Act. The failure to provide a seaman with a safe place to work can be present in many forms. 2 Norris, *The Law of Seamen*, § 688; *Hanson v. Luckenbach S.S. Co.*, 2 Cir., 65 F. 2d 457; *Persson v. James Griffiths & Sons, Inc.*, 85 Cal.App.2d 672, 673, 194 P.2d 86. It certainly includes the subjecting of a seaman to risks not justified by the ob-

ject to be accomplished. In *Matson Navigation Co. v. Hansen*, 9 Cir., 132 F.2d 487, 488, it is said: "Obviously, the test of reasonable safety varies with the prevailing conditions. No liability flows from requiring a sailor to perform his necessary sailor's duties with the ship rolling and lurching in a heavy storm, even though he may be injured from a fall caused by a wave sweeping across the deck. Yet the owner would be liable if, instead of performing some necessary duty, he were injured when sent by the mate across the same wave swept deck to rescue the ship's cat. The test is whether the requirement of the sailor is one which a reasonably prudent superior would order under the circumstances." The question presented in this respect in our case is: would a reasonably prudent superior, because of his duty to guard the reasonable safety of the sailor, under the circumstances proved have departed from the rule that the lookout should be in the bow?

A statement of some of the evidence is now required. On the night of February 27, 1951, the vessel after having delivered a load of cement at Honolulu was returning without cargo. Oil and water had been taken in the aft part of the ship. It left Honolulu shortly after 10 P.M.; the accident happened at 12:25 A.M. (0025) February 28, some 25 or 30 nautical miles from Honolulu on the way to San Francisco. At 11 P.M. the witness Jones, then on lookout duty, had called the skipper on the telephone and told him it was pounding and banging real hard. The master only hung up the telephone. Jones testified "it was blowing very bad and the ship was banging" and "bucking the seas" so that he had to hang on to the gunwale. The pitching and pounding was getting worse all the time. Plaintiff was one of the three men who had the midnight to four o'clock watch. Under ship routine one is standing lookout, one going to the wheel, one acting as standby and they rotate these activities themselves during the watch. Plaintiff first acted as lookout at midnight. The ship's log for midnight showed: "Scattered clouds. Rough easterly sea and swells. Vessel pitching considerably at times. Good visibility." When

plaintiff reached the forecandle head where the lookout stood a few minutes before twelve the ship, according to his testimony, was pounding up and down, jumping up and down quite heavy. When the empty ship with nothing in the forepart hits the sea she takes a tremendous bang. He could not walk and keep his balance at the forecandle head. He stationed himself just ahead of the forepeak hatch taking hold of one of the dogs (hatch cover fasteners about 15 inches above the deck). The wind prevented him from standing closer to the stem of the vessel; it was there too windy to keep his eyes open. Before he fell there were seven or eight bounces all bad but then a tremendous one and when the ship came down he was wrenched from his hold of the dog and fell against it. Although plaintiff felt sick he remained on the lookout until he was relieved at 5 minutes to one. He then went amidship. The ship log shows that at 1:20 he reported his earlier fall. He did that to the officer who was at the wheel. He did not use the telephone like Jones. At 0029 the propeller speed was reduced from 77.7 revolutions per minute to 65 and at 0030 increased again to 70. At 1:25 filling of the No. 2 port and starboard tanks with water began. There remained log entries as to considerable pitching and occasional pounding.

Over and above this evidence there was much evidence as to custom and as to past experience with respect to the taking of the lookout from the bow to the bridge in bad weather and also opinion evidence as to good seamanship in that respect. So far as this evidence was offered by plaintiff and in his favor it was mostly objected to. In the opinion of plaintiff (an able-bodied seaman who had followed the sea since 1914 and in war time had acted as temporary third and second officer) the conditions prevailing at the time of the accident required removal of the lookout to the top bridge where he would be protected. That would accord with the custom of the sea and the customary practice on ships like the *Permanente Silverbow* and other ships. Coast Guard Regulation 62.25(a) was so interpreted by seamen. The order for removal would come from the officer of the watch. Seaman Jones (8 years at sea) testified

by deposition that his experience was that under similar circumstances the officer on duty would call the lookout to the flying bridge. It was the duty of said officer to look out for the man on the bow in that manner.

Earl Condon, a master mariner with 20 years experience, gave as his opinion based on the ship log that the speed changes were a customary trying for a speed where the ship might perform better; the taking of ballast was to get her down deep enough in the water so that she would wear easily. It would make the ship behave better. When a ship is pitching considerably, reducing speed and ballasting is the natural thing to make it ride easily. Going at the speed she went, being light, she would slap down and strike with tremendous force and with the bow six feet higher than the stern there would be considerable strain and a very uncomfortable ship. The taking of ballast would reduce pounding and heaving and so would reduction of speed. He testified at length as to the normal placing of the lookout forward but that for different reasons he is taken off the bow to the bridge, among which pitching heavily so that there is a chance of his being injured. This is done at least when the visibility is good. In the situation here present good seamanship would have placed the man on the bridge. On the bridge the pendulum action of the sea is reduced. A man who has to hang on to keep from being thrown down cannot maintain a lookout as required.

De Pinto, a master mariner 15 years at sea, also gave as his opinion, after examining the log of the *Permanente Silverbow*, that on such a ship under such conditions the lookout should be situated on the bridge because it is dangerous for the personnel to keep their footing down there and when the sea is pounding considerably he could not keep a proper lookout. "The rules of the road simply state 'a proper lookout' based on the practice of seamanship and the special circumstances of the case. Consequently, the practice of seamanship, a pounding vessel, the special circumstance of the case, the proper lookout is up on the bridge."

The Captain of the *Permanente Silverbow* conceded that under the Coast Guard regulations he had discretion as to when he can move the lookout to the bridge. The discretion was mainly exercised by the officer in charge of the watch. It was mainly used immediately when the lookout was going to get wet from spray coming over, even if not actually necessary, but hardly ever for pounding.

[5] In urging that the above evidence does not support the verdict, appellant first contends that no order to stand lookout on the forecastle was proved but that plaintiff worked there voluntarily. Respondent's position that the ship's routine constituted an implied order must be accepted, the more so as it was conceded that it was for the officer of the watch to take plaintiff from the forecastle. So long as no such order had been given there was an implied order to stand on the forecastle.

Appellant further urges that the fall was an ordinary risk of the seaman's dangerous employment which the seaman is considered to have assumed. The *Iroquois*, 194 U.S. 240, 243, 24 S.Ct. 640, 48 L.Ed. 955. As we said before, citing the *Matson Navigation Co.* case, this is the crux of the matter: was it a necessary risk or a risk that the officer should have avoided. In the evidence stated there is substantial evidence to the latter effect.

Appellant also contends that there was no evidence at all of negligence in navigation causing the injury. Respondent does not stress this side of the negligence question much. It is true that there was no express expert evidence that the navigation was faulty, but could this not be inferred from the evidence that the ship was going with unreduced speed and without ballast, although it was empty of cargo and had only some load aft and that after the accident had taken place speed was diminished and ballast taken in? It is true, however, that there was hardly any evidence that if these measures had been taken earlier the accident would not have taken place. At any rate the evidence showing negligence in not placing plaintiff on the bridge sufficiently

supports the decision. For application of the substantial but conflicting evidence rule in a Jones Act case see *Guay v. American President Lines*, 81 Cal.App.2d 495, 508, 184 P.2d 539.

[6] Appellant contends that under federal rule here applicable the case should not have gone to the jury, citing *Brady v. Southern Ry. Co.*, 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239. It is true that what should be submitted to the jury in the Jones Act and Federal Employers Liability Act cases (like the *Brady* case) is considered a federal question. *Carpenter v. Atchison, T. & S. F. Ry. Co.*, 109 Cal.App.2d 18, 21, 240 P.2d 5; *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398. However the later United States Supreme Court cases show that the court considers jury trial as a most important part of the rights provided for by said two statutes and that it is disinclined to take cases from the jury or to reverse jury decisions either because of insufficiency of the evidence or failure of the complaint to state sufficient facts for negligence. See the New Supreme Court and the Old Law of Negligence, 18 Law and Contemporary Problems, 110; A Decade of Progress under the Federal Employers' Liability Act, *idem.*, p. 257; *Anderson v. Atchison, T. & S. F. Ry. Co.*, 333 U.S. 821, 68 S.Ct. 854, 92 L.Ed. 1108, reversing *Anderson v. Atchison, T. & S. F. Ry. Co.*, 31 Cal.2d 117, 187 P.2d 729; *Lavender v. Kurn*, 327 U.S. 645, 653, 66 S.Ct. 740, 744, 90 L.Ed. 916. In the *Lavender* case it is said: "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." Our case is not one of the very exceptional cases where under such federal rule the case should have been taken from the jury or

now reversed because of insufficiency of the evidence.

Next appellant contends that opinion evidence as to where a lookout should be placed under the circumstances of the case, about the custom of the sea as to such placing and as to the meaning of the Coast Guard regulation, was erroneously admitted together with evidence as to former experience as to the placing of lookouts, all for the purpose of nullifying the Coast Guard ordinance 62.25(a), which as statutory law should have been interpreted by the court only.

[7,8] Many cases are cited to the effect that custom cannot abolish plain requirements of law or of regulations with force of law. However, as stated before, there is here no plain, unfringible rule of law, if ordinance 62.25(a) is a rule of law governing civil responsibility at all. A right to deviate under special circumstances for the safety of the lookout must be recognized and under what circumstances a reasonable master would deviate and whether these circumstances were present are jury questions. They have some resemblance to the question of excuse for violation of traffic statutes which without excuse is negligence per se. In *Satterlee v. Orange Glenn School Dist.*, 29 Cal.2d 581, 590, 177 P.2d 279, 284, it is said, quoting from *Scalf v. Eicher*, 11 Cal.App.2d 44, 54, 53 P.2d 368: "'Whether or not a violation of a statute or ordinance proximately contributed to an accident and whether the violation was excusable or justifiable are questions of fact except in a case where 'the court is impelled to say that from the facts reasonable men can draw but one inference.''" The question whether in this case the matter was for the court or the jury must be decided according to federal law. Although the parties do not cite any decisions under federal law similar to the *Satterlee* case there seems little doubt that by the preference of the United States Supreme Court for jury decisions in Jones Act and Federal Employers Liability Act, 45 U.S.C.A. § 51 et seq., cases the same rule must be accepted. So it was held in *Dice v. Akron, Canton & Youngstown R.*

Co., 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398, that although Ohio law required matters of fraud in the obtaining of a release to be tried partly by the court such could have no application in a Federal Employers Liability Act case where all factual issues had to be decided by the jury. In *Anderson v. Atchison, T. & S. F. Ry. Co.*, 31 Cal.2d 117, 187 P.2d 729, our Supreme Court decided in such a case as a matter of law that there was no duty to use ordinary care to ascertain the whereabouts of one who was missing from the train on which he was employed. The United States Supreme Court reversed, holding without determining the question of law that if the matter had gone to the jury the evidence might have "revealed a situation as to which a jury under appropriate instructions could * * * have found that decedent's exposure and consequent death were due 'in whole or in part' to failure of respondent's agents to do what 'a reasonable and prudent man would ordinarily have done under the circumstances of the situation.'" [33 U.S. 821, 68 S.Ct. 855.] In *Pierro v. Carnegie-Illinois Steel Corp.*, 3 Cir., 186 F.2d 75, an action under the Jones Act, in which the inspection certificate of the Coast Guard required four firemen to be in service and the master proceeded to home port with only three firemen after one became ill, it was held that the issue whether the master had exercised an unreasonable judgment could not be answered as a matter of law but was rather properly a matter for the trier of fact in the first instance. The above cases show a tendency to eliminate as much as possible questions of law and to treat the whole matter as a question of conduct of a reasonable man for the jury.

[9-13] In such matters evidence as to customary standards of conduct is admissible in cases relating to injury to seamen as well as in other negligence cases, although in neither is such evidence conclusive of the standard of due care in relation to negligence. 65 C.J.S., Negligence, § 232, p. 1047 et seq.; 38 Am.Jur. 1015, Negligence, § 317; II Wigmore on Evidence, §§ 461, 488; *Sieracki v. Seas Shipping Co.*, 3 Cir., 149 F.2d 98, 100; 79 C.J.S., Seamen, §§ 212-213,

p. 724 et seq.; 48 Am.Jur., Shipping, §§ 186-187, p. 130. Custom or usage is a matter of fact to be testified to as such by witnesses qualified by adequate knowledge. It can be proved by instances or by direct testimony of its existence by such witnesses. 32 C.J.S., Evidence, § 483, p. 139; *Ames Mercantile Co. v. Kimball S. S. Co.*, D.C., 125 F. 332, 336. Moreover in nautical matters expert evidence is admissible as to what good seamanship required under the circumstances of the case. 48 Am.Jur. 374; 32 C.J.S., Evidence, § 546, p. 332; *Union Ins. Co. v. Smith*, 124 U.S. 405, 8 S.Ct. 534, 31 L.Ed. 497. Such evidence can in the discretion of the trial court also be admitted as to the ultimate issue in the case if expert opinion as to it is required and cannot practically be restricted to a separate part of it. *Hamilton v. United States*, 5 Cir., 73 F.2d 357, 358, 359; VII Wigmore on Evidence, § 1921 and compare *Casey v. Seas Shipping Co.*, 2 Cir., 178 F.2d 360, 362. Nevertheless it may be conceded that in the admission of the evidence complained of the above rules were not always correctly followed and distinguished. However, whatever irregularity there may have been in that respect was of form more than of substance. Those who testified as to custom of the sea and/or good seamanship had sufficient experience to know the facts as to custom and to give their opinion as to good seamanship. We are convinced that the not always correct wording of their testimony was not prejudicial.

[14] Appellant especially complains of the fact that witnesses were permitted to testify what the ordinance meant and in how far there was a discretion to deviate from it. It is said correctly that this was a matter of law for the court to rule on by instruction and that no such testimony should have been admitted. Although this seems correct, again we think the error was not prejudicial. The matter can best be treated together with appellant's grievances with respect to instructions which are closely related to it.

[15, 16] It must first be pointed out that the court read the ordinance 46 C.F.R.

62.25(a) literally to the jury with an instruction that such Coast Guard regulations have force and effect of law. The court also gave an instruction on the duty to furnish a reasonably safe place to work. Moreover, there is an instruction (from B.A.J.I.) which requires conscientiousness and ordinary care in the management of a ship and states that whether ordinary care was used must be determined in the light of the then known facts, practices and experiences of the business, the accumulated knowledge of the trade, the prevailing view of experts, the necessities of the situation, and all practical considerations involved. Appellant objects to the instruction on the duty to furnish a reasonably safe place to work, but the objection is without merit. It is said that the instruction is outside the issues as only a negligent order to stand lookout on the forecastle was alleged. Evidently the gravamen of the complaint is that the plaintiff was ordered to stand watch (work) in an unsafe place. The duty to furnish a reasonably safe place to stand watch was a duty which the master had to weigh against the duty under the ordinance and an instruction on both was therefore required. What seems objectionable is that there is no instruction on the relation between the rule of the ordinance and the reasonable safety of the watchman, custom, experience, due care, etc., but this is not pointed out as error. Appellant complains of the giving of a further instruction to the effect that the jury should consider opinion evidence of experts and must resolve the conflicts in their testimony concerning the customs of the sea. It is said that the jury could apply this rule to the testimony given by expert witnesses as to the meaning of the ordinance and the discretion to deviate from it, and could on this basis replace the ordinance by the prevailing expert opinion as to the customs of the sea. Although the instruction does not specifically relate to that matter it could possibly also be applied to it.

However, it could not eliminate the express instruction given as to the force of law of the ordinance, an instruction in its unmitigated form possibly even too favorable to appellant. It has already been said that the admission of evidence as to the meaning of the ordinance was error and that the court should have instead instructed on the interrelation of the different rules and elements involved. However, the statements made by the witnesses as to this matter were to the general effect that as a rule the lookout should be placed in the bow, but that for different reasons, among which danger for the safety of the lookout, deviation was permitted. These statements are generally in accord with what we have found to be the law and although they were stated to the jury by witnesses instead of by the court, we do not consider this prejudicial. Also if the court had instructed on the general rule as to deviation under special circumstances, evidence as to custom and good seamanship with respect to specific circumstances of such kind would have remained admissible and necessary. We hold that the technical errors do not require reversal.

[17] Appellant's further complaint concerning an instruction given to the effect that the Jones Act gives an action for injuries caused by negligence of the employer and his agents or by a defect or insufficiency in appliances, boats and equipment caused by such negligence, although in this case no such defect was involved, is wholly without merit. Such introductory instruction is evidently not prejudicial. *Guay v. American President Lines*, 81 Cal.App.2d 495, 498, 516, 184 P.2d 539.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

Hearing denied; EDMONDS, SCHAUER and SPENCE, JJ., dissenting.

Arthur W. STOWE, Plaintiff and Appellant,
v.

FRITZIE HOTELS, Inc., a corporation, John One and Two, Jane One, John Doe and Richard Roe, copartners doing business under the fictitious firm name and style of St. Francis Hotel and Apartments, a copartnership, Fritzie Hotels, Inc., doing business under the fictitious name and style of St. Francis Hotel and Apartments, St. Francis Hotel and Apartments, Black Company, a corporation, and John Doe Weinberg, Defendants,*

Fritzie Hotels, Inc., a Corporation,
Respondent.
Civ. 20468.

District Court of Appeal, Second District,
Division 2, California.
Dec. 14, 1954.

Hearing Granted Feb. 10, 1955.

Action by tenant of hotel apartment for injuries sustained when lamp fell upon him. The Superior Court, Los Angeles County, James G. Whyte, J., sustained demurrer, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that complaint was insufficient for failure to allege that landlord had had actual knowledge of the alleged unfitness of the lamp.

Judgment affirmed.

4. Landlord and Tenant ⇨164(1)

As a general rule, in absence of fraud, concealment or covenant, a landlord is not liable to a tenant on account of property leased.

2. Landlord and Tenant ⇨164(7)

There is no liability of a lessor for that which is visible to the naked eye or which is discoverable by the tenant in the exercise of ordinary care.

3. Landlord and Tenant ⇨162

A lessor is not insurer of the safety of his houses and tenements.

4. Landlord and Tenant ⇨164(6)

A landlord is under no duty to examine for latent defects.

5. Landlord and Tenant ⇨169(3)

There is no basis for recovery against a landlord for defects or a dangerous condition unless it be alleged that he had superior knowledge thereof.

6. Pleading ⇨207

Bare statement, in complaint by tenant for injuries sustained when lamp in leased premises fell upon him, that landlord negligently maintained the lamp was insufficient in presence of a special demurrer.

7. Pleading ⇨207

When a demurrer is presented, seeking greater certainty and particularity, a complaint alleging negligence in general terms of a landlord toward his tenant is deficient.

8. Landlord and Tenant ⇨164(6)

Statute authorizing a tenant to give landlord notice of defects in premises is designed to prevent injuries by a defective movable by enabling tenant to repair or remove it. Civ.Code, § 1955.

9. Landlord and Tenant ⇨164(6)

Once a tenant has served notice upon landlord of a defective movable, tenant may have movable removed at landlord's expense. Civ.Code, § 1957.

10. Bailment ⇨21

At common law, a lessor of movables was not liable for injuries caused thereby.

11. Landlord and Tenant ⇨51

A landlord does not have exclusive control or management of leased premises.

12. Pleading ⇨21

Not only do antagonistic allegations fail to state a cause of action, but they render a complaint ambiguous and uncertain.

13. Pleading ⇨207

Against a special demurrer, a complaint must declare the essential facts with reasonable precision and with particularity sufficiently specific to acquaint the defendant with the nature, source and extent of the cause of action.

14. Appeal and Error ⇨854(3), 916(1)

Where a plaintiff has failed to plead with particularity sufficiently specific, it will be presumed, on appeal, that he has set

* Opinion vacated 282 P.2d 890.

forth his cause of action as effectively as possible in his favor, and, where he has failed to amend, judgment sustaining demurrer must be affirmed.

15. Landlord and Tenant ⇨169(3)

Complaint by tenant for damages for landlord's alleged negligence in maintaining lamp which was within leased apartment and which fell on tenant was insufficient to state a cause of action in negligence.

16. Landlord and Tenant ⇨169(3)

Allegation, in tenant's complaint, for injuries sustained when lamp in leased premises fell, that landlord knew or could have known that the lamp was in a dangerous and unfit condition, did not declare that landlord actually knew the lamp was unfit.

17. Landlord and Tenant ⇨169(3)

Where tenant's complaint for injuries sustained when lamp in leased premises fell did not allege that landlord had had actual knowledge, or could have had such in the exercise of reasonable care, or that landlord had concealed knowledge, it could not be said that landlord had held out or orally represented that the lamp was in a safe and usable condition.

18. Landlord and Tenant ⇨169(3)

Tenant's complaint, against landlord for injuries sustained when lamp in leased premises fell, failed to state a cause of action for oral misrepresentations and breach of warranty in that it failed to state whether lamp was attached to floor, how landlord exercised full and exclusive control, why defect was not as apparent to tenant as to landlord, how landlord had been negligent in maintaining lamp and whether alleged warranty was express or implied.

19. Landlord and Tenant ⇨169(3)

Complaint by tenant, who had occupied apartment for 15 months, for injuries sustained when lamp fell upon him, was insufficient for failure to allege that landlord had had actual knowledge of the alleged

unfitness of the lamp. Civ.Code, §§ 1833, 1955.

20. Landlord and Tenant ⇨164(7)

A lessee is bound to make reasonably careful inspection of the premises he contracts to occupy as tenant and the equipment to be used by him.

Harold D. Kraft, Los Angeles, and Robert F. Reynolds, San Francisco, for appellant.

Frank W. Woodhead, Robert E. Morrow and Henry F. Walker, Los Angeles, for respondent.

MOORE, Presiding Justice.

Action for \$76,868.80 damages against a lessor for bodily injuries allegedly sustained when a standard lamp in appellant's apartment fell on him as he slept. A general demurrer to each of his three counts was sustained. He declined to amend, whereupon a judgment of dismissal was entered 34 days after the order sustaining the demurrer.

Count I sounding in negligence alleges substantially:

(Paragraph III)¹ Defendant was owner and manager of a multiple unit hotel and furnished apartment premises located in Los Angeles, which it operated for profit. It leased unit 425 and its furniture, including a standard lamp, to appellant. During his tenancy and at the time of the injury, defendant owned and retained and exercised full and exclusive control and management of all of said unit and its lamp. The latter "had at its top as its shade a large glass bowl" which weighed about ten pounds and was much larger and heavier than the metallic base which was at the foot of a five-foot standard.

(IV and V) September 1, 1952, plaintiff leased the furnished unit with maid service for the use of himself and wife at a rental of \$90 per month for their dwelling. When injured, plaintiff was asleep in his apartment as tenant, business guest and invitee of defendant.

1. Paragraphs I and II are formal.

(VI) Defendant so negligently managed the lamp that it was caused to, and did, fall and topple over so the bowl was caused to collide with plaintiff's right leg.

(VII) That as the proximate result thereof, plaintiff suffered a great laceration of said leg to the rear of the knee, cuts, contusions and abrasions near the knee and great pain and suffering; that hospitalization and the services of a physician and surgeon were required to care for said injuries at a reasonable charge of \$793.80 and plaintiff was reasonably caused to and did expend for ambulance service, medicines and bandages \$55; future medical services will be required.

Time lost from his work as a salesman caused plaintiff a loss of earnings in the sum of \$1,020 and he will lose earnings in the future, all to plaintiff's damage in the aggregate sum of \$76,868.80.

Count II

Plaintiff adopts the allegations of paragraphs I, II, III, IV, and V of the first count and proceeds to allege specific negligence and breaches of express and implied statutory warranties of fitness.

(II) During said tenancy and at its inception, defendant held out and orally represented and warranted to plaintiff that said lamp was in a safe and useable condition and fit for the purpose for which it was intended, to wit, a lamp in the proximity of plaintiff's bed where defendant maintained it, and plaintiff believed said facts so represented and warranted and relied on them.

(III) At the time of the lamp's fall, it was in an unsafe and dangerous condition in that it was top-heavy, loosely put together and liable to topple over without cause beyond its own make-up, plus the force of gravity and the normal vibrations of the premises and was unfit for human use. Said facts were unknown to plaintiff. Said unsafe, dangerous and unfit conditions were latent, not known or ascertainable by plaintiff. Defendant at all times knew or could have known by the exercise of reasonable care, while plaintiff did not and could not know that the lamp was always in an unsafe, dangerous and unfit condition,

but let and hired it to plaintiff for use as defendant's tenant and allowed plaintiff to occupy unit 425 with said lamp therein.

(IV) As a proximate result of the lamp's dangerous and unfit condition, it fell over on plaintiff while he and his wife slept in a bed about five feet from the lamp, which fall caused the injuries, detriments and damages described in paragraph VII of the first count.

Count III

Plaintiff adopts paragraphs I, II, III, IV and V of Count I and paragraphs I, III, IV and V of Count II.

As so constituted, appellant describes his action in Count III in his brief thus: "Specific Negligence and breach of implied-statutory warranty of fitness."

No Valid Cause of Action Alleged

[1] Appellant leased the unit June 1, 1951. The lamp fell upon him September 1, 1952. He does not allege any ophthalmic infirmity in himself; he alleges neither active nor passive fraud on the part of respondent. Since it is a general rule that in the absence of fraud, concealment or covenant, a landlord is not liable to a tenant on account of property leased, *Forrester v. Hoover Hotel & Investment Company*, 87 Cal.App.2d 226, 232, 196 P.2d 825, then if plaintiff has a cause of action falling within an exception to such rule, he must plead the exception under which he claims, *Wilson v. Ray*, 100 Cal.App.2d 299, 303, 223 P.2d 313, and the facts he intends to prove.

[2-5] During fifteen months appellant occupied the unit as his home, the lamp was not only within the range of his vision but by its very nature appellant must have contacted it daily, whereby its location, its disposition to lean and its inclination to topple must have become known to appellant. There is no liability of a lessor for that which is visible to the naked eye or which is discoverable by the tenant in the exercise of ordinary care. *Powell v. Stivers*, 108 Cal.App.2d 72, 73, 238 P.2d 34. The lessor is not an insurer of the safety of his houses and tenements. *Ayres v. Wright*, 103 Cal.App. 610, 616, 284 P. 1077.

Nor is he under duty to examine for latent defects. *Daulton v. Williams*, 81 Cal.App. 2d 70, 75, 183 P.2d 325; *Ellis v. McNeese*, 109 Cal.App. 667, 672, 293 P. 854; *Toner v. Meussdorffer*, 123 Cal. 462, 465, 56 P. 39. In truth, appellant makes no allegation that he had no knowledge of the top-heavy condition of the lamp, no declaration that such fact could have been discovered by defendant by the exercise of ordinary care. There is no basis for recovery against a landlord for defects or dangerous conditions unless it be alleged that he had a superior knowledge thereof. See *Monroe v. East Bay Rental Service*, 111 Cal.App.2d 574, 578, 245 P.2d 9. At no point does the complaint allege that respondent knew any more about the heavy bowl of the standard lamp and its likelihood of falling than could have been learned by appellant through the exercise of reasonable care to learn the nature of his environment. In *Goldstein v. Healy*, 187 Cal. 206, 201 P. 462, cited by appellant, the defendant had constructed a railing on the side of his platform out of decomposed wood. Defendant had "full information"; operated a hotel and the plaintiff was his invitee.

[6,7] In the instant complaint there is no allegation from which it can be ascertained what respondent did or omitted to do that was negligence; no allegation that respondent knew the lamp was dangerous and that appellant was ignorant of such danger. The bare statement, in the presence of a special demurrer, that defendant negligently maintained the standard lamp is an insufficient allegation. *Baisley v. Henry*, 55 Cal.App. 760, 764, 204 P. 399. When a demurrer is presented, seeking greater certainty and particularity, a complaint alleging negligence in general terms of a landlord toward his tenant is deficient. *Abos v. Martyn*, 31 Cal.App.2d 705, 707, 88 P.2d 797.

[8-10] The complaint contains no allegation that plaintiff gave defendant notice of any vice in the lamp or in its use as a lamp or in the position it occupied in unit 425. Such notice is authorized by section 1955 of the Civil Code and is designed to prevent injuries by a defec-

tive movable by enabling the letter of such personalty to repair or remove it. Moreover, had such notice been served on defendant, plaintiff might have had the lamp removed at defendant's expense. Civ.Code, sec. 1957. Is it reasonable that a judgment for injuries to appellant should be rendered against respondent when the condition of the lamp about which appellant complains was actually in his possession and had been for fifteen months without his utterance of a word of criticism? The very presence of the last cited statutes argue mightily in the negative and especially so since at common law, the lessor of movables was not liable for injuries caused thereby. In *Forrester v. Hoover Hotel and Investment Company*, supra, a judgment against the hotel was reversed because the evidence disclosed no knowledge on the part of the landlord of any defect in the wall bed which had occasioned plaintiff's injuries. "To hold the landlord liable upon warranty for any injury resulting from a latent defect in the equipment or furnishings leased with a furnished apartment would be to make the landlord virtually an insurer of the safety of the tenant." *Id.*, 87 Cal.App.2d 231, 232, 196 P.2d 825, 828.

[11-15] Another ambiguity or uncertainty is found in Count I. If one horn of the dilemma is taken it would be impossible to attach liability to respondent. First, it is alleged that prior to the accident appellant leased unit 425 with the lamp as one of the furnishings. Next, he alleges defendant owned and exclusively controlled the unit and the lamp at all times. Finally, he alleges that when the lamp fell on him asleep, he was there "pursuant to and by virtue of said renting." Such allegations cannot all be true. If the apartment and the lamp had been leased to appellant, respondent could not have had exclusive control or management. If respondent was in exclusive control, then it did not lease the unit to appellant. Taking the allegations most strongly against the pleader, he was never a tenant of respondent and the latter owed him

no duty. If the apartment was leased to appellant, he was responsible for a condition that had continued for fifteen months. Not only do antagonistic allegations fail to state a cause of action, but also they render a complaint ambiguous and uncertain. *Powell v. Powell*, 112 Utah 418; 188 P.2d 736, 737. As against a special demurrer, a complaint must declare the essential facts with reasonable precision and with particularity sufficiently specific to acquaint the defendant with the nature, source and extent of his cause of action. *Goldstein v. Healy*, supra, 187 Cal. at page 210, 201 P. 462. When a plaintiff has failed so to plead, upon appeal, it will be presumed that he has set forth his cause of action as effectively as possible in his favor; and having failed to amend, the judgment must be affirmed. *Metzenbaum v. Metzenbaum*, 86 Cal.App.2d 750, 752, 753, 195 P.2d 492.

Count II

[16, 17] Count II is uncertain and ambiguous. It alleges that defendant knew or could have known that the lamp was in a dangerous and unfit condition. But such allegation does not declare defendant actually knew the lamp was unfit. *Phipps v. Western Pacific Development Company*, 60 Cal.App. 171, 173, 212 P. 407. It merely alleges defendant could have known. In the absence of an allegation that defendant had actual knowledge, or could have had in the exercise of reasonable care, and that he concealed such knowledge, it cannot be said that defendant "held out and orally represented to plaintiff that the lamp was in a safe and useable condition." In the absence of actual knowledge, the quoted allegation is a mere conclusion of the pleader without a statement of fact to serve as a basis for it. The allegation "that all during said tenancy and at the time of the occurrence of the accident * * * said lamp was in an unsafe and dangerous condition" et cetera does not improve the pleading. The fact there alleged might have been ascertained after the accident. *Fisher v. Pennington*, 116 Cal.App. 248, 2 P.2d 518, is not authority for the complaint. Miss Fisher suffered

her injury during the first month of her tenancy. It resulted from a latent defect in the bed's attachment to a door which fell upon the lady. The bed was connected to the door by small plates fastened by screws that could easily be removed and was therefore personalty. Not only was there an implied warranty of the bed's fitness for use but there was no evidence from which it could reasonably have been inferred that the door's collapse was the result of the wrongful use of the bed or other carelessness of the lady. Appellant neglected to keep the bed in good repair. As proprietor he was liable for damages caused by the defects of his furniture, Civ.Code, sec. 1833, and was responsible by virtue of his want of ordinary care in the management of his property. Civ.Code, sec. 1714.

A bed attached to a door is not analogous to a lamp standing five feet high in a bedroom. During fifteen months such a lamp was a daily companion of appellant and his wife. The fact that it was "top-heavy, loosely put together, and liable to lean and topple over without cause" must have been observed frequently during tenancy by appellant. To move it once would have betrayed its vices, and if its construction was as defective as described by the complaint, it was incumbent upon appellant in the exercise of reasonable care for the welfare of his wife and himself to request its removal and exchange for another.

As to appellant's allegation that defendant "held out and orally represented to plaintiff that the lamp was in a safe and usable condition" the case of *Toner v. Meusdorffer*, 123 Cal. 462, 56 P. 39, 40, is not without its value as a precedent. It was alleged that in reliance by the plaintiff upon certain false assertions of defendant at the time of hiring to the effect that the premises were entirely safe and in perfectly sound condition, plaintiff in reliance upon and belief in such statements leased the property of defendant; that plaintiff had no knowledge or belief upon the subject, but the nails and posts in the rear gallery were at the time of the hiring and during the occupancy by plaintiff, "insecure,

defective, rotten, and insufficient to hold said fence in place." At no time during the occupancy and until the accident did plaintiff have any knowledge or belief except by defendant's assertion. The condition of the rear gallery was inherent and not apparent and was not disclosed to plaintiff but this was followed by the allegation that defendant "asserted positively, and without qualification, that the premises were entirely safe and in a perfectly sound condition, in the absence of any knowledge * * * on the part of defendants as to the truth of the assertion, and that the defect was inherent and not apparent upon exterior view." Because the defect was so latent that plaintiff's family did not discover it during five months' occupancy, because the assertion was made in good faith by defendant, and because before making his statements he was not asked to make such examination as would have led to a discovery of the defect, no fraud was committed by defendant. The statement charged to respondent was "little more than what would be called '*simplex commendatio*' * * * to all such transactions the rule of *caveat emptor* applies." Indeed, by what logical process or rule of reason could a landlord be liable to a roomer for the intrinsic construction of a standard lamp after the tenant has lived with it for more than a year before he was injured by its fall?

[18] At its best, the second count is ambiguous in that it declares on both oral representations and a warranty without alleging them in separate counts. Also, it is uncertain in that (1) it does not appear whether defendant maintained the lamp near plaintiff's bed by attaching it securely to the floor or merely stood it on the floor so that it could have been removed from one place to another; (2) it does not appear how defendant exercised full and exclusive control of apartment 425 and the lamp while plaintiff occupied that apartment as tenant; (3) it does not appear why it could not be observed by plaintiff that the glass bowl at the top of the lamp was larger and heavier than the base of the

lamp as readily as by defendant; (4) it is not alleged by what means, method or manner defendant so negligently maintained or managed the lamp as to cause it to fall; (5) it does not appear whether there was an oral express warranty or merely an implied warranty.

Third Count

[19,20] Appellant has made a third cause of action by adopting portions of his first and second counts. He adds nothing to such adopted allegations. In his brief he argues it under the proposition that "a hotel guest states a cause of action by alleging the hotel retained exclusive ownership and control over a latently dangerous lamp let to the guest where the hotel knew of the danger but the guest did not and the lamp fell on the guest as he slept inflicting great injury." He supports his thesis by contending that a plaintiff so injured may prove the negligence by establishing a violation of the statutes, Civ.Code, secs. 1833, 1955, relating to the letting of such a movable. He contends that section 1955 is pertinent for the reason the lamp was never put in condition fit for the purpose for which it was let. Again appellant is in error in that his complaint does not allege that defendant had actual knowledge of the unfitness of the lamp. A landlord is not liable upon warranty for an injury resulting from a latent defect as shown above. A lessee is bound to make a reasonably careful inspection of the premises he contracts to occupy as tenant and the equipment to be used by him. *Powell v. Stivers*, supra, 108 Cal.App.2d at page 75, 238 P.2d 34. He may not languidly enter an apartment, use its furnishings day and night for months on months, and recover damages because a standard lamp fell upon him.

The authorities cited by appellant are not pertinent since the pleading is insufficient as against either the special or general demurrers.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.

129 Cal.App.2d 528

Ernest C. SEVENMAN, as Administrator of
the Estate of **Flora M. Sevenman**, De-
ceased, Plaintiff and Appellant,

v.

LONG BELL LUMBER COMPANY, and
Sugar Creek Pine Company, a corpo-
ration, Defendants,

Sugar Creek Pine Company, a corporation,
Respondent.

Civ. 8511.

District Court of Appeal, Third District,
California.

Dec. 14, 1954.

Hearing Denied Feb. 10, 1955.

Action by the administrator of his deceased mother's estate against two lumber companies to recover possession of certain land. One of defendants filed a cross-complaint to quiet title to the land as against plaintiff's claims. From a judgment of the Superior Court, Siskiyou County, James M. Allen, J., quieting cross-complainant's title to the land, plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that the evidence was insufficient to support the trial court's finding of cross-complainant's title by adverse possession as against plaintiff and his sister as decedent's heirs and cross-complainant's cotenants of the land after decedent's surviving husband's conveyance thereof to cross-complainant by a quitclaim deed, which conveyed only his undivided third interest in the land.

Judgment reversed.

1. Tenancy In Common ⇨15(2)

Title to land by adverse possession is acquired as against possessor's co-tenant of land by acts of same character as will produce any other ouster and in either case is wrongful dispossession or exclusion from realty of party entitled to possession thereof and with same hostile intent. Code Civ.Proc. § 318.

2. Adverse Possession ⇨28

The fact that land can be put to little use does not excuse one claiming title thereto by adverse possession from exercising such acts of possession and control of land as would constitute some notice to world

and legal owner of claimant's hostile conduct. Code Civ.Proc. § 318.

3. Adverse Possession ⇨115(1)

The adverse character of occupation and use of land by one pleading statute of limitations against another's legal title thereto is ordinarily a fact question to be resolved by trial court, whose conclusions are entitled to every inference of validity and sufficiency.

4. Deeds ⇨121

Tenancy In Common ⇨15(7)

Words describing capacity in which grantor conveyed land by deed reciting that he, as deceased owner's surviving spouse, quitclaimed land to grantee corporation, were not merely descriptio personae, but deed conveyed only third interest which owner's death caused to be vested in grantor as an heir of decedent, who was also survived by two children, so that grantee's entry on land was not within rule that where a cotenant purports to convey entire interest in land and grantee takes possession accordingly without recognizing rights of other cotenants out of possession, grantee's possession is regarded as adverse to such cotenants, but such entry and grantee's acts of possession under deed were within rule that a cotenant, to initiate and maintain adverse possession of common property, must exercise unequivocal acts of ownership so overt and notorious and of such nature as to impart, by their own import, information and notice to cotenants that adverse possession and disseisin are intended against them.

5. Tenancy In Common ⇨15(10)

In action by administrator of decedent's estate against grantee in decedent's surviving husband's quitclaim deed, conveying his third interest in decedent's land, to recover possession thereof, evidence was insufficient to sustain trial court's finding of grantee's adverse possession of land as against decedent's two surviving children as her heirs and grantee's cotenants of land.

Barr & Hammond, H. A. Hammond,
Yreka, Richard Stevens, Hollister, for ap-
pellant.

Floyd Merrill, Yreka, Cal., Ellis Filene, San Francisco, for respondent.

VAN DYKE, Presiding Justice.

Appellant Sevenman, as Administrator of the Estate of Flora M. Sevenman, deceased, brought this action against Sugar Creek Pine Company, a corporation, respondent herein.

The complaint simply alleged that in his capacity as administrator plaintiff was entitled to the possession of a described tract of land, and that the defendants claimed some right or interest therein when in fact they had none. The answer of respondent denied generally the allegations of the complaint. It also contained affirmative defenses. By the first of these it asserted that the real property mentioned had at the date of the death of Flora Sevenman been the community property of herself and her husband, H. M. Sevenman; that she died intestate in July, 1939; that he survived her and thus acquired the entire interest in the property and that on October 5, 1944 he conveyed the property to respondent. It may be said now that there is in this appeal no contention that this defense was made out in that it is agreed from the record that the property was the separate property of Flora Sevenman and, therefore, that by her death her husband took a one-third interest in the property, the other two-thirds being severally vested by reason of the same death in his son, Ernest, who herein appears as administrator of his mother's estate, and his daughter Mary, a sister of appellant. By other affirmative defenses respondent pleaded the statute of limitations, Code Civ.Proc. § 318, limiting to five years the right of one who has been ousted from possession of real property and whose property has been held by adverse possession to assert title. By cross-complaint couched in the usual terms respondent asserted its own ownership of the property in controversy and sought to have its title quieted against the claims of appellant. After trial the court upheld respondent's claims under the statute of limitations, holding that respondent had, since 1944, been in the actual, open and notorious possession under color of title and had, during

that period, paid all taxes assessed and exercised complete dominion over the property; that the recordation of the deed from H. M. Sevenman to respondent, together with other acts of respondent in connection with the property had put appellant and those for whom he claimed on notice and that they had lost all title to the property by the adverse possession of respondent. Judgment was entered quieting title of respondent as fee simple owner of the property.

The only issue presented by the appeal is as to the sufficiency of the evidence to support the findings of the trial court relating to adverse possession. In addition to what has been said the testimony shows the following: Flora Sevenman died intestate July 29, 1939. She owned the property in severalty. On October 5, 1944, by deed recorded October 10th following Sevenman quitclaimed the property to respondent. In material part this deed read as follows:

"In consideration of Ten Dollars
* * * receipt of which is hereby acknowledged, I, H. M. Sevenman, surviving spouse of Flora M. Sevenman, Deceased, does hereby quitclaim to Sugar Creek Pine Co., a corporation
* * *" the subject property.

The description in the deed was a proper legal description. Appellant at the trial proved title of record in his decedent and rested. Respondent then called two witnesses and their testimony completes the record. The Siskiyou County Auditor testified that all the taxes on the property had been paid. It was shown that the taxes had been paid by respondent. It does not appear how the land was assessed. The other witness, Roy E. Mason, testified as follows: From January 1, 1943 until July 1, 1950 he was the manager of sawmill operations for respondent in Siskiyou County; the subject property had never been used for any purpose other than as prospective timber land; there might possibly have been some mineral prospecting done on it; Mason visited the property on foot and on horseback at various times during the 1944-1950 period, checking the boundaries, cruising the timber, checking

against possible trespassings and threats of fire; he had advised various strangers to the title that respondent owned the property; nothing had been done on the property, that is, in any way putting it to use, from 1945. The foregoing was Mason's direct testimony. On cross-examination the following was elicited: With respect to the year October 5, 1944 to October 5, 1945 he visited the property two times on horseback and several times on foot; altogether that year he spent not to exceed one full day on the property and during his visits his entire work consisted of finding some survey marks, walking through the timber and locating some of the boundary lines. He did not visit the property in 1946 and so far as he knew no employee of respondent did so. In 1947 he visited the property twice during the summer, once with a Mr. Lewis, to whom he pointed out a section corner establishing the line between the Lewis property and the subject property, and once later in the season when he returned to see if there was any trespassing going on. Nothing further occurred in 1947, but in 1948 he visited the property once, at a time when there was a fire in the general vicinity which was out of control. It was across a canyon from the subject property. He had made no clearings around the property for its protection and on that visit he spent about three hours on the land, which time was consumed traveling to the property and across it to an observation point and then returning to the road. On the land itself he spent about an hour. In 1949 he visited the property four times to see if a Mr. Munson who was cutting timber in the vicinity was trespassing. During that year he spent about five hours on the property. While there he endeavored to locate the boundary line but did nothing more at that time. On his second visit he spent about two hours on the land, during which he checked the south line to detect trespassing. He spent an hour on the third visit and about the same on the fourth during that year. These visits all involved checking to see if Mr. Munson had trespassed and cut timber. He did not visit the property in 1950. A Mr. McDonald Smith had cruised the property during this period for the re-

spondent. He made a rather lengthy technical survey of the standing timber and when necessary made survey lines and marked the boundary. He and his surveying crew were in there two or three days. Respondent owned property to the west and to the east of the subject property. The property had been "set up on its books" as being owned by respondent.

[1] The sole issue presented by this appeal is whether or not the evidence supports the court's finding of adverse possession. We will discuss this issue first without regard to the fact that the deed of decedent's surviving husband conveyed no more to respondent than an undivided one-third interest in the subject property and made respondent a co-tenant with the other heirs. Adversely a title as against a co-tenant is acquired, if at all, "by acts of the same character as will produce any other ouster. In either case it is the 'wrongful dispossession or exclusion of a party from real property who is entitled to the possession.' In each case the same kind of possession is required, and it must be taken and held with the same hostile intent." *Winterburn v. Chambers*, 91 Cal. 170, 180, 27 P. 658, 660.

[2] It must be said that the evidence of adverse possession presented by this record is unusually and exceedingly weak. There was little, if anything, in the way of actual possession by any one over the course of five or six years which the evidence covered. An employee of respondent occasionally went upon the land, once upon a tractor in order to reach a certain point for observation purposes, twice on horseback and several times on foot. Altogether the acts of occupancy and use shown to have been done by respondent through its employees would scarcely add up to one day in each year as an average and during at least more than one year no such acts occurred. If the other heirs of decedent, her son and daughter, had exercised acts of possession and use on their part one hundred fold greater than those exercised by respondent they might never have contacted any one exercising any possession of the land for respondent nor discovered

traces of such acts upon the surface of the ground. Respondent seeks to strengthen this obvious weakness of evidence of adverse possession by pointing out that the testimony showed the land to be so steep and irregular and of such poor productivity as to make its only use that of the growth and timely harvesting of timber. But the fact that land can be put to little use or perhaps is scarcely usable at all does not excuse one claiming to have adversely possessed the same from exercising such acts of possession and control as would constitute some notice to the world and to the legal owner of his hostile conduct. Such a situation may make it difficult for one to seize and possess the lands of another and ultimately to take his title, but the adverse claimant is hardly in any position to assert injury resulting from the hardship. In *Saecker v. Cohn*, 180 Cal. 151, 179 P. 890, evidence of adverse possession was held insufficient to support a finding thereof in the following situation: Claiming under a void tax deed respondent had leased land in Kern County for grazing purposes, which use was shown to be the only use of which the land was capable. This use, however, of the unenclosed land, which was surrounded by open country, was held insufficient to establish adverse possession where the lessee pastured sheep and cattle over that land and other land a few days in the spring and a few days in the fall of each year at irregular annual intervals. Said the court, 180 Cal. at page 156, 179 P. at page 892:

"* * * It thus appears that he had sheep on the land in the fall of 1908, and that there was no use whatever of the land thereafter until the fall of 1909, nor during the time from the spring of 1911 until the spring of 1912. On two occasions, therefore, during the five years period next before the beginning of the action, there was an interval of an entire year when the land was wholly unoccupied by the tenant of Cohn. Furthermore, in the present case there is no proof that during the long intervals when the land company was not pasturing the land other people were not occupying

the same. Such occupancy is wholly insufficient to constitute that open, continuous, and notorious adverse possession which is necessary to give notice to the owner thereof that some other person is claiming his land. There is no evidence that the plaintiff and his predecessors in interest had any knowledge whatever of the use or occupation of the land company, or of the claim of Cohn. The proof was substantially the same as that considered in *De Frieze v. Quint*, 94 Cal. 653, 660, 30 P. 1, 28 Am.St.Rep. 151, and which the court there held was insufficient to prove adverse possession. The court there said that to set the statute of limitations in motion and constitute adverse possession the occupancy of the land—'must be sufficiently open and notorious to notify an ordinarily prudent owner of its existence, and of its hostile character, unless he is otherwise *actually* notified of these facts; * * *"

[3,4] Since the adverse character of occupation and use in a case where the occupier has pleaded the statute of limitations against the legal title is ordinarily a question of fact to be resolved by the trial court and since in such a case the conclusions of the trier of fact are entitled to every inference of validity and sufficiency, we think it appropriate that we now discuss this same evidence in the light of the actual title which was conveyed to it by respondent's predecessors in interest. The record of the title ended with the ownership of Flora Sevenman. There was no evidence that her estate had been probated or that her heirs had been ascertained by any sort of judicial proceeding, and, in the absence of such evidence, we must assume that no such proceeding had ever been taken until the appointment of appellant as administrator of her estate. When she died, however, her title descended to and vested in her heirs, which the record shows were her surviving husband and her two children. Such was the situation when respondent purchased and it had constructive notice that the surviving husband from whom it bought had no record title.

It is significant then that it did not take from him a grant deed, but took only a quitclaim and that in this document he was described as being the surviving husband of his predeceased wife. The quitclaim deed was sufficient to convey to respondent such title as the surviving husband had, but the use of the form and the use of the description of the capacity in which the surviving husband was conveying his interest show clearly that respondent understood it was purchasing only the interest of an heir of appellant's decedent. There is nothing on the face of the instrument to indicate that there were not other heirs and for aught that appears respondent knew that there were. Respondent asserts that the descriptive words were *descriptio personae* only and have no significance. We do not agree. We think the deed can only be construed from its face as one whereby an heir of a decedent described as the surviving spouse conveys and purports to convey only such interest as the death of his wife caused to be vested in him as an heir. The entry of respondent upon the land, therefore, could not come under the rule that:

"If a cotenant makes a conveyance which purports to convey not merely his undivided interest in the land, but the entire interest therein, * * * and the grantee in the conveyance takes possession accordingly, without any recognition of the rights of the other cotenant, out of possession, the possession of the grantee is regarded as adverse to the latter, and the latter is charged with notice to this effect." (Tiffany on Real Property, Vol. 4, 3rd ed., Sec. 1185, p. 533.)

On the contrary, the entry and the acts of possession of respondent under the deed which it took and recorded falls within the rule that in order for a cotenant to initiate and maintain adverse possession to the common property he must exercise acts of ownership of such an unequivocal character, so overt and notorious and of such

nature, as by their own import to impart information and notice to his cotenants that an adverse possession and disseisin are intended against them. (Tiffany on Real Property, Sec. 1185, p. 526.) Says the author:

"* * * As between cotenants, the fact that A is in possession, or takes all the rents and profits, while B is not in possession and receives none of the rents and profits, is not of itself sufficient to start the running of the statute in favor of A. B has a right to assume that A holds possession, or otherwise utilizes the property, with a full recognition of the right of B to do the same if he so chooses, and B is guilty of no laches in failing to assert his rights."

[5] Even if respondent had started cutting the timber on the subject property and the fact had been brought to the notice, actual or constructive, of the cotenants they could not have stopped the harvesting of the timber if, in point of fact, it was ripe and ready for harvest and in the exercise of good husbandry ought to be harvested. They could join in the activity and in the disposition of the cut timber and share in the expenses and income therefrom, but they could not prevent such proper use to which alone, according to this record, the property could be put. It may equally be said that if they had had actual knowledge of those things which respondent did in fact do they could not have prevented them in any way nor had a right of action to enjoin, or otherwise interfere with, such use and occupancy of the property by respondent. We conclude that whatever may be said as to the sufficiency of those things done by respondent to initiate and complete adverse holding as against a stranger its acts were totally insufficient to constitute such adverse possession as against its cotenants.

The judgment appealed from is reversed.

PEEK and SCHOTTKY, JJ., concur.

Joseph TANZOLA, Plaintiff and Respondent,
v.

**John DE RITA, Executor of Last Will and
Testament of Angelo Pipolo, Deceased,
Defendant and Appellant.***
Civ. 20538.

District Court of Appeal, Second District,
Division 2, California.

Dec. 15, 1954.

Hearing Granted Feb. 10, 1955.

Action against the executor of a will to recover sums allegedly loaned to defendant's testator by plaintiff. From a judgment of the Superior Court of Los Angeles County, James G. Whyte, J., for plaintiff, defendant appealed. The District Court of Appeal, McComb, J., held that evidence sustained the trial court's finding that testator's wife had authority to sign testator's name to two checks given him by plaintiff, with word "loan" written thereon, and that such authority was not required to be in writing, as the contract could have been performed within one year from the date of the making thereof.

Judgment affirmed.

1. Witnesses \S 193

In action for sums loaned to defendant executor's testator by plaintiff, testimony of testator's widow that testator, after their marriage, placed plaintiff's check, payable to testator, with word "loan" written thereon, on witness' desk at spouse's pharmacy, and that witness endorsed testator's name on check and deposited it in bank to his credit, was admissible, since witness was not testifying to communication made to her by her husband, but to an act done by him in her sight and to what she herself did. Code Civ.Proc. \S 1881, subd. 1.

2. Witnesses \S 193

The statutory inhibition of testimony by husband or wife as to communications by one of them to the other during marriage is inapplicable to testimony as to acts performed by one spouse in other's presence. Code Civ.Proc. \S 1881, subd. 1.

* Opinion vacated 285 P.2d 897.

3. Husband and Wife \S 24

In action for money loaned to defendant's testator by plaintiff, testimony of testator's widow that she handled all of testator's banking and book work, including signature of his name on all occasions, and that testator gave her complete authority to act in his behalf sustained trial court's finding that she had authority to sign testator's name to checks given him by plaintiff with word "loan" written thereon.

4. Frauds, Statute of \S 44(1)

A wife's authority to sign her husband's name to checks given him by another for moneys loaned to him was not required to be in writing, as loan being in nature of demand loan, contract could have been performed within year from date of making thereof. Civ.Code, \S 1624.

5. Husband and Wife \S 23½

A husband, orally authorizing his wife to sign his name to checks given him for money loaned to him by maker and retaining benefits of her acts in endorsing husband's name on checks and depositing them in bank to his credit, ratified such acts of wife as husband's agent. Civ.Code, \S 2310.

6. Limitation of Actions \S 25(2)

Loans in form of two checks, with word "loan" written thereon, constituted agreement evidenced by writing, so that four-year, not two-year, statute of limitations applied to action against executor of husband's will on such checks after his death. Code Civ.Proc. $\S\S$ 337, 339.

7. Limitation of Actions \S 24(2)

To come within four-year statute of limitations applicable to action for debt evidenced by or founded on written contract, writing need not contain express promise to pay debt, but is sufficient, if it acknowledges debt and states facts from which obligation or liability to pay debt necessarily and directly flows. Code Civ. Proc. \S 337.

8. Pleading \S 36(2)

The fact that original complaint in action for money loaned to defendant execu-

tor's testator by plaintiff stated that action was suit on oral agreement did not bar plaintiff from subsequently contending in amended complaint that action was on written agreement, as such statement was mere conclusion of law, not binding on pleader, and surplusage; controlling feature being facts appearing in pleading or from evidence.

9. New Trial \S 144

The trial court did not abuse its discretion in denying defendant's motion for new trial after judgment for plaintiff, where grounds for motion, as stated in defendant's affidavits, were answered in plaintiff's counter affidavits and no abuse of court's discretion in finding in support of allegations in counter affidavits appeared.

Arnerich, del Valle & Sinatra, Los Angeles, for appellant.

George J. Tapper and Jack D. Most, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury, in an action to recover sums of money allegedly loaned to defendant's testator, defendant appeals.

Facts: Angelo Pipolo died on June 28, 1952. John DeRita was duly appointed executor of his estate. Thereafter plaintiff filed a creditor's claim which was rejected by the executor, whereupon plaintiff instituted the present suit to enforce his claim.

Plaintiff gave to defendant's decedent two checks, each in the sum of \$6,000, one on November 11 or 12, 1949, and the other on

December 16, 1949. Decedent and Mrs. Pipolo were married on November 26, 1949. These checks were endorsed with the decedent's name by Mrs. Pipolo and deposited in the bank by her.

[1,2] *Questions:* First: *Did the trial court err in permitting decedent's wife, Mrs. Pipolo, to testify to communications during the marriage between the decedent and herself with respect to the check dated December 16, 1949?*

No. Decedent's wife, over objection that she was not competent to testify because her testimony was regarding a confidential communication and therefore inadmissible under the provisions of Section 1881, subdivision 1, of the Code of Civil Procedure,¹ was permitted to testify that after their marriage her husband brought a check dated December 16, 1949, in the sum of \$6,000 to her; that the check was placed on her desk at their pharmacy; that she endorsed her husband's name on the check and deposited it in the Citizens National Bank to the credit of Angelo Pipolo's account; that the word "loan" was written in the upper left hand corner of the check.

Such testimony was admissible since the wife was not testifying to a communication made to her by her husband but to an act done by the husband in her sight, and to what she herself had done. The inhibition of section 1881, subdivision 1, of the Code of Civil Procedure is applicable only to communications made by one spouse to the other, not to acts that are performed by one in the presence of the other or to acts that are performed by one spouse. (See *People v. Peak*, 66 Cal.App.2d 894, 903[11], 153 P.2d 464.) Therefore the trial court's ruling was correct.

proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, or for a crime committed against another person by a husband or wife while engaged in committing and connected with the commission of a crime by one against the other; or in an action for damages against another person for adultery committed by either husband or wife."

1. Section 1881, subd. 1, Code of Civil Procedure reads:

"A husband can not be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or

[3] Second: *Was there substantial evidence to sustain the trial court's finding that Mrs. Pipolo had authority to sign decedent's name to the two checks which were given him by plaintiff and upon which the word "loan" was written?*

Yes. Mrs. Pipolo testified as follows: "I handled all of his banking for him, and all of his book work. Even during the time when I was home ill in bed for a year, he brought it out to me to take care of it for him because he didn't want to be bothered with it."

"Q. Did that include signing his name on any occasion? A. On all occasions."

The evidence further disclosed that decedent and Mrs. Pipolo had planned to be married some four years prior to the receipt of the first \$6,000 check; that the loans in question were for the purpose of building a home in which decedent and Mrs. Pipolo intended to live after their marriage. Mrs. Pipolo testified further that decedent "gave me complete authority to act in his behalf."

[4] Third: *Was Mrs. Pipolo's authority to sign decedent's name required to be in writing under the provisions of Section 1624 of the Civil Code?*

No. The contract upon which the suit was instituted was one which could have been performed within one year from the date of the making thereof, since the loan was in the nature of a demand loan, and there is nothing in the statute of frauds requiring that the authority of an agent to execute such a contract be in writing.

[5] In addition, Section 2310 of the Civil Code provides that the act of an agent is ratified "where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof." In the instant case decedent gave an oral authorization and retained the benefits of the acts which the agent performed pursuant thereto.

[6] Fourth: *Were plaintiff's causes of action on the two checks barred by the Statute of Limitations since the present action was not commenced until more than*

two years had elapsed after the loans had been made?

No. Since the loans were made in the form of two checks upon each of which the word "loan" had been written, such transaction constituted an agreement evidenced by a writing. Therefore, the four year statute of limitations applied, Code Civ. Proc. § 337, and not the two year statute, Code Civ. Proc. § 339.

A case on all fours with the instant case on this point, *Hester & Wise v. Chinn*, Tex. Civ. App., 162 S.W.2d 450, is by a Texas court. The statute there is similar to that in force in California, and reads in part as follows: "What actions barred in four years: There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

"1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing." Vernon's Ann. Civ. St. art. 5527.

In the cited case, on the check in the lower left hand corner appeared the word "loan." The court there held as follows (at page 451): "This is a suit which was instituted on August 2, 1939, by appellee to recover money in the sum of \$4,000 (less a credit of \$500) which he alleged he loaned to appellants on November 30, 1935.

"The principal question in the case is whether the instrument sued on does itself contain a contract for appellants to repay to appellee so as to make the four-year statute of limitation applicable.

"The written instrument sued on consists of a check, dated November 30, 1935, drawn by appellee on the South Texas Commercial Bank of Houston, for the sum of \$4,000, payable to the order of appellants. On the face of the check, in the lower left-hand corner, appellee had written the word 'Loan'. The endorsements on the check are as follows, and in this order: 'Hester & Wise, for deposit, Paul E. Wise, trustee'. 'Dec. 2, 1935, paid through Houston Clearing House, Prior Endorsements

guaranteed, National Bank of Commerce.'

* * *

"We overrule appellants' first point. The instrument in writing sued on by appellee is so complete that, except for appellants' pled-defense and evidence given in support thereof (the nature of which is sufficiently indicated by the jury's findings), appellee would have been entitled to judgment thereon after proving the delivery of the check, the endorsement thereon, and the fact that it was duly honored by the bank drawn on. The obligation of appellants to repay the loan was not one 'implied by law' as that term is usually employed; that is to say appellants' obligation to repay the loan did not arise out of quasi contract, but out of true contract. When appellee made the loan and appellants accepted it, in virtue of that transaction appellee was the lender and appellants the borrowers; appellee was the creditor, and appellants the debtors. The obligation of a borrower or debtor to repay the money lent him is not a quasi contract obligation, but a true contract obligation. The word loan embodies the concept that the one who accepts it will repay it. If the money is accepted on any understanding between the parties other than that it is to be repaid, it is a gift or some character of transaction other than a loan. The parties do not have to write into a loan transaction in so many words that the borrower agrees to repay it, because the parties by voluntarily assuming a creditor-debtor status or relation to each other, with reference to the money lent, agree that this shall be done, and words are unnecessary to be expressly written, where the transaction is in writing. The obligation of an endorser is not one resting in quasi contract, but by voluntarily assuming the status of an endorser, the endorser voluntarily assumes the obligations attached to being an endorser. In this connection, see Guaranty Bond State Bank of Athens v. Fraternal Bank and Trust Company, Tex.Civ.App., 68 S.W.2d 305, at pages 306 and 307.

"As stated in Cowart v. Russell, 135 Tex. 562, 565, 144 S.W.2d 249, 250: 'It is well settled that "in order for an action

to be one for an indebtedness evidenced by or founded upon a contract in writing, as referred to in the above quoted statute (i. e., Article 5527, Subd. 1), the action must be between the immediate parties to the contract, or those for whose benefit it was made, or their privies, and the written instrument relied upon must itself contain a contract to do the thing for the nonperformance of which the action is brought.'" Shaw v. Bush, Tex.Civ.App., 61 S.W.2d 526, 528, writ refused.'" (See also O'Brien v. King, 174 Cal. 769, 164 P. 631.)

[7] The rule is established in California that in order to come within the four year statute the writing in question need not contain an express promise to pay. It is sufficient if the writing acknowledges the debt and sets forth a state of facts from which the obligation or liability to pay necessarily and directly flows. (Tagus Ranch Co. v. Hughes, 64 Cal.App.2d 128, 130[2], 148 P.2d 79; see also Sannickson v. Brown & Others, 5 Cal. 57, and Ashley v. Vischer, 24 Cal. 322.)

[8] Fifth: *Did the fact that the original complaint was labeled a suit on "an oral agreement" bar plaintiff from subsequently contending in the amended complaint that it was on a written agreement?*

No. The statement on the original complaint of the pleader was a mere conclusion of law which was not binding upon the pleader, the controlling feature being the facts which appear in the pleading or from the evidence. (Deming v. Smith, 19 Cal. App.2d 683, 690[5], 66 P.2d 454; Shive v. Barrow, 88 Cal.App.2d 838, 842[1], 199 P.2d 693; Shaw v. McCaslin, 50 Cal.App.2d 467, 472, 123 P.2d 102.)

Under the foregoing rules the label "oral agreement" placed by plaintiff on his original complaint was a mere conclusion of the pleader, not binding upon plaintiff in the face of the specific facts which appeared contrary to the conclusion of the pleader. Such conclusion was mere surplusage and properly disregarded by the trial court.

[9] Sixth: *Did the trial court abuse its discretion in refusing to grant defendant's motion for a new trial?*

No. The grounds for the motion for a new trial as set forth in defendant's affidavits were answered in counter affidavits filed by plaintiff and it has not been made to appear that the trial court abused its discretion in finding in support of the allegations in the counter affidavits.

Affirmed.

MOORE, P. J., and FOX, J., concur.



129 Cal.App.2d 573

Sarah D. BOLLOTIN, Appellant,

v.

STOCKTON SAVINGS & LOAN BANK,
Trustees, Estate of Donald G. Metzger
et al., Respondents.

Civ. 20540.

District Court of Appeal, Second District,
Division 1, California.

Dec. 16, 1954.

Rehearing Denied Jan. 6, 1955.

Hearing Denied Feb. 10, 1955.

Plaintiff filed affidavit of prejudice and served it on judge prior to expiration of time allowed plaintiff for amendment of complaint following sustaining of demurrer. After expiration of time to amend complaint, judgments of dismissal upon failure to file amended complaint were entered in Superior Court, Los Angeles County, Philbrick McCoy and James G. Whyte, Judges and plaintiff appealed. The District Court of Appeal, Doran, J., held that filing of affidavit of prejudice suspended proceedings as of that time and default judgments taken thereafter were invalid.

Judgment reversed and cause remanded.

Judges ☞51(4)

Where plaintiff filed affidavit of prejudice and served it on judge prior to expiration of time allowed plaintiff for amendment of complaint following sustaining of

demurrer, proceedings were suspended as of time of filing of affidavit, and judgments of dismissal taken by defendants after expiration of time to amend complaint were invalid. Code Civ.Proc. § 170.

Sarah D. Bollotin, in pro per.

MacFarlane, Schaefer & Haun and William Gamble, Los Angeles, for respondents, Stockton Savings and Loan Bank and Carroll G. Grunsky.

Frank W. Swann, Jr., Beverly Hills, for respondents, J. B. Gunn, Frederick O. Adler and Victoria O. Adler.

DORAN, Justice.

This is an appeal from the judgments and orders of dismissal of the action following the failure to file an amended complaint after an order sustaining the demurrer.

The appeal relates to two judgments and orders, one dated April 5, 1954 wherein Judge James G. Whyte granted a motion of three of the defendants to dismiss the action together with judgment of \$116.50 for costs. The other, dated April 13, 1954 wherein Judge Philbrick McCoy granted a similar motion by two other defendants for the same reason and the action was dismissed as to them.

It is contended on appeal that the orders and judgments are invalid because the proceedings were suspended by reason of an affidavit of prejudice filed by appellant on March 25, 1954 alleging prejudice of Judge James G. Whyte and personally served on April 1, 1954.

The demurrers had been sustained on March 18th and 22nd with twenty days to amend. Thus it appears that on March 25th when the affidavit of prejudice was filed there was nothing pending for determination.

Obviously, however, appellant had the right, before the twenty days had expired to make a motion for a reconsideration of the issue.

Whether the demurrer should have been sustained is beside the issue. The only question is the validity of the judgment

and order. By virtue of the provisions of section 170, Code of Civil Procedure, the judgment is invalid. The filing of the affidavit of prejudice and the personal service thereof on the judge suspended the proceedings. See *City of Vallejo v. Superior Court*, 199 Cal. 408, 249 P. 1084, 48 A.L.R. 610; *Miller & Lux, Inc., v. Superior Court*, 19 Cal.App.2d 628, 66 P.2d 689; *Rosenfield v. Vosper*, 70 Cal.App.2d 217, 160 P.2d 842.

The judgments are reversed and the cause remanded.

WHITE, P. J., and DRAPEAU, J., concur.



129 Cal.App.2d Supp. 867

Albert C. CORDAS and Mrs. Albert C. Cordas, husband and wife, Plaintiffs and Appellants,
v.

George E. WRIGHT and Arnold J. Schroeder, individually and as co-partners doing business under the fictitious name and style of The "Wright" Concrete Products, et al., Defendants and Respondents.

No. 191781.

Appellate Department, Superior Court,
San Diego County, California.

Nov. 22, 1954.

Action for damages for breach of contract and for neglectful and unskillful work in laying a concrete slab. The Municipal Court, San Diego Judicial District, County of San Diego, Charles E. Burch, Jr., J. pro tem., rendered judgment for defendants, and plaintiffs appealed. The Superior Court, Burch, J., held that where contract stated that work would be performed "as per plans," evidence was admissible, on issue whether reference was to original plans drawn by plaintiffs or their modification as claimed by defendant.

Judgment affirmed.

1. Evidence ⇨441(1), 458

Where a contract is not clear on its face, evidence of negotiations of the parties and of surrounding circumstances are admissible for purpose of determining meaning of the writing. Code Civ.Proc. §§ 1856, 1860.

2. Evidence ⇨455

Where contract for laying concrete slab stated that work would be performed "as per plans," evidence was admissible, in action on contract, on issue whether reference was to original plans drawn by plaintiffs or their modification as claimed by defendant. Code Civ.Proc. §§ 1856, 1860.

3. Evidence ⇨455

Where, by reason of mistake or omission or inaptness of expression, words employed in contract are of doubtful or uncertain meaning as related to the contractual obligation, extraneous evidence will be received, not to make a new contract but to discover what is, in fact, the agreement.

4. Evidence ⇨441(1)

Where parties' agreement is integrated into their written contract, parol evidence is unnecessary.

Franklin B. Orfield, San Diego, for appellants.

John F. Martin, Encinitas, for respondents.

BURCH, Judge.

Plaintiffs appeal on a settled statement from a judgment of defendants. The action is one for damages for breach of contract and for neglectful and unskillful work in laying a concrete slab. According to plaintiffs, as set forth in their brief, "The only question involved is whether it was proper for the trial court to admit evidence, oral and written, of prior negotiations to contradict the terms of a written instrument." Attached to plaintiffs' complaint is a copy of the writing upon which they rely as the integration of the agreement of the parties. The original

writing was introduced as an exhibit at the trial and reads as follows:

"April 25, 1952

"A. C. and E. B. Cordas

"1430 Diamond

"San Diego, California

"We agree to form and pour concrete slab for home as per plans at 1090 Santa Fe, Encinitas California including 2" rock fill, reenforcing steel, and 15# felt membrane for the sum of \$568.80. Full payment due and payable when job is completed.

"/s/ George E. Wright

"George E. Wright

"Accepted:

"A. C. Cordas

"A. C. and E. B. Cordas"

The job was completed and paid for by plaintiffs on May 17, 1952.

Upon examining the writing, we are met with an uncertainty as to how the work is to progress "as per plans" because the writing makes no mention as to their identification. This uncertainty required evidence extraneous to and in addition to the writing. In undertaking to make certain that which was uncertain in the writing, the plaintiff A. C. Cordas, himself, introduced testimony pointing to certain plans which he had himself theretofore drawn and which, indeed, provided for a binder to form tensile strength consisting of a wire mesh "6 x 6 x 8" to be laid in the slab. The defendants countered this evidence and testified that before the writing was executed by the parties they agreed to the elimination of the wire mesh binder, which testimony gives a totally different picture from that of the plaintiffs as to whether the work was performed in accordance with the mutual intent of the parties. Defendant George E. Wright testified further that the concrete slab he laid faced the extra hazard of exceptional dry air on the day the work was done, and that the slab was damaged by this fact; that an unusual amount of cracks developed; that he promised plaintiffs that he could and would overcome these defects

when the remainder of the construction was completed, but that plaintiffs refused the offer and decided upon suit instead.

It is the introduction of this extraneous evidence presented by defendant George E. Wright rather than his own to which plaintiffs object. Since he has narrowed the question on appeal to the application of the parol evidence rule, we set to one side any question of an implied warranty of the defendants that the work be done in a workmanlike manner and that the materials used were suitable to the purpose.

Our only question, then, is whether the trial court acted properly in receiving evidence to make certain that which the writing left uncertain; or, stated more pointedly, does the contract by the words "as per plans" refer to the original plans drawn by the plaintiffs or their modification as testified to by the defendant George E. Wright.

[1,2] It is thus apparent that the contract is not clear on its face. In such cases, evidence that the negotiations of the parties and of surrounding circumstances are held admissible for the purpose of determining the meaning of the writing. Code of Civil Procedure, §§ 1856, 1860; Union Oil Co. of California v. Union Sugar Co., 31 Cal.2d 300, 188 P.2d 470; Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 761, 128 P.2d 665; Wachs v. Wachs, 11 Cal.2d 322, 326, 79 P.2d 1085; Balfour v. Fresno Canal & Irrigation Co., 109 Cal. 221, 223, 41 P. 876; Weinstein v. Moers, 207 Cal. 534, 540, 279 P. 444; McNeny v. Touchstone, 7 Cal.2d 429, 433, 60 P.2d 986; Body-Steffner Co. v. Flotill Products, Inc., 63 Cal. App.2d 555, 561, 147 P.2d 84; McBain California Evidence Manual, 408, 409.

[3] The principle is fundamental in this and other jurisdictions that where the parties, by reason of mistake, of omission or inaptness of expression the words employed are of doubtful or uncertain meaning as related to the contractual obligation, extraneous evidence will be received, not to make a new contract but to discover what is, in fact, the agreement. As stated

in *United Iron Works v. Outer Harbor, etc., Co.*, 168 Cal. 81, 84, 141 P. 917, 920:

"This rule of evidence is invoked and employed only in cases where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other *than* what they said, but by showing what they meant *by* what they said."

[4] Had the parties, in fact, "integrated" their agreement into the "writing,"

the conflict which the court correctly resolved by extraneous evidence would not have been present, and the court could then have determined, as a matter of law, that parol evidence was unnecessary. See *In re Estate of Gaines*, 15 Cal.2d 255, 100 P.2d 1055; *Fedele v. Dowling*, 120 Cal. App.2d 427, 431, 432, 261 P.2d 295, 102 A.L.R. 287.

The judgment is affirmed.

TURRENTINE, P. J., and GLEN, J., concur.

130 Cal.App.2d 1

C. Ray ROBINSON and Pauline I. Robinson,
Plaintiffs and Respondents,

v.

**SOUTHWESTERN DEVELOPMENT COM-
PANY, a corporation, Robert K. Gilbert,
C. R. Gallagher, C. E. Houchin, A. E. Mont-
gomery and Sarah Montgomery, Defend-
ants,**

C. R. Gallagher and C. E. Houchin,
Appellants.
Civ. 8477.

District Court of Appeal, Third District,
California.

Dec. 29, 1954

Action to determine rights of parties to bonus paid for execution of oil and gas lease. The Superior Court, Merced County, Gregory P. Maushart, J., gave judgment for plaintiffs. Two defendants appealed. The District Court of Appeal, Van Dyke, J., held that under deeds which conveyed to grantees a certain percentage of all oil, gas, petroleum or other hydrocarbon substances which might be produced and saved from the property, they received an expense-bearing mineral fee interest, and not an expense-free royalty interest.

Judgment affirmed.

1. Tenancy In Common ⇨32

If one cotenant of land produces oil on land he is entitled to charge the interest of non-producing cotenants for their proportionate share of drilling and operating expenses.

2. Tenancy In Common ⇨28(4)

Where oil and gas lease is executed by a cotenant, the non-consenting cotenants can either recognize the lease and receive their fractional interests in the royalty, or they can reject the lease and receive their fractional part of the oil produced, less their proportionate share of the cost of discovery and production.

3. Mines and Minerals ⇨55(4)

Tenancy In Common ⇨28(4)

Where deeds conveyed a certain percentage of all oil, gas, petroleum or other hydrocarbon substances which might be

produced and saved from the land, grantees did not receive an expense-free royalty interest, but rather an expense-bearing mineral fee interest, and each took specified interest in the oil produced and was entitled to same percentages of bonuses, rents and royalties.

4. New Trial ⇨108(2)

In action to determine rights of parties in bonus paid for execution of oil and gas lease, under terms of deeds conveying interests in oil and gas in certain land to defendants, newly discovered evidence consisting of a lease made before plaintiffs acquired an interest in oil and gas within property, could not estop plaintiffs from claiming share of bonus greater than that mentioned in lease, and trial court did not abuse its discretion in refusing to grant a new trial on such evidence.

H. H. Bell and Norbert Baumgarten,
Bakersfield, for appellants.

C. Ray Robinson, W. E. Craven, Merced,
for respondents.

VAN DYKE, Presiding Justice.

This is an appeal by defendants Houchin and Gallagher from a judgment in favor of plaintiffs and respondents, C. Ray and Pauline I. Robinson, in an action for declaratory relief brought to determine the rights of the respective parties under an oil and gas lease, including their rights in a bonus paid for the execution of the lease. Involved in such determinations are the rights of the parties with respect to royalties to be paid under the same lease or future leases. Other defendants than Houchin and Gallagher did not appeal.

The judgment appealed from declares the following: Respondents Robinson, together with A. E. and Sarah Montgomery, who are non-appealing defendants, were and are the owners of an undivided 45%ths interest in and to certain real property in Fresno County; respondents Robinson were and are the owners of an undivided one-half interest of said undivided 45%ths interest in said real property; prior to the execution and delivery of the oil and gas

lease under which the bonus was paid, the following transactions had taken place affecting the ownership of the land and the rights of the parties to share in oil, gas and other hydrocarbons produced therefrom:

On July 7, 1938, A. E. Jones and wife, who then owned the fee simple title to all of said land, executed an oil and gas lease to The Texas Company, which provided a rental or royalty of 12½% of production.

On April 6, 1939, while said lease was existing, the successor in interest to A. E. Jones and wife, conveyed an undivided one-fourth of the land to A. E. Montgomery, the deed reciting that it conveyed the designated interest and a one-fourth interest in the existing lease.

On May 3, 1939, Montgomery and wife conveyed to appellant Houchin "An undivided 1% of all oil, gas, petroleum or other hydrocarbon substances within or underlying or which may be produced and saved from" the said real property, and also on said date conveyed one-half of one per cent of all oil, gas, etc., to non-appealing defendant Gilbert. (The description in the two deeds as to the nature of the rights conveyed is the same.)

June 12, 1939, Montgomery and wife, by a like further instrument, conveyed one-half of one per cent of the oil, gas, etc. to non-appealing defendant Southwestern Development Company, a corporation.

On July 11, 1939, Houchin and wife conveyed to appellant Gallagher one-fourth of their interest.

March 24, 1941, Montgomery took by conveyance five-sixths of an additional one-fourth interest in the real property and "in the oil and gas lease thereon".

April 16, 1949, Montgomery and wife conveyed an undivided one-half of Montgomery's interest in the real property to respondents Robinson.

The Texas Company's lease was abandoned at some time not disclosed by the evidence. On April 26, 1949 respondents Robinson and the Montgomerys executed an oil and gas lease to the Barnsdall Oil Company. This lease provided for a 25% royalty, and as a bonus, in consideration of the execution of the lease, the lessee paid

the sum of \$12,375, which sum was received by respondent C. Ray Robinson and placed in his trust account. Thereafter he offered to distribute the money as follows:

To Houchin, ¾ of 1% of total amount	\$ 92.82
To Gallagher, ¼ of 1% of total amount	30.94
To Gilbert, ½ of 1% of total amount	61.87
To Southwestern Dev. Co., ½ of 1% of total amount	61.87
To Montgomerys, 49% of total amount	6,063.75
To respondents Robinson, 49% of total amount	6,063.75

All parties except Gilbert returned their checks, this action was begun, and Robinson continued to hold the represented money in trust.

The trial court by its judgment declared that the sums tendered were the correct sums to which the interested parties were entitled. It further decreed that respondents Robinson, together with the Montgomerys, have the "sole and exclusive right to execute any oil and gas lease on said real property upon any terms which they might elect, provided that the defendants, Southwestern Development Company, C. E. Houchin, C. R. Gallagher and Robert K. Gilbert shall receive their proportionate shares, as herein defined, of any bonus, royalty, rent or other consideration paid or payable for and under the terms, conditions and provisions of any such oil and gas lease." This part of the decree is based upon the deeds whereby the four parties named received their fractional interests; and no attack is made in this appeal upon this part of the decree. The court further decreed that Southwestern Development Company was entitled to receive one-half of 1% of any royalty, rent or other consideration paid or payable under the terms of any oil and gas lease on the real property; that Gallagher was entitled to receive one-half of 1%; Houchin three-fourths of 1% and Gallagher one-fourth of 1% of such payments; and that respondents Robinson and defendants Montgomery were entitled to receive each

49% of such payments. The court decreed that Southwestern Development Company was the owner of an undivided one-half of 1% of all oil, gas, petroleum or other hydrocarbon substances within or underlying "or which may be produced and saved from said real property, together with perpetual rights for drilling and production purposes, but subject, however, to any present or future oil or gas lease executed by the Robinsons and the Montgomerys. Like ownerships, with proportionate interests, were declared to exist in Gilbert, Houchin, Gallagher, the Montgomerys and the Robinsons.

The questions presented on appeal as stated by appellants are these: 1. Did the lower court err in its determination of the existing interests of the parties to the action? 2. Did the court err in refusing to grant appellants' motion for new trial?

It is apparent from the record that the trial court mainly relied upon the case of *Little v. Mountain View Dairies*, 35 Cal.2d 232, 217 P.2d 416, 418, deeming that case to be decisive of the main issues between the parties. We may note the similarities in the factual picture presented in that case and in the case at bar. In both cases the granting clauses of the instruments of conveyance contained the same language, that is, there was granted a specified percent of the oil, gas and light substances in or under or which might be produced and saved from the subject property. In both cases also the owners of fractional interests who did not execute the lease had agreed to be bound by the terms thereof.

[1-3] In *Little v. Mountain View Dairies*, the Supreme Court stated it was settled law that if one cotenant produces oil he is entitled to charge the interests of non-producing cotenants for their proportionate share of drilling and operating expenses; that the expense incurred by the owners of the mineral rights in producing the oil from the land was, in that case, represented by the $\frac{5}{6}$ ths of the oil that the lessee retained from the total production; that by ratifying the lease the defendants in the cited case had agreed that this was a fair charge for the expense of bringing

the oil to the surface. Further the court declared that where a lease is executed by a cotenant the non-consenting cotenants could either recognize the lease and receive their fractional interest in the royalty or they could reject the lease and receive their fractional part of the oil produced, less their proportionate share of the cost of discovery and production; and that a grant of a fraction of all "of the oil, gas and other minerals in and under, and that may be produced" from the land creates an expense-bearing mineral fee interest rather than an expense-free royalty interest. When these rules are applied to the case before us, it is apparent that the deeds by which appellants took their interest did not grant to them expense-free royalty interests, but rather expense-bearing mineral fee interests. Therefore, the trial court correctly decreed that each grantee took the specified interest in all the oil produced under the lease and was entitled to the same percentage of bonuses, rents and royalties. For instance, Houchin, by the deed which conveyed to him an undivided 1% of all oil, gas, petroleum or other hydrocarbon substances within or underlying or which might be produced and saved from the subject real property became entitled to one barrel in each one hundred barrels of oil produced, chargeable, however, with the expense of production. He was, therefore, entitled to 1% of the net after subtraction of production expense, that is, after the subtraction of the lessee's share.

Appellants seek in various ways to distinguish this case from *Little v. Mountain View Dairies*, supra. We think it unnecessary to comment upon each of such contentions as we think that the two cases cannot be distinguished. The decision must turn upon the interpretation of the instruments of conveyance, aided by the agreement of the grantees as expressed in those conveyances, that the respondents and the Montgomerys could execute leases binding the grantees.

[4] We turn now to appellant's contention that the trial court erred in denying their motion for new trial. The motion was made on the ground of newly discovered

evidence and was supported by an affidavit of Mr. Bell, one of the attorneys for appellants. In his affidavit Mr. Bell stated that Mr. Hewicker, another attorney for appellants, was in charge of the preparation and trial of the action; that he had died suddenly after the trial, and that Mr. Bell had discovered in Mr. Hewicker's files the original of a lease which pertained to the subject property. It was dated May 27, 1942, which was prior to the time the respondents Robinson acquired their interest. It appeared to have been executed by the then owners, including the Montgomerys, Houchin and wife, Gallagher and wife, Gilbert and wife, and Southwestern Development Company. It purported to grant to A. E. Wright as lessee the right to drill for and to extract oil and gas from the property and it reserved to the lessors 12½% of the oil and gas produced and saved. It appears that Houchin signed as the owner of 6% of all oil royalties, etc., to be paid by the lessee, that Gallagher signed as owner of 2% of the same, that Gilbert signed as owner of 4% and that Southwestern Development Company signed as owner of 4%. Though of course respondents Robinson were not parties to the purported lease, yet it is alleged in the affidavit that Mr. Robinson had knowledge of the lease at the time he acquired his interest in the property. The affiant places this construction upon the document which he discovered: He says that the lease shows all the parties having any interest in the oil and gas rights in the property had agreed among themselves as to the true interest of each in and to royalties and bonuses; that it shows that they had agreed to proportions greatly exceeding those upon which were based the tender of money by Robinson and greatly exceeding the several interests as decreed by the trial court. Affiant further declared that by that lease respondents Robinson are estopped from claiming any greater share than those mentioned in that lease. We are unable to read into this discovered document the significance which appellants attach to it. There would be no estoppel binding upon respondents Robinson. When they acquired their interests, they had before them the documents we have hereinbefore referred to

and which were placed in evidence in this case. They were free to interpret those documents according to their own conclusions as to their meaning. This case did not present a matter of estoppel to interpret the granting documents according to their own contents, but did present the single issue of what was conveyed thereby. The record presents no showing of abuse of discretion by the trial court in refusing to grant a new trial.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.



129 Cal.App.2d 797

Mark STROSK, Plaintiff and Respondent,

v.

HOWARD TERMINAL CO., Defendant and Appellant.

No. 16093.

District Court of Appeal, First District,
Division 1, California.

Dec. 28, 1954.

Action for injuries received when plaintiff tripped over steel plate on unlighted portion of defendant's dock while returning home from his employment as relief engineer aboard ship berthed at dock. The Superior Court, County of Alameda, S. Victor Wagler, J., with consent of plaintiff, reduced \$16,000 verdict to \$14,000 as condition of denial of defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that award of \$16,000 damages as reduced to \$14,000 by trial judge, to plaintiff, who, as chief marine engineer, had earned \$1,000 a month, plus maintenance, room, and board while on board ship or \$315 a month on shore, but who, at time of trial, was receiving \$2.75 an hour as relief engineer, and who, during four-month period he was under care of doctor, received \$1,000 as relief engineer, and who suffered impaired use of

his hand which caused loss of grip affecting his ability to climb up and down ship's ladders, was not excessive.

Judgment affirmed.

1. Damages ⇨38

If, by reason of injury, plaintiff has become unable to perform labor which he was accustomed to transact or perform prior to injury, plaintiff is entitled to recover damages for effect of injury upon his earning capacity even though, at time of accident, he was not receiving wages or salary equal to those he had previously received.

2. Trial ⇨296(11)

In action for injuries received when plaintiff tripped over steel plate on an unlighted portion of defendant's dock while returning home from his employment as relief engineer aboard ship berthed at dock, giving of instruction that fact that plaintiff was not in receipt of wages as chief marine engineer at time of accident would not deprive him of right to compensation for loss of his earning capacity since he was capable of earning more than that he was actually earning as relief engineer did not put undue emphasis upon "chief marine engineer" in view of other instructions given.

3. Appeal and Error ⇨1004(3)

When, in proceeding upon motion for new trial, trial judge determined that verdict was excessive to extent of \$2,000 and reduced it by such amount, he acted in capacity of 13th juror and weighed evidence and determined its worth, and it would take a very clear case for a reviewing court to disturb such determination.

4. Appeal and Error ⇨999(2)

New Trial ⇨77(1)

Verdict, which has been given under influence of passion or prejudice, can be either set aside or reversed.

5. Appeal and Error ⇨979(5)

Trial judge's action in granting new trial on ground of excessive damages, or requiring reduction of amount as condition of denying new trial, will not be reversed upon appeal in absence of plain showing of abuse of trial judge's discretion, and, where there is a material conflict of evidence re-

garding extent of damage, imputation of such abuse is repelled just as if ground of order were insufficiency of evidence to justify the verdict.

6. Damages ⇨132(8)

Award of \$16,000 damages as reduced to \$14,000 by trial judge, to plaintiff, who, as chief marine engineer, had earned \$1,000 a month, plus maintenance, room, and board while on board ship or \$315 a month on shore, but who, at time of trial, was receiving \$2.75 an hour as relief engineer, and who, during four-month period he was under care of doctor, received \$1,000 as relief engineer, and who suffered impaired use of his hand which caused loss of grip affecting his ability to climb up and down ship's ladders, was not excessive.

7. Trial ⇨133(6)

Where, during redirect examination of plaintiff in personal injury action, plaintiff's counsel stated that purpose of certain line of inquiry was to show that lights had been installed at place of accident by defendant would not require granting of new trial in view of fact that court had ruled out such remark, instructed jurors to disregard it, and later instructed jurors to disregard testimony stricken by court order and statements made by attorneys but not supported by evidence.

Weinmann, Rode, Burnhill & Moffitt, Oakland (Cyril Viadro, San Francisco, of counsel), for appellant.

Benner & Harris, Arthur Harris, Berkeley, for respondent.

FRED B. WOOD, Justice.

Plaintiff brought this action to recover for a permanent injury to his hand, incurred when he tripped over a steel plate on an unlighted portion of defendant's dock while returning home from his employment as a relief engineer aboard a ship berthed at the dock. The jury awarded him damages in the sum of \$16,000, which was reduced to \$14,000 by the trial judge, with the consent of plaintiff, as a condition of the denial of defendant's motion for a new trial.

In support of its appeal the defendant claims an instruction on the measure of damages was prejudicially erroneous and that the judgment as reduced is still excessive.

[1] The questioned instruction read as follows: "The fact that plaintiff was not in receipt of salary or wages of a chief marine engineer at the time of the accident does not deprive him of the right to compensation for loss of his earning capacity, since it was what he was capable of earning rather than what he was actually earning that is to be considered by the jury. If by reason of the injury he has become unable to perform the labor which he was accustomed to transact or perform prior to the injury, he is entitled to recover damages for the effect of the injury upon his earning capacity." This instruction, as an abstract proposition of law, is unobjectionable. See *Hicks v. Ocean Shore Railroad, Inc.*, 1941, 18 Cal.2d 773, 784, 117 P.2d 850; *Storrs v. Los Angeles Traction Co.*, 1901, 134 Cal. 91, 93, 66 P. 72. Defendant claims that by this instruction the court put undue emphasis upon "chief marine engineer" and thereby limited the jury to consideration of plaintiff's earning capacity as a chief marine engineer whereas there was evidence from which the jury could have inferred that plaintiff no longer was regularly employed as a seagoing chief marine engineer and was engaged as a relief engineer of ships while in port, at considerably less compensation.

[2] We do not think the instruction is reasonably susceptible to that interpretation. It immediately followed this instruction: "One of the elements of damage referred to in the previous instruction was compensation for loss of earning power. In fixing this amount, you may consider what plaintiff's physical abilities and earning power were before the accident and what they are now, the extent and nature of his injuries, whether or not they are reasonably certain to be permanent, or if not permanent, the extent of their duration, all to the end of determining the effect of his injuries upon his future earning capacity and the present value of the loss so suf-

fered." They should be read together, as a single instruction. Thus read, we do not think the portion which defendant criticizes has the limiting effect claimed for it.

The reference to "chief marine engineer" had a natural basis in the evidence. Plaintiff was employed as relief engineer at the time of the accident. He testified that he was only temporarily engaged as relief engineer; on account of his wife's illness he stayed at home for a time and only took duty once in a while. The jury had a right to know that the measure of damages was not limited to the effect, if any, of the injury upon plaintiff's earning power in the work he happened to be doing at the time of the accident.

Nor was there undue emphasis upon loss of earning power, if any, as an element of damages. The instructions above quoted immediately followed appropriate instructions (to which defendant has taken no exception) on compensatory damages in general, loss of time during disability, pain and suffering, and mental suffering, with a general caution to the jury not to single out any individual instruction but to consider them as a whole, each in the light of all the others.

[3] Concerning the claim of excessive damages, we are confronted with the fact that the trial judge has given it special consideration, has determined the award was excessive to the extent of \$2,000, and has reduced it by that amount. When he did that he acted in the capacity of thirteenth juror, weighing the evidence and determining its worth. It would take a very clear case for a reviewing court to disturb that determination. When we look at the evidence we can not say that he was wrong. As chief marine engineer plaintiff earned \$1,000 a month, plus maintenance, room and board while on board ship or \$315 a month on shore. At the time of trial he was receiving \$2.75 an hour as relief engineer. During the four-month period that he was under the care of a doctor he received \$1,000 as a relief engineer. There was evidence of impairment. Two seagoing trips since the accident, covering a period of several months, convinced plaintiff that the im-

paired use of his hand seriously handicapped him in the performance of the attendant duties. His loss of grip in the injured hand impaired his ability to climb up and down the ship's ladders, some of which are vertical and some have a pitch of 45 to 60 degrees. There was medical testimony of a considerable impairment of the right hand (he is right-handed), that it is permanent, and that on account of the weakness of the grip plaintiff's fear of using a vertical ladder is well founded.

[4] Attention has been directed to the minute order which conditionally granted a new trial "on grounds of excessive damages appearing to have been given under the influence of passion or prejudice and insufficiency of the evidence to justify the verdict." At oral argument counsel discussed this order upon the assumption, it would seem, that a verdict "given under the influence of passion or prejudice" could only be set aside, not reduced, and that there was here presented a question whether the trial court really meant what this order seems to say. That is not a correct view of the situation. It was early held that "an excessive verdict implies no misconduct of the jury necessarily, but simply that the result has been induced through excited feelings or prejudice, of which the jury may not, perhaps, have been even aware, but which has, nevertheless, precluded an impartial consideration of the evidence." *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 162, 47 P. 1019, 1020. "To say that a verdict has been influenced by passion and prejudice is but another way of saying that the verdict exceeds any amount justified by the evidence." *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 254, 116 P. 513, 520.

[5] "Whatever may be the rule which should govern the trial judge, it is certain that when his action in granting a new trial on the ground of excessive damages, or requiring a reduction of the amount as the

condition of denying one, comes to be reviewed on appeal, his order will not be reversed unless it plainly appears that he abused his discretion; and the cases teach that, when there is material conflict of evidence regarding the extent of damage, the imputation of such abuse is repelled, the same as if the ground of the order were insufficiency of the evidence to justify the verdict." *Doolin v. Omnibus Cable Co.*, 125 Cal. 141, 144-145, 57 P. 774, 775; quoted with approval in *Koyer v. McComber*, 12 Cal.2d 175, 180, 82 P.2d 941, which in turn was approved in *Sinz v. Owens*, 33 Cal.2d 749, 760-761, 205 P.2d 3, 8 A.L.R.2d 757.

[6] Upon this record we can not substitute our judgment for that of the trial judge and say as a matter of law that the amount of the verdict as reduced by him is excessive.

[7] During the redirect examination of the plaintiff his counsel asked him if he was on the dock a couple of weeks after the accident. Defense counsel objected. The court asked plaintiff's counsel the purpose of this line of inquiry and he said it was to show the condition of lights subsequent to the accident, that "lights had been installed," that "they had made an installation." Defendant's counsel objected to this remark and moved it be stricken. The court ruled it "may go out" and instructed the jurors "to disregard it." Later, the court gave the usual instructions to disregard any testimony stricken by order of the court and to disregard statements, if any, made by the attorneys not supported by the evidence. In view of this and the fact that the same point was presented to the court below upon motion for new trial and overruled, we do not believe that defendant's case was prejudiced in the minds of the jury by this brief stricken statement of plaintiff's counsel.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

129 Cal.App.2d 823

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Richard William WOOD and Samuel J.
Macias, Defendants,

Samuel J. Macias, Appellant.

Cr. 5263.

District Court of Appeal, Second District,
Division 3, California.

Dec. 28, 1954.

Prosecution for robbery. From adverse judgment of Superior Court of Los Angeles County, Ralph K. Pierson, J., the defendant appealed. The District Court of Appeal, Parker Wood, J., held that the evidence was sufficient to sustain the conviction.

Judgment affirmed.

1. Robbery \S 24(1)

Evidence was sufficient to sustain conviction for robbery in the first degree.

2. Criminal Law \S 781(2)

In prosecution for robbery, evidence warranted instruction that if there was an occasion when defendant failed to make denial in the face of an accusation charging him with the crime, the circumstance of his silence could be considered against him as indicating an admission that the accusation was true.

3. Criminal Law \S 784(4), 814(17)

In prosecution for robbery, instruction, that if there were two reasonable theories equally supported by testimony with guilt of defendant and the other is consistent with innocence of defendant, then jury had duty to adopt theory which was consistent with defendant's innocence, was confusing and properly refused, and even if instruction had been properly worded refusal to give it was not error when there was substantial direct evidence as to defendant's guilt.

Edmund G. Brown, Atty. Gen., and
James D. Loeb, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant Macias and Richard William Wood were charged with robbery. Macias admitted an allegation in the information that he had been convicted of a felony. Upon the motion of defendant Wood separate trials were ordered. In a jury trial, Macias was found guilty of robbery in the first degree. He appeals from the judgment.

[1] Appellant contends that the evidence was insufficient to support the judgment; and that the court erred in giving an instruction and in refusing to give a requested instruction.

On February 2, 1954, about 2 a. m., two men entered a gasoline service station in Los Angeles and talked with the attendant, Mr. Moore, five or ten minutes regarding the purchase of a tire. Then one of the men pointed a revolver at Mr. Moore and told him to open the cash box and the safe. The attendant complied with the demand, and the man took about \$70 from the box and safe, and \$10 from the attendant's wallet. Then the other man told the attendant to go into the back of the station. The attendant complied with the demand, and then the other man tied the attendant's hands with tape and tied his feet with a belt. After the men left, the attendant untied himself and telephoned the police.

Mr. Moore, the attendant, testified that defendant Macias was the man who pointed the revolver at him and took the money; that the revolver referred to as Exhibit 1 is similar to the revolver which Macias pointed at him; that he could not identify the other robber.

Officers Gonzales and Estrada arrested Macias on February 18, 1954, at his apartment. Officer Estrada found a revolver, Exhibit 1, under the drainboard of the kitchen sink in Macias' apartment. Officer Estrada testified that, after finding the gun, he went into the living room where Macias, Wood, and Officer Gonzales, were, and he

Alexander L. Oster, Los Angeles, for appellant.

(Estrada) asked Macias if he had any other guns in the house, and Macias said, "No, that is the only gun I have"; after Macias' sister came into the room Macias pointed to his sister and said, "That is not my gun. It belongs to my brother-in-law."

About February 23, Officer Gonzales and another officer took Macias and Wood to the service station, where Mr. Moore, the robber victim, was present. Mr. Moore testified that at that time Wood "re-enacted the holdup"—he went over what happened on the night of the holdup, telling of things that happened; Officer Gonzales asked Mr. Moore if he recognized the other person involved in the robbery; Mr. Moore replied that he did recognize the other person involved, and that he (witness) pointed at Macias and Macias said, "Who me?"; then he (witness) said, "Yes."

Macias testified that he did not commit the crime alleged in the information; that on February 2, 1954, at 2 a. m., he was at his home (his home was more than ten miles from the service station); on February 1, 1954, about 9 p. m., he went to the home of his girl friend, Nellie Cabellero; after being there about 15 minutes he and Nellie went to the home of Mrs. Alvarez and stayed there until approximately 12:15 a. m.; he and Nellie arrived at Nellie's home about 1:20 a. m.; he returned to his home at 1:50 or 2 a. m.

Mrs. Alvarez testified that Macias and Nellie visited at her home on February 1, 1954, and stayed there until after midnight.

Nellie Cabellero testified that she and Macias arrived at Mrs. Alvarez' home about 9:30 p. m. on February 1, 1954, and left there a few minutes after midnight; Macias left Nellie's home after 1:30 p. m. on February 2, 1954.

With reference to appellant's contention that the evidence was insufficient to support the judgment, his counsel seems to argue to the effect that an "extraordinary situation is here presented" because Mr. Moore could not identify the "other fellow" who tied him up. The alleged point of such argument is not stated clearly in appellant's briefs or at all, but it seems from the oral argument of appellant's counsel that he is

implying that since Mr. Moore could not identify the other fellow his identification of Macias was not reliable. Mr. Moore stated positively that Macias was one of the robbers. The contention regarding insufficiency of the evidence is wholly without merit.

[2] Appellant also contends that the court erred in giving an instruction, at the request of plaintiff, which was in substance as follows: "If * * * there was an occasion when the defendant, under conditions which fairly afforded him an opportunity to reply, failed to make denial in the face of an accusation * * * charging him with the crime * * * the circumstance of his silence may be considered against him as indicating an admission that the accusation thus made was true. * * *" His argument is that he did not remain silent in face of the accusation by Mr. Moore—when Mr. Moore pointed to appellant as one of the robbers; that since appellant answered, "Who me?" he was under no further duty to speak. It is to be noted that after Macias made such inquiry, as to whether Mr. Moore was referring to him, Mr. Moore said, "Yes." If Macias made such inquiry because he was in doubt as to whether he was being accused, he could not have any such doubt after Mr. Moore, in reply to the inquiry, said "Yes." Thereafter, appellant did remain silent. It was proper to give said instruction.

[3] Appellant also contends that the court erred in refusing to give an instruction, requested by appellant, which was in substance as follows: "The jury are further instructed that if * * * they find that there are two reasonable theories equally supported by the testimony with the guilt of the defendant, and the other, is consistent with the innocence of the defendant then it is the policy of the law, and the law makes it the duty of the jury to adopt the theory which is consistent with the innocence of the defendant and to find the defendant not guilty." The instruction is not clear—the part of the instruction which reads "two reasonable theories equally supported by the testimony with the

guilt of the defendant" is not understandable. The instruction in the form in which it was proposed should not have been given, because it was confusing. Presumably that part of the instruction just quoted was intended to read "two reasonable theories equally supported by the testimony, *one of which is consistent* with the guilt of defendant." Even if the instruction had included those italicized words (or words of similar meaning) at the place indicated, it was not error to refuse to give the instruction. In *People v. Savage*, 66 Cal. App.2d 237, at page 247, 152 P.2d 240, 245, it was said: "Where the proof is not entirely circumstantial it is not error to refuse an instruction requiring the jury to adopt that interpretation which would admit of defendant's innocence and to reject that which would point to the guilt of the accused." In the present case there was substantial direct evidence. Mr. Moore testified, as above stated, that Macias was the man who pointed the revolver at him and took the money.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



129 Cal.App.2d 693

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

John J. CALVERT, Defendant,
National Automobile and Casualty Insurance Company, a corporation,
Appellant.

Civ. 20448.

District Court of Appeal, Second District,
Division 1, California.

Dec. 21, 1954.

Defendant was charged by information with an offense, and an undertaking of bail was filed by surety. The Superior Court of Los Angeles County, Charles W.

Fricke, J., entered an order denying motion to set aside forfeiture of bail, and surety appealed. The District Court of Appeal, White, P. J., held that where defendant was advised by his physician that he was afflicted with an incarcerated right direct and indirect inguinal hernia, and defendant was under treatment therefor and was confined to bed under heavy sedation, with foot of bed elevated, and compresses applied to hernia, in attempt to replace hernia into abdomen, Superior Court abused its discretion in denying motion to set aside order of forfeiture of bail.

Order reversed and cause remanded with directions to vacate and set aside order of forfeiture and to exonerate the bond in question.

1. Ball ⇐79(2)

Order denying motion to set aside order of forfeiture of bail rests very much in discretion of trial court and will not be disturbed on appeal unless it is satisfactorily shown that order is so plainly erroneous as to amount to an abuse of discretion. Pen.Code, § 1305.

2. Ball 79(2)

The "discretion" which court is permitted to exercise in passing on motion to set aside order of forfeiture of bail is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. Pen.Code, § 1305.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Discretion".

3. Ball ⇐39

The object of bail is to insure attendance of principal and his obedience to orders and judgment of court, and there should be no suggestion of revenue to the state or county, or punishment of surety.

4. Ball ⇐79(2)

In passing on question of whether trial court has abused its discretion in denying or granting remission of a bail forfeiture, facts of individual case must be taken into consideration and purpose of bail must be kept in mind. Pen.Code, § 1305.

5. Bail ⇐79(2)

In passing on question of whether trial court abused its discretion in denying or granting remission of a bail forfeiture, cause and purpose of defendant's nonappearance as well as good faith of surety are factors that must be considered. Pen.Code, § 1305.

6. Bail ⇐79(2)

In passing on question of whether trial court has abused its discretion in denying or granting remission of a bail forfeiture, consideration should be given to whether default of party was wilful, whether notwithstanding the default a trial of the cause could be had, and whether public justice required that penalty of forfeiture be enforced. Pen.Code, § 1305.

7. Bail ⇐79(2)

In ruling on motion to set aside order of forfeiture of bail, the "discretion" to be exercised by the trial court is a sound discretion with due regard for that which is right and equitable under the circumstances, and not a discretion exercised arbitrarily. Pen.Code, § 1305.

8. Bail ⇐79(1)

Where defendant was advised by his physician that he was afflicted with an incarcerated right direct and indirect inguinal hernia, and defendant was under treatment therefor and was confined to bed under heavy sedation, with foot of bed elevated, and compresses applied to hernia, in attempt to replace hernia into abdomen, trial court abused its "discretion" in denying motion to set aside order of forfeiture of bail. Pen. Code, § 1305.



Joseph T. Forno, Harold J. Ackerman, Los Angeles, for appellant.

Joseph T. Forno, Los Angeles, for defendant Calvert.

Harold W. Kennedy, County Counsel, John Powers Wright, Deputy County Counsel, Los Angeles, for plaintiff and respondent.

WHITE, Presiding Justice.

An information had been filed against the above named defendant and undertaking of Cal.Rep. 277-278 P.2d-17

bail in the amount of \$10,000 was filed by appellant National Automobile and Casualty Insurance Company, a corporation. When the cause was called for trial on January 15, 1954, the defendant failed to appear. His counsel moved for a continuance and in support of such motion presented an affidavit from defendant's physician, Dr. Joseph Green, dated January 13, 1954, and reading as follows:

"This is to certify that I have examined Mr. John Calvert this afternoon, at his home, and found him to have an incarcerated right direct and indirect inguinal hernia. At the present time, this is not completely strangulated, but is quite tender and cannot be replaced with compression.

"The patient is now confined to bed under heavy sedation, with the foot of the bed elevated, and compresses applied to the incarcerated hernia, in an attempt to replace the hernia into the abdomen. If at the end of one week it does not drop back into the abdomen, and becomes strangulated completely; he will require hospitalization and surgery; and he will be confined for at least one month."

Thereupon, the court made an order that "by reason of the physical condition of the defendant, cause is continued to February 18, 1954 at 9 a. m. for trial".

Later the same day (January 15, 1954) according to the record the trial judge "received information which caused me to doubt the inability of the defendant to be present at the trial". An order was thereupon made "That Doctor Marcus Crahan is appointed by the Court under Section 1871 C.C.P. to visit and examine the defendant as to his physical ability to attend court and report his findings to the Court". At the same time a bench warrant was issued by the court with instructions to the sheriff and Dr. Crahan as follows: "that if the defendant was capable of being transported to the county jail with safety after being taken into custody with a bench warrant, that that should be done; but that if his physical condition would not permit that the bench warrant should not be served."

On January 15, 1954, fortified with the foregoing bench warrant and instructions,

Dr. Crahan, accompanied by two police officers of the Los Angeles Police Department, went to the home of defendant in the city of Long Beach, arriving there about 3:30 p. m., where they found the defendant in bed attired in bed clothes and lying prone.

Following his examination of defendant, Dr. Crahan reported to the court as follows: "His alleged incapacity was a partially strangulated right inguinal hernia. He denied other medical complaints. Examination of the area involved revealed a large (4-inch diameter) soft pliable mass in the right inguinal region, relatively non-tender, non-indurated and readily reduced by light manipulation. Strangulation in this type of hernia is highly improbable.

"The defendant was felt to be physically capable of appearing for trial on January 18, 1954 and Sergeants Barrick and Horne of the Los Angeles Police Department were so advised."

Following the examination, Dr. Crahan offered defendant the services of an ambulance for transportation to the county jail but according to the physician, defendant declined ambulance service and volunteered to go in the police car. It is however noteworthy that on arrival at the county jail Dr. Crahan ordered the usual "booking" procedures, which it is asserted, ordinarily consume from five to twelve hours, dispensed with and directed that the defendant be immediately placed in the hospital ward of the county jail where he was confined until the morning of January 18, 1954, when the cause was called for further proceedings. At this time defendant was returned to court by the sheriff and his counsel was present. The court thereupon ordered a forfeiture of the bail bond theretofore posted by appellant, bail was fixed in the sum of \$25,000 and the cause ordered on calendar January 19, 1954 for resetting. At this time the court appointed Dr. Walter Dodge, pursuant to Section 1871 of the Code of Civil Procedure, to examine defendant and report his findings to the court.

On the following day (January 19, 1954) Dr. Dodge examined defendant and under the caption of "Comment" epitomized his report as follows: "From the history

given and from the results of my examination, I believe that this man is in good health. I found no evidence of any strangulation of his hernia and, from the history as related to me, I greatly doubt that on the dates he mentioned, namely four weeks ago and one week ago, that he had any strangulation of his hernia. This opinion is based principally on his statement that on each of these occasions the hernia was very easily reducible and that he reduced it himself. This is not the history of a strangulated hernia.

"His hernia, while of good size, is not apparently disabling as he informed me that he has been playing golf very regularly up until a short time ago.

"This man is physically able to attend court at this time. He has been getting about in a normal manner, has been quite active and with no complaints. He probably would be more comfortable with a properly fitting truss and at some future time a surgical repair of his hernia should be done."

On April 16, 1954, appellant Surety Company appeared in court by its counsel and defendant personally appeared with his attorney. Both made motions to vacate the order of forfeiture entered on January 18, 1954 and to exonerate the bail bond. Pursuant to the provisions of Section 1305 of the Penal Code, appellant surety company filed its affidavit of non-collusion, and in support of his motion, defendant filed a supporting affidavit. The court received as an exhibit eight volumes of daily transcript of the testimony given in the case of *People v. Calvert and Green* (No. 162238) then on trial in another department of the court, and which will hereinafter be referred to. The motion of appellant surety company to set aside the order of forfeiture and exonerate its bond was denied. From such order this appeal is prosecuted.

With regard to the case of *People v. Calvert and Green*, above referred to, it appears that following the order forfeiting the aforesaid bail bond, defendant herein, John J. Calvert, and Dr. Green who furnished the affidavit to secure a continuance of defendant's trial, were indicted for

violation of Sections 182 (Conspiracy) and 134 (Preparing False Evidence) of the Penal Code. This case was on trial and not completed at the time of the hearing on the motion to set aside the forfeiture. It is conceded that at the conclusion of the trial both defendants, Calvert and Dr. Green, were found not guilty in this last-mentioned proceeding.

Presumably, the purpose of receiving as exhibits in the case now before us, the transcripts of testimony given in the subsequent trial was to show that the statements made in the affidavit of defendant physician when the motion for a continuance was made were true and that the defendant absented himself from the court only because of the advice given him by his doctor that to attend upon his trial would seriously and injuriously affect his health.

The record of the last-mentioned trial shows medical testimony, practically uncontradicted, that assuming the statements made by Dr. Green in his affidavit at the time a continuance was sought to be a true history of defendant's ailment, he should have remained in bed, and that therefore, the reason given by defendant for absenting himself from his trial was a reasonable one. At the trial of defendant and his doctor, the district attorney stated:

"Mr. Wichello: May I say this your Honor? We have at all times been in a position to stipulate that if the statements in the affidavits in question were true that that would be the result we have never contended otherwise."

[1] It is conceded that orders like the one now under consideration, in legal parlance, rest very much in the discretion of the court below, and will not be disturbed on appeal unless it is satisfactorily shown that the order is so plainly erroneous as to amount to an abuse of discretion.

The correct principle for the exercise of sound discretion is set forth in the early case of *Bailey v. Taaffe*, 29 Cal. 423, 424, and thereafter quoted with approval in the cases of *Demens v. Huene*, 89 Cal.App. 748, 753, 265 P. 389, and *Atkinson v. Atkin-*

son, 35 Cal.App.2d 705, 708, 96 P.2d 824, 825.

[2] In the first of the cases just cited it was said, "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex arbitrio*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates".

We are not here confronted with a case wherein the accused has fled the jurisdiction of the court, surreptitiously disappeared, failing to contact his counsel or to advise the court as to the reason for his absence at the time set for the commencement of the trial.

Section 1305 of the Penal Code authorizes the forfeiture of the bail when a defendant "without sufficient excuse" neglects to appear on any occasion when his presence in court is lawfully required, and the same section provides that an order of forfeiture may be set aside when, within 90 days after such a forfeiture, the defendant and his bail appear, "and satisfactorily excuse the defendant's neglect * *."

We are persuaded that in the instant case there was a sufficient showing that the defendant's absence was excusable and certainly a sufficient showing to vacate and set aside the order of forfeiture. This is not a case wherein there was a conflict in the evidence as to why the defendant was not present for trial. The facts were admitted. He was advised by his physician that he was afflicted with an incarcerated right direct and indirect inguinal hernia and was under treatment therefor, being "confined to bed under heavy sedation, with the foot of the bed elevated, and compresses applied to the incarcerated hernia, in an attempt to replace the hernia into the abdomen". It seems clear to us

that the conclusion is inescapable that the defendant "satisfactorily excused" his non-appearance when he submitted to and obeyed the order of his physician, and the advice of his attorney. To hold otherwise would be to say that the defendant was required to disregard the admonition of his doctor that his appearance in court would create a clear and present danger to his health, if not to his life, should complete strangulation of the hernia ensue.

As to the reasonableness of defendant's conduct in not appearing for trial in deference to the advice of his physician and attorney, it is noteworthy that, as heretofore pointed out, Dr. Crahan, one of the court-appointed physicians, suggested the use of an ambulance to transport defendant from his residence in Long Beach to the Los Angeles County Jail and upon arrival at the jail the doctor ordered suspension of the usual procedure for "booking" a prisoner and directed that defendant be placed in the hospital ward of the jail where he remained over the weekend and until he was taken into the courtroom situated in the same building as the jail.

[3] In matters of bail forfeiture it should be borne in mind that bail is not taken on forfeiture as money is taken for a debt due upon a valid consideration. The object of bail is to insure the attendance of the principal and his obedience to the orders and judgment of the court. There should be no suggestion of revenue to the state or county, nor punishment to the surety.

[4-6] In passing upon the question of whether the trial court has abused its discretion in denying or granting remission of a bail forfeiture, the facts of the individual case must be taken into consideration and the purpose of bail kept in mind. The cause and purpose of defendant's non-appearance as well as the good faith of the surety are also factors. Consideration should also be given to whether default of the party was wilful, whether notwithstanding the default a trial of the cause could be had, and whether public justice required that the penalty of forfeiture be enforced.

[7] No citation of authority is needed for the statement that in ruling upon a motion to set aside an order of forfeiture of bail the term discretion when used as a guide to judicial action means *sound* discretion, not discretion exercised arbitrarily, but with due regard for that which is right and equitable under the circumstances. It means discretion directed by reason and conscience to a just result.

[8] Flanked by this legal background and from a consideration of the circumstances here present, in the light of the provisions of Section 1305 of the Penal Code, we are satisfied that there was presented to the trial court an un rebutted *prima facie* showing that justice did not require the enforcement of the forfeiture and that the denial of the motion to vacate the order of forfeiture constituted an abuse of discretion.

The order appealed from is reversed and the cause remanded with directions to the court below to vacate and set aside the order of forfeiture and to exonerate the bond in question.

DORAN and DRAPEAU, JJ., concur.



L. E. CROWLEY, Individually and doing business as Crowley Sales Co., Plaintiffs and Appellants,

v.

MODERN FAUCET MFG. CO., a corporation, F. K. Robertson, Dan G. Liston and Ernest Bucknell, Defendants and Respondents. *

Civ. 20505.

District Court of Appeal, Second District, Division 1, California.

Dec. 20, 1954.

Rehearing Denied Jan. 10, 1955.

Hearing Granted Feb. 16, 1955.

Action for breach of alleged written memorandum of agreement whereby defendants were to sell shower heads exclusively to plaintiffs. The Superior Court,

* Vacated 282 P.2d 33.

Los Angeles County, John J. Ford, J., entered judgment of dismissal, and plaintiffs appealed. The District Court of Appeal, Drapeau, J., held that, where, in prior action for breach of alleged oral agreement on part of defendants to give plaintiffs exclusive rights to buy from defendants a number of patented shower heads, complaint alleged that a written memorandum of such agreement had been signed by defendants and was attached to complaint as an exhibit and that written guarantee and memorandum of such agreement signed by defendants was also attached to another exhibit, but trial judge sustained demurrer on ground that action on the alleged contract was barred by statute of frauds because contract was not in writing, complaint, in this action, which alleged that defendants had signed and delivered to plaintiffs written memorandum of agreement to sell the shower heads exclusively to plaintiffs, stated a new and different cause of action and, therefore, action was not barred by judgment in prior action.

Judgment reversed.

1. Judgment ⇐585(1)

Procedural effect of judgment on merits to extent that it adjudicates that facts alleged do not constitute cause of action is a bar to a second action alleging the same facts.

2. Judgment ⇐572(2)

Even though different facts may be alleged in second action, if demurrer was sustained in first action on ground equally applicable to second action, judgment in first action will be a bar to the second action.

3. Judgment ⇐585(3)

If new or additional facts are alleged which cure defects in original pleading in first action, judgment in such first action does not constitute a bar to second action.

4. Judgment ⇐572(1)

Judgment entered on demurrer does not have the same broad *res judicata* effect as judgment entered after trial of a case.

5. Judgment ⇐585(3)

Where, in prior action for breach of alleged oral agreement, complaint alleged

existence of written memorandum of such agreement and attachment thereof to complaint as an exhibit, but trial judge sustained demurrer on ground that action was barred by statute of frauds because contract was not in writing, in subsequent action, complaint, which alleged that defendants had signed and delivered to plaintiffs written memorandum of the agreement stated a new and different cause of action, and, therefore, such subsequent action was not barred by a judgment in prior action. Civ.Code, § 1624, subd. 1; Code Civ.Proc. § 1973, subd. 1.

6. Judgment ⇐572(2)

Fact that plaintiff's prior action on alleged oral contract, by which plaintiffs were given exclusive right to buy a number of patented shower heads from defendants, was terminated upon trial court's sustaining of demurrer to complaint without leave to amend would not make plaintiff's action, which was for breach of alleged written memorandum of agreement to sell the shower heads exclusively to plaintiff, sham and frivolous.

Nicolas Ferrara, Los Angeles, for appellants.

Myron J. Glauber, Los Angeles, for respondents.

DRAPEAU, Justice.

This appeal has to do with two lawsuits growing out of one business transaction.

In the first action plaintiffs' third amended complaint alleges that plaintiffs and defendants entered into an oral agreement whereby plaintiffs were given the exclusive right to buy from defendants a number of patented shower heads. Other of the many parts of the agreement alleged need not be repeated. The complaint then alleges breach of the agreement and damages therefor.

Paragraphs XI and XII of the complaint read:

"XI. That a written memorandum of said agreement, signed by the defendants, is set forth in a letter dated October 17th, 1950 a copy of which is attached hereto

as Exhibit 'A' and made a part hereof as though set forth herein in full.

"XII. That a written guarantee and memorandum of said agreement, signed by the defendants, is set forth in a letter dated January 15th 1951, a copy of which is attached hereto as Exhibit 'B' and made a part hereof as though set forth herein in full."

Defendants' plea by demurrer to the complaint was sustained without leave to amend, and judgment followed. Plaintiffs' appeal from that judgment was dismissed by the District Court of Appeals.

It appears from a memorandum of decision by the trial judge that the demurrer was sustained for the reason that action on the alleged contract, not being in writing, was barred by the statute of frauds. Civil Code, § 1624, subd. 1; Code of Civil Procedure, § 1973, subd. 1.

In the second action, now before this Court, defendants' motion for dismissal was granted, and judgment followed. The motion was granted because the Superior Court determined that the cause of action pleaded was *res judicata*, and entirely concluded by the judgment in the first action.

Plaintiffs appeal from this judgment.

Therefore it becomes necessary to compare the complaints in the two cases, and to determine whether plaintiffs have now successfully pleaded a new and different cause of action. *Keidatz v. Albany*, 39 Cal.2d 826, 249 P.2d 264; Cf. *Sutphin v. Speik*, 15 Cal.2d 195, 99 P.2d 652, 101 P.2d 497.

The complaint in this action alleges that defendants signed and delivered to plaintiffs their written memorandum of agreement to sell the shower heads exclusively to plaintiffs. All of the other allegations of the complaint are substantially the same as in the first action.

Plaintiffs contend that the complaint in this action states a new and different cause of action, and thus brings their pleading within the rules stated in the *Keidatz* case. Many *res judicata* cases are collected and cited in the decision in that case.

[1-4] The rules stated in the *Keidatz* case may be summarized as follows:

1. The procedural effect of a judgment on the merits to the extent that it adjudicates that the facts alleged do not constitute a cause of action is a bar to a second action alleging the same facts.

2. Even though different facts may be alleged in the second action, if the demurrer was sustained in the first action on a ground equally applicable to the second, the former judgment will be a bar.

3. If, on the other hand, new or additional facts are alleged that cure the defects in the original pleading, the former judgment is not a bar to the subsequent action.

4. A judgment entered on demurrer does not have the same broad *res judicata* effect as a judgment entered after trial of a case. Such a judgment is analogous to the rule that was applicable to nonsuits before section 581c was added to the Code of Civil Procedure in 1947. Before this amendment to the Code, a judgment of nonsuit was not on the merits, and the plaintiff could start anew and recover judgment if he could prove sufficient facts in the second action.

Defendants argue that the reference to the writings in the complaint in the first case made a written contract one of the essential elements of the pleading and thus put in issue the very fact alleged in the complaint in this case.

This Court has read the pleadings, and the affidavit of counsel for defendants, and has endeavored to put itself in the position of the Superior Court and the parties at the time of the decision in the first case. It seems clear that although reference was made to the writings in the complaint, the case was submitted to the Superior Court and decided on the theory that the contract pleaded was not in writing, and that plaintiffs' case was, therefore, barred by the statute of frauds.

[5] So, trying this case in accordance with the rules applied in the *Keidatz* case, it is concluded that the present complaint states a new and different cause of action, and that plaintiffs are entitled to their day in court. Then they may prove, if they can,

that the cause of action is founded upon a written contract.

[6] Defendants argue that the judgment should be affirmed on the further ground that the second action is "sham and frivolous." However, this Court can not go so far as to say that the history of this case shows clearly that the pleading is sham and without merit. See McKenna v. Elliott & Horne Co., 118 Cal.App.2d 551, 258 P.2d 528. We think the legal philosophy of this case requires submission of the controversy to a trial court for determination after a hearing on the merits.

The judgment is reversed.

WHITE, P. J., and DORAN, J., concur.



129 Cal.App.2d 793

Della G. GERBRACHT et al., Plaintiffs and Respondents,

v.

Kathryn OBERSMITH, also known as Carrie Obersmith, Defendant and Appellant.

Kathryn OBERSMITH, Cross-Complainant and Cross-Defendant,

v.

Della G. GERBRACHT et al., Cross-Defendants.

Civ. 20285.

District Court of Appeal, Second District,
Division 3, California.

Dec. 27, 1954.

Action to quiet title to two city lots. One of defendants filed a cross-complaint against plaintiffs and others to quiet title to the lots and a plea in abatement on the ground of pendency of a former action. From a judgment of the Superior Court of Los Angeles County, Clarence M. Hanson, J., for plaintiffs and an order denying a motion to enter a different judgment cross-complainant appealed. The District Court

277 P.2d—537

of Appeal, Shinn, P. J., held that the trial court's findings supported the judgment for plaintiffs.

Judgment and order affirmed.

1. Quieting Title ⇨47(2)

In action to quiet title to two city lots, trial court's findings supported judgment for plaintiffs. Code Civ.Proc. § 318.

2. Deeds ⇨194(3)

A grant deed duly executed is presumed to have been delivered to grantee at its date. Civ.Code, § 1055.

3. Appeal and Error ⇨1008(1)

The trial court's fact findings not attacked by party appealing from judgment thereon must be accepted as conclusive on material facts by District Court of Appeal.

4. Abatement and Revival ⇨80

In action to quiet title to city lots where one defendant's cross-complaint to quiet title thereto did not pray for abatement of action on ground of pendency of former action but sought decree establishing cross-complainant's title to lots and she did not urge plea in abatement at trial of action, such plea was waived.

Kathryn Obersmith, in pro. per.

Dwain Tarbet, Los Angeles, for respondents.

SHINN, Presiding Justice.

Della G. Gerbracht and Rolf L. Meuer, substituted as plaintiffs for Methodist Leaders Lodge, sued Kathryn Obersmith and others to quiet title to two city lots. Defendant Obersmith filed a cross-complaint against plaintiffs and others to quiet title. Among other defenses to the cross-complaint of Obersmith, the answers of the cross-defendants alleged title by prescription. Obersmith, by answer and cross-complaint, pleaded in abatement of the present action the pendency of a former action which remained undetermined.

The court found that the plaintiffs and cross-defendants Della G. Gerbracht and Rolf L. Meuer are now the owners of the fee title to the property in question, having

obtained it by mesne conveyance from Helen A. Leavitt, the sole heir to Henry P. Leavitt, deceased. It found that Clara Anderson was formerly the owner of the fee title; she conveyed her title to Henry A. Leavitt on May 8, 1936, by conveyance which was duly recorded in Los Angeles County on February 25, 1938; Leavitt entered into "actual, exclusive and continuous occupation and possession of the property," and that he and his successors have remained in such possession until the commencement of this action, claiming the same adversely and paying all taxes assessed thereon. It was found that Clara Anderson on June 14, 1937, deeded the property to defendant Obersmith but that the deed was taken by the latter with actual and constructive notice of the prior conveyance to Leavitt, and also with actual and constructive notice of the continued use and occupation of the property by Leavitt and his successors. It was found that Obersmith had paid no taxes on the lots since May 8, 1936, nor been in possession or occupation of the lots. The findings, conclusions and judgment were that defendant Obersmith had no title and that any claim of title by her was barred by the provisions of section 318 of the Code of Civil Procedure. Defendant Obersmith appeals.

[1] The findings support the judgment. They not only establish that plaintiffs' predecessors acquired title from Mrs. Anderson by deed which was superior to the deed to Obersmith but they also show a good prescriptive title in plaintiffs.

[2, 3] Appellant argues that there was no evidence that there was a delivery of the deed of Mrs. Anderson to Leavitt. A grant duly executed is presumed to have been delivered at its date. Civ.Code, § 1055. In her briefs appellant makes no attack upon the finding that she received her deed from Mrs. Anderson with notice of the prior deed to Leavitt. Neither does she question the finding of facts which would establish a prescriptive title in plaintiffs, nor does she make any reference to the evidence upon that issue. We must accept

the findings as conclusive as to the material facts.

[4] Although it was alleged in the cross-complaint of Obersmith that an action to quiet title was instituted against her in 1939 by one of plaintiffs' predecessors and that the action was still pending, the cross-complaint did not pray for an abatement of the present action but, upon the contrary, sought a decree establishing title in the cross-complainant. It does not appear that appellant urged a plea in abatement at the trial. If there was any merit in the plea of another action pending, which we doubt, the plea was waived.

The judgment and the order appealed from are affirmed. The attempted appeal from an order denying motion for a new trial is dismissed.

PARKER WOOD and VALLÉE, JJ.,
concur.



129 Cal.App.2d 700

Earl G. BIEG, Plaintiff and Respondent,

v.

Jennings B. SHAMEL and Ruth T. Shamel,
Defendants and Appellants.

Civ. 20123.

District Court of Appeal, Second District,
Division 3, California.

Dec. 21, 1954.

Hearing Denied Feb. 16, 1955.

Real estate broker brought action against owners of ranch for broker's commissions. The Superior Court of Los Angeles County, H. S. Farrell, J., entered judgment for broker, and owners appealed. The District Court of Appeal, Wood, J., held that where owners agreed to pay broker commission for procuring purchaser of ranch for \$200,000 if owners should "dispose of" ranch to prospective purchaser within six months, on any terms or condi-

tions, even if broker did not "consummate" transaction, and owners let prospective purchaser take possession of ranch, though he did not pay escrow agent \$58,000 required by offer of purchase, and thereafter prospective purchaser redelivered possession of ranch to owners, Superior Court erred in entering judgment for broker without finding meaning that parties attributed to words "dispose of" and whether owners "disposed of" ranch within six months.

Judgment reversed and cause remanded for new trial.

1. Brokers ⇨40

Right of real estate broker to recover commission must be measured primarily by terms of his employment.

2. Brokers ⇨83(14)

Where owners of ranch agreed to pay broker commission for procuring purchaser of ranch for \$200,000 if owners should "dispose of" ranch to prospective purchaser within six months, on any terms or conditions, even if broker did not "consummate" transaction, and owners let prospective purchaser take possession of ranch, though he did not pay escrow agent \$58,000 required by offer of purchase, and thereafter prospective purchaser redelivered possession of ranch to owners, court erred in entering judgment for broker in action against owners for commissions without finding meaning that parties attributed to words "dispose of" and whether owners "disposed of" ranch within six months.

3. Brokers ⇨86(1)

Where owners of ranch agreed to pay broker commission for procuring purchas-

er of ranch, if owners should dispose of ranch to prospective purchaser within six months from date of agreement, court erred in finding that commissions became payable on date of agreement, in absence of any showing that ranch was disposed of on date of agreement.

H. P. Babson and John C. Goff, Los Angeles, for appellants.

Gross & Svenson, and Harold W. Svenson, Van Nuys, for respondent.

PARKER WOOD, Justice.

Action by real estate broker to recover commission allegedly due him from defendants. Judgment was for plaintiff in the sum of \$15,429.37 (\$13,500 plus interest). Defendants appeal from the judgment.

Defendants, husband and wife, owned certain real property in Los Angeles County known as the Shamel Ranch. On April 2, 1950, defendant Jennings B. Shamel signed, and delivered to plaintiff, a listing agreement which provided that plaintiff had the exclusive right until May 5, 1950, to sell the Shamel Ranch for \$200,000; that Shamel would pay to plaintiff, as commission, 7½ per cent of the selling price "on any deal accepted by" Shamel. At the time of receiving the listing, plaintiff had a prospective purchaser by the name of R. W. Alcorn.

Thereafter plaintiff prepared a document, which bears the date May 3, 1950, entitled "Offer to Purchase."¹ Said document (Exhibit B) recited in effect that Alcorn offered to purchase the ranch for \$200,000,

and agree to pay, therefore (sic), the sum of \$200,000.00 as follows:

\$———— deposit herewith, \$58,000.00 on or before Sept. 1, 1950 and bal. 1st T.D.—\$75,000. pay. \$7500. &/or more 9-1-51 plus 5% int., \$7500. &/or more plus 5% int. on 9-1 each yr. thereafter until paid in full, 2d T.D.—\$67,000. pay. \$25,000. plus 5% int. 1-5-51, \$4200. &/or more plus 5% int. on 1-5 each yr. Thereafter until paid in full.

"I herewith deposit with you the sum of \$———. If, before midnight of June 1, 1950 you obtain the acceptance

1. "Offer to purchase

"Earl G. Bieg

"13531 Ventura Boulevard

"Sherman Oaks, California

"May 3 1950

"Dear Sir:

"I hereby offer to purchase the following property situated in Los Angeles County, California, to wit: Shamel Ranch in Las Virgines Canyon on Las Virgines Canyon Rd. free and clear of all liens, indebtedness, claims of every kind, except those noted below, but subject to all restrictions, reservations, conditions and rights of way of record,

and would pay \$58,000 on or before September 1, 1950, and would deliver a first and a second trust deed to secure payment of the balance of the purchase price. The document was signed by Alcorn, but the record does not show when he signed it. The bottom portion of said document was entitled "Acceptance," and it was signed by defendants on June 1, 1950. It recited, in part, that defendants agreed to pay plaintiff "7½% commission if we dispose of such property to the maker of such offer, or his nominee, within six (6) months from the date hereof. * * *

Alcorn and defendants also signed escrow instructions, dated May 6, 1950, in which it was provided that the total consideration for the property was \$200,000; Alcorn would deliver "through escrow" \$58,000, provided that on or before September 1, 1950 instruments were filed for record which would entitle the escrow agent to procure a policy of title insurance; Alcorn

of the owners of the above property to this offer, I will, by 9-1-50 deposit in escrow the cash above mentioned, execute all papers and documents and do everything else necessary to fully comply with this agreement upon my part to be performed. Such money and papers are to be so deposited in an escrow which you are authorized to open anywhere you desire. The cash and documents are to be used only when the owners, at their cost, furnish me, through such escrow, with a policy of Title Insurance of a reputable company showing the title to the property as above mentioned, and upon the transfer and conveyance of such property to me, or my nominee.

"I will pay the usual purchaser's share of the escrow and other charges. All income, rents, utility, charges, taxes and insurance are to be prorated as of the close of escrow.

"If you do not obtain the owner's acceptance of this offer within such period, upon the terms and conditions herein mentioned or such others as the owner and I may agree upon, the above deposit shall be immediately returned to me. If you do obtain such consent, and I fail to comply with each and all of the terms and conditions hereof on my part to be performed, you shall retain from such deposit the full amount of the commission to which you are entitled as the owner's agent, and the balance shall be held by

also would deliver to the escrow agent a first trust deed as security for a note dated May 6, 1950, for \$75,000 in favor of defendants, and a second trust deed to secure another note dated May 6, 1950, for \$67,000 in favor of defendants. The instructions also provided that defendants would "Pay at close of escrow * * * the following: Pay [real estate brokers'] commission of \$3333.33 to Bill Keim * * * \$3333.33 to Evelyn Tate * * * \$8333.33 to Earl Bieg * * *." (It was stipulated at the trial herein that plaintiff, by reason of an assignment, was entitled to any commission which may be due.)

After the documents, above mentioned, were executed Alcorn moved to, and took possession of, the ranch. The record does not show when he moved to the property but it does show that he was residing there in July, 1950, and that he resided there until January 15, 1951. Defendants thereafter took possession of the property.

you until the owners and I agree upon its disposition.

"Time is the essence hereof. Bill of sale to all personal property will be given by seller but no inventory. I have inspected land, bldgs., and water on the 640 ac., more or less, and accept said property as is. All furn. & equip on the ranch as of this date are to be included.

Address _____

Purchaser R. W. Alcorn

Phone _____

Purchaser _____

R. W. Alcorn

"Acceptance

"We are the legal owners of the above described property, and agree to sell the same to _____ or his nominee, upon the terms and conditions above mentioned. We will pay the owner's share of the escrow charges, revenue stamps and all other usual owner's expense.

"We agree to pay Earl G. Bieg 7½% commission if we dispose of such property to the maker of such offer, or his nominee, within six (6) months from the date hereof, on any terms or conditions, even if Earl G. Bieg does not consummate (sic) the transaction.

Address _____

Owner J. B. Shamel

Phone _____

Owner Ruth T. Shamel

Date June 1-1950"

Alcorn did not pay any part of the \$58,000 to the escrow agent or to defendants, and he did not perform any of the conditions of the escrow instructions or of the offer and acceptance agreement. He did pay \$1,500 (outside escrow) to plaintiff on October 19, 1950. Plaintiff applied the \$1,500 on his claim for commission in the amount of \$15,000.

On March 18, 1952, plaintiff commenced this action to recover \$13,500, the amount allegedly due as commission. He alleged in the complaint that prior to May 3, 1950, he was employed by defendants to procure a purchaser of the Shamel Ranch; on May 3, 1950 he procured Alcorn as a prospective purchaser of the property for \$200,000; Alcorn executed a written offer to purchase the property and defendants accepted said offer in writing; pursuant to the terms of the agreement, the defendants and Alcorn on May 6, 1950, opened an escrow and executed escrow instructions; thereafter Alcorn with permission of defendants went into possession of the property, operated the ranch for his own benefit, constructed improvements thereon and paid plaintiff \$1,500 outside of escrow to apply on the purchase price of the property; about November, 1950 Alcorn and defendants orally agreed to cancel the transaction and Alcorn redelivered possession of the property to defendants; the agreed commission of 7½ per cent amounting to \$15,000 became due from defendants to plaintiff on May 3, 1950, the date of the sale, and no part of said amount has been paid except the sum of \$1,500 leaving a balance of \$13,500 now due and unpaid. (A copy of the listing, a copy of the offer and acceptance agreement, and a copy of the escrow instructions, were attached to and made a part of the complaint.)

Defendants filed an answer in which they admitted that they accepted the written offer to purchase but alleged that said offer was accepted conditionally and that no condition therein was complied with by Alcorn; admitted that Alcorn went into possession of the property and operated the ranch, but denied that Alcorn made any payments on account of the purchase price, "or with their [defendants'] knowledge or

consent." As an affirmative defense, they alleged therein that on May 3, 1950, plaintiff presented to defendants a written offer, Exhibit B, to purchase the property which offer was signed by Alcorn; said document and the escrow instructions were prepared by plaintiff; in order to obtain defendants' conditional acceptance of said offer the plaintiff stated to them that he knew Alcorn, that by reason of plaintiff's former banking connections he had confidential information that Alcorn was tremendously wealthy, that Alcorn was going to organize the ranch for underprivileged boys and there was considerable money available other than the money of Alcorn; plaintiff also stated that Alcorn had a \$200,000 trust fund and had made millions of dollars in the wheat market; plaintiff also stated that it was desirable to accept the proposal of Alcorn and give him possession of the ranch immediately because a man in his position could not thereafter afford to back down; plaintiff represented that said agreement would not obligate defendants to pay any commission unless said sale was completed and defendants received the purchase price of the property; defendants relied upon the representations made by plaintiff and executed the agreement, Exhibit B; said representations were false and were known by plaintiff to be false at the time they were made.

The court found, in part, as follows: On May 3, 1950, "plaintiff procured one R. W. Alcorn as a prospective purchaser" of the Shamel Ranch at a price of \$200,000, and that Alcorn thereupon executed a written offer to purchase the property, and on June 1, 1950, defendants accepted the offer to purchase. Exhibit B is a copy of said offer and acceptance, and delivery of said document was made by said parties to plaintiff. Pursuant to said offer and acceptance, Alcorn and defendants opened an escrow and on May 6, 1950, defendants executed escrow instructions, which instructions were thereafter signed by Alcorn and delivered to the escrow company. Immediately thereafter Alcorn, with the permission of defendants, entered into possession of the property, operated the ranch located thereon for his own benefit, made improvements

thereon, and in October, 1950, paid \$1,500 to plaintiff outside of escrow to apply on the purchase price of the property. Plaintiff performed all the conditions of the contracts, set forth in his complaint, on his part to be performed. Commission of $7\frac{1}{2}$ per cent, amounting to \$15,000, became payable by defendants to plaintiff on the date of the sale which was June 1, 1950, the date of the execution of the acceptance by defendants. Plaintiff received \$1,500 in October, 1950, from Alcorn on account of commission, and the balance of the commission of \$13,500 has not been paid. Alcorn failed to pay \$58,000 in escrow on September 1, 1950, and defendants, "granted an extension for the payment thereof." The escrow has not been closed. The offer to purchase was presented to defendants on June 1, 1950, and not on May 3, 1950. The court found further, as to allegations of the affirmative defense of the answer, that it is true that plaintiff stated to defendants in effect that Alcorn was connected with the production of a motion picture; that plaintiff stated to defendants he had received information from Alcorn's broker, and from a credit report of a bank, to the effect that Alcorn owned a large home in Kansas, had been active in the wheat market, had an interest in a motion picture, and appeared to be wealthy; that plaintiff also told defendants that he had not read the bank report, he knew nothing of the truth thereof, and he "was relaying it to the defendants for what it might be worth"; and it was not true that defendants executed the agreement in reliance upon the representations made by plaintiff.

Plaintiff testified in part as follows: On February 5, he saw defendant Mr. Shamel (referred to herein as defendant) for the first time when he went to defendant's office and told him that he (plaintiff) would like an "exclusive" listing of the Shamel Ranch—that he had someone as a prospect, who "was a big producer [of motion pictures]" and he (plaintiff) understood that the prospect had made considerable money in the wheat business in Kansas. Defendant gave him an exclusive listing for 20 days, to February 25, 1950. Plaintiff showed the ranch to two men who were representing

Alcorn, the prospect. On February 26, 1950, one of the men told plaintiff that Alcorn had been to the ranch and was going to make a deal. On February 27, 1950, defendant told plaintiff by telephone that Alcorn came to the ranch on the 25th, that defendant then went to Alcorn's office and they "shook hands" on a deal. Plaintiff stated that they would have to get papers signed and get a deposit. Defendant told plaintiff to make out the papers but not to insist on any particular amount as deposit because he did not know whether he could get a cash deposit. Thereafter defendant told plaintiff not to put too much pressure on Alcorn, that he was temperamental and defendant might lose the deal. Plaintiff replied that "Until we get something signed and a deposit we don't have any deal." Later, plaintiff told defendant "that the smartest thing for us to do" is to get a deposit from Alcorn. In April plaintiff called defendant and told him that a friend of plaintiff, "a broker who was in the deal," said that he had read a report on a banker's desk which purported to be a report on Alcorn; that the report stated that Alcorn had a \$200,000 trust fund and had made a lot of money in wheat; and plaintiff also said that he had not seen the report and knew nothing about it. During the latter part of April, 1950, defendant told plaintiff that he was buying a ranch up north and "wanted this paper to use on the purchase of that ranch," and for plaintiff to get some kind of papers signed and that he (defendant) did not care anything about a cash deposit. Thereafter defendants and a man from the escrow company prepared the escrow instructions, and defendant and his wife signed them. Said instructions and an offer and acceptance agreement (Exhibit B) were sent to Alcorn's attorney and were signed by Alcorn. Then the instructions were sent to the escrow company and the offer and acceptance agreement was returned to plaintiff. Plaintiff then took the offer and acceptance agreement to defendants' home where defendant and his wife signed the acceptance. Thereafter defendant told plaintiff that Alcorn wanted to move to the ranch, and plaintiff said "no." Defendant said he did not see how it would

hurt anything—that he was not using the ranch and it was not being operated. Plaintiff then said that it was up to defendant but that plaintiff would not do it. Plaintiff testified further that: During the early part of June, 1950 he left town and was gone until the latter part of September, 1950. When he returned he went to the ranch and that was the first time he knew Alcorn had gone into possession. All the transactions up to this date were between Alcorn and defendant. During the second week of October, 1950, at plaintiff's request, Alcorn and defendant came to plaintiff's office for a meeting. Plaintiff told them that he would like to get the deal straightened up but if they were going to deal together they should pay him his commission and then they could do what they wanted to. Alcorn stated that he would have it (money for commission) there in a few days. Plaintiff called another meeting at which defendant and Alcorn were present, and defendant said that "there was no question but that plaintiff's commission was due and should be paid." Alcorn agreed to bring \$5,000 to plaintiff within two days and \$10,000 within ten days. Subsequently, Alcorn sent a check to plaintiff for \$1,500.

Defendant testified in part as follows: In April, 1950, plaintiff asked him for a renewal of his listing or an additional listing, claiming that he had a deal with Alcorn who would pay \$200,000 cash for the ranch. Plaintiff said that Alcorn was many times a millionaire, had made millions in the wheat market, was a large producer in the movie industry, and had a \$200,000 trust fund. Defendant then gave plaintiff another listing dated April 2, 1950 (Exhibit A). In a later conversation with plaintiff, defendant said that he wanted plaintiff to show good intention "by opening an escrow with some money in it," and plaintiff said that he had not been able to get any money from Alcorn. Thereafter plaintiff asked defendant to sign the offer and acceptance (Exhibit B) and stated that he had access to information that the average person did not have because of his former bank experience, that he knew Alcorn had a lot of money and the signing of the agreement

would be equal to money in escrow. Defendant told plaintiff that he would not assume the chore of completing the deal or collecting the money. When defendant and his wife signed the acceptance, the offer had not been signed by Alcorn. At the beginning of the transaction plaintiff suggested that inasmuch as defendant was not operating the ranch that it "would have a great influence in Alcorn's completing the deal if he would let him take over the ranch"; it would relieve defendant of paying his foreman's salary while the deal was in the making, and that Alcorn would be terribly embarrassed to reverse himself. When the September 1 payment was not made, plaintiff told defendant to exercise patience because Alcorn was raising sufficient money from an organization in Chicago to pay \$58,000 in escrow. Defendant then verbally extended the time for the payment—no date was agreed upon for the extension. Thereafter defendant told Alcorn that he (Alcorn) would have to give possession of the ranch to defendant. There was no conversation between him and Alcorn regarding the closing of escrow but defendant paid the escrow charges. Alcorn told defendant, on one occasion, that he had a trust fund and could not break it and later told him that he did not have a trust fund. During the latter part of Alcorn's occupancy of the ranch, he (Alcorn) "admitted" that he did not have a dime. Defendant did not state in October, 1950, or at any other time, that plaintiff had earned his commission and should be paid. Defendant did not tell plaintiff that he had closed the deal with Alcorn. Plaintiff told defendant to stay away from Alcorn that he was temperamental and plaintiff would handle him.

Appellants (defendants) contend that, under the terms of the offer and acceptance agreement, payment of a commission was contingent upon the property being *disposed of* within six months after executing the agreement; that the property was not disposed of within that time or at all, and no commission became due. They assert that the escrow instructions are consistent with their interpretation of said agreement,

since it was provided in the instructions that appellants would pay commission "at close of escrow."

Respondent (plaintiff) asserts that his claim to commission is based solely upon the offer and acceptance agreement; that he so stated in his opening brief in the trial court, and in his opposition to a demurrer, and in a letter to the trial judge; and that the court rested its decision entirely on the offer and acceptance agreement.

[1,2] The portion of the offer and acceptance agreement which related to the payment of commission, as above shown, was as follows: "We agree to pay Earl G. Bieg 7½% commission if we dispose of such property to the maker of such offer, or his nominee, within six (6) months from the date hereof, on any terms or conditions, even if Earl G. Bieg does not consummate (sic) the transaction." It therefore appears that a commission would become payable under a certain condition or upon the happening of a specified event, that is, if defendants disposed of the property within six months. The court made no finding as to whether the property had been disposed of. Such a finding was necessary for a proper determination of the issues. Also, such a finding would have to be based upon the understanding or intention of the parties with respect to the meaning of the words "dispose of" as used in the agreement. There was no finding as to the understanding or intention of the parties with respect to the meaning of those words. In the absence of evidence to show otherwise, it is to be assumed that the parties intended that those words should be given their usual and ordinary meaning. According to Webster's Dictionary (1950) those words mean: "To get rid of; to put out of the way; to finish with; * * * To transfer to the control of someone else, as by selling; to alienate; part with; relinquish; bargain away." Plaintiff argues to the effect that the word "dispose" has many meanings, and that defendants disposed of the property, within the meaning of the agreement, by reason of the following acts: executing escrow instructions, delivering

possession of property to Alcorn, and extending time for the payment of the deposit. It cannot be concluded as a matter of law from the findings which were made, with respect to the escrow, possession of the property, extending time, or other facts, that the property was disposed of within the meaning of the agreement. Also, it cannot be said as a matter of law from the evidence that the property was disposed of. As above shown, the offer and acceptance agreement, which was prepared by plaintiff, had a provision therein that defendants would pay the commission if they dispose of the property with six months, "even if Earl G. Bieg does not consummate (sic) the transaction." (Italics added.) The words within those quotation marks indicate that it was contemplated that the transaction should be consummated by someone before a commission would become payable, and in the event it was consummated plaintiff would be entitled to commission even though he did not consummate it. When the words "dispose of" are considered in connection with the word "consummate," which is in the same sentence with those words, it would seem that the parties intended that the words "dispose of" should be synonymous with the word "consummate." If such a meaning was intended, then it would appear that plaintiff would not be entitled to a commission unless the sale to Alcorn was consummated. As stated in *McGill v. Fleming*, 32 Cal.App.2d 601, at page 604, 90 P.2d 341, at page 343: "The word 'consummate' means to bring to completion." In *Hodges v. Lewis*, 112 Cal.App.2d 526, at page 528, 246 P.2d 676, at page 677, it was said: "The right of a broker to recover commission must be measured primarily by the terms of his employment. [Citations.] As above shown, it was specifically provided in the commission agreement that, in consideration of plaintiff's efforts to negotiate the sale of the property to Safeway Stores, the defendant would give to plaintiff 'upon final consummation of said sale' an option to purchase certain real property. It therefore appears that plaintiff's right to receive the option was

contingent upon the happening of a certain event, namely, the final consummation of the sale." It was held therein that the sale was not consummated, and that defendant was not required to compensate plaintiff. It was also said therein at page 529 of 112 Cal.App.2d, at page 677 of 246 P.2d: "When a condition precedent is adopted by contracting parties in their agreement, the court will exact a substantial if not a strict observance of the provisions of the agreement before ordering a judgment thereon." The failure to find whether the property had been disposed of was a failure to find upon a controlling factual question in the case. Also, the failure to find what the parties understood or intended by the words "dispose of" was a failure to find upon another principal issue in the case. In *Commeford v. Baker*, 127 Cal. App.2d —, 273 P.2d 321, plaintiffs were entitled, under a contract, to commissions of six per cent on gross sales but there was no finding as to the understanding or intention of the parties with respect to the meaning of "gross sales." The court said therein 127 Cal.App.2d at page —, 273 P.2d at page 327: "We therefore have no finding upon the one issue of fact upon which plaintiffs' right to commissions depends. It is a settled rule of appellate procedure that a judgment may not stand in the absence of findings on the material issues which support the judgment."

[3] The court herein did find that the commission became payable on the date of the sale which was June 1, 1950, when defendants signed the acceptance agreement. The provision for payment of a commission is in said acceptance agreement which was prepared and submitted by plaintiff. Plaintiff emphasizes, as above shown, that he relies solely on the offer and acceptance agreement. It must be assumed that there was some object in providing therein that defendants agree to pay com-

mission "if we dispose of such property * * * within *six (6) months from the date hereof* [June 1, 1950]." (Italics added.) The finding that the commission became payable on June 1, 1950, the date the acceptance was signed is in direct conflict with defendants' written agreement that they would pay commission *if they disposed of* the property within six months from June 1, 1950. That provision in the agreement was a condition precedent and the defendants' liability for a commission was contingent upon the fulfillment of the condition. In view of said provision which expressly made the payment of commission dependent upon a future occurrence, the said finding to the effect that commission became payable *immediately when defendants signed the agreement* is not supported by the evidence.

In *Commeford v. Baker*, supra, 127 Cal. App.2d —, 273 P.2d 327, it said: "No just decision of the cause is possible without a determination by a trial court, after the receipt of all proper evidence, as to the meaning the parties attributed to the term 'gross sales' as used in the contract." In the present case, a similar statement with respect to the meaning of the words "dispose of" is appropriate. No just decision of this cause is possible without a determination by a trial court (1) as to the meaning the parties attributed to the words "dispose of" as used in the agreement, and (2) whether the defendants disposed of the property within six months or at all after June 1, 1950.

By reason of the above conclusions, it is not necessary to discuss other contentions.

The judgment is reversed, and the cause is remanded for a new trial.

SHINN, P. J., and VALLÉE, J., concur.

129 Cal.App.2d 803

Claude A. GRIFFITH, Plaintiff and Respondent,
v.

Pearl GRIFFITH, Defendant and Appellant.
Civ. 20346.

District Court of Appeal, Second District,
Division 2, California.

Dec. 28, 1954.

Husband's divorce action. The Superior Court, Los Angeles County, Fred Miller, J., entered interlocutory decree for husband, and wife appealed. The District Court of Appeal, McComb, J., held that evidence was sufficient to support decree.

Affirmed.

1. Divorce ⇨130

In husband's action for divorce on grounds of extreme cruelty, evidence was sufficient to support interlocutory decree for husband.

2. Divorce ⇨184(4)

On appeal from decree for husband in divorce action, wife's testimony contrary to husband's would be disregarded.

3. Divorce ⇨184(6, 10)

Infliction of grievous mental suffering is a question of fact to be determined from circumstances of the case, in light of intelligence, refinement and delicacy of sentiment of complaining party, and a correct decision must depend upon the sound sense and judgment of the trial court, whose conclusion will not be disturbed unless evidence is so slight as to indicate an abuse of discretion.

4. Divorce ⇨127(4)

The sufficiency of corroborative testimony lies in sound discretion of trial court, and it is unnecessary that all of plaintiff's testimony be corroborated and sufficient if corroborative evidence strengthens and confirms testimony of party seeking dissolution of marriage.

5. Husband and Wife ⇨299(1)

Previous separate maintenance decree was not a bar to an action for divorce grounded on acts of cruelty occurring subsequent to entry of that decree.

6. Divorce ⇨252

In a divorce action wherein decree is granted to a party upon grounds of extreme cruelty, it is within trial court's discretion to award innocent spouse all of the community property.

7. Divorce ⇨252

Trial court's action in awarding all community property to husband who was awarded divorce on ground of extreme cruelty was not abuse of discretion.

Joseph Scott, J. Howard Ziemann and G. L. McFarland, Los Angeles, for appellant.

Ball, Hunt & Hart, Long Beach, for respondent.

McCOMB, Justice.

This is an appeal from an interlocutory decree of divorce, granted to plaintiff on the grounds of extreme cruelty, wherein the community property was awarded to plaintiff.

Facts: Plaintiff and defendant were married on January 15, 1921, and lived together until September 11, 1940. On September 20, 1940, plaintiff filed a complaint against defendant for divorce, to which defendant filed an answer and cross-complaint for separate maintenance. After a contested trial plaintiff was denied a divorce and defendant was granted a decree of separate maintenance on May 2, 1941. This judgment became final.

On May 15, 1952, plaintiff instituted the present action for divorce, alleging extreme cruelty. After trial an interlocutory decree was awarded to plaintiff on the grounds of extreme cruelty and the community property of the parties was awarded to him.

Questions: First: *Was there substantial evidence to sustain the material findings of the trial court?*

Yes. The trial court found: (a) "On one occasion, when plaintiff had loaned his car to defendant while he and his brother, Orville, had dinner, and spent the evening together, when plaintiff requested the return of his automobile, defendant refused

to give it to him, cursed at him, threw the car keys away, and pushed the car down an inclining driveway, causing considerable damage to said car * * *."

The foregoing finding was supported by plaintiff's testimony, as follows: "A. Alone. So I told her being as we were going to go, I would leave her my car to drive, my wife and my sister-in-law, could use the car. So we did. So we came back the next morning to pick up my car. She refused to let me have the car.

"Q. What was said by her? A. She says, 'Well, you dirty son of a bitch, you are not going to get it,' and threw the keys away.

"Q. Who did that car belong to? A. It belonged to me and the finance company. * * * Then she pushed the car out of the garage and let it run across on the incline down and caved in the back end of the car on a telephone pole. It bounced across the street a couple of times and hit that post.

"Q. Did you say anything to her about that or have any argument? A. No, I did not.

"Q. Did anything else happen at that time? A. I found the keys, got in the car and drove off."

This testimony was fully corroborated by his brother, Orville.

The trial court found: (b) "Within one year after May 2, 1941, defendant came to the apartment on Long Beach Boulevard in South Gate, where plaintiff was living, beat upon the window, and talked in a loud, boisterous manner causing plaintiff's landlady to request him to move, which he did."

The foregoing finding was supported by plaintiff's testimony, as follows: "Q. What happened? A. She came up there between 12:00 and 1:00 o'clock at night, rapping and hammering on the door and was mad because my sister come up to stay with me.

"Q. Did she say anything to you? A. I didn't talk to her. She talked to my sister through the window and I saw her there. I was in the room there. I got up from

the other room and come in where my sister was.

"Q. How long was she there during this time, do you think, Mr. Griffith? A. I would say ten or fifteen minutes.

"Q. Were there any results or consequences of this? A. The consequence was that my sister went and had to go home and go down and stay with her. Then the landlady forced me to move because she would come there in the middle of the night and disturb the place. * * *

"Q. The Court: What was the disturbance? You have not described any yet.

"The Witness: Well, disturbing, that she would come there and knock on the door and calling at 12:00 or 1:00 o'clock, in the middle of the night.

"Mr. Hart: What did she say? What was the tone of her voice? A. The tone of her voice was that she was mad because I had taken my sister and said that I was trying to keep her away from visiting with her."

The trial court also found: (c) "On a second occasion, when plaintiff was living in an apartment at Compton, defendant followed the practice of parking in front of plaintiff's house for no apparent reason, until his landlady requested plaintiff to leave."

The above finding is supported by the following testimony of plaintiff: "The Witness: The summer of 1943 and fall of 1943. She was parking out across the street there watching the house continually all the time. * * *

"Mr. Hart: You saw her out there several times? A. That is right.

"The Court: How many times?

"The Witness: Well, I would say a half dozen times, at least.

"Mr. Hart: Any consequences of that, anything happened because of her being out there? A. Well, the landlady told me I would have to move.

"Q. Did she tell you why you would have to move? A. She said she wasn't going to have somebody watching her place. * * *

"The Court: Just tell us what happened next.

"The Witness: She did the same thing there. She drove out there.

"The Court: When was that?

"The Witness: And watching the place.

* * *

"The Witness: That is in Compton.

"Mr. Hart: How many times did it occur over there? A. Well I know of three different times.

"Q. What times of day would she be out there? A. It would be along 8:00, 9:00 o'clock at night.

"Q. Did she ever explain to you what her purpose was? A. No. I didn't go up and talk to her."

The court found: (d) "When defendant purchased the home, which was badly in need of repairs and work, and where gophers had thrown up large amounts of dirt underneath the house, which impaired ventilation and heating system, plaintiff did voluntarily offer and did spend many weeks during an entire year cleaning out under the house, painting it, building shelves in the garage, and other general manual labor in and about said home; on each occasion when he was working, defendant complained about how he did each job, berated him, swore at him and acted generally in a manner inconsistent with one receiving free voluntary work."

The foregoing finding is supported by this testimony of plaintiff: "Q. At any time did you ever go over to her place to do any work or anything like that? A. Lots of times.

"Q. Did anything happen on those occasions? A. Yes.

"Q. On the first time you went over there, what did you go over there to do, after May 2, 1941? A. I went over to mow her lawn and clean up her yard.

"Q. What happened when you went over? * * * A. Nothing, only just led to a fuss every time that I would do those things.

"Q. What did she say to you? A. She would always want to know, 'What you're

doing.' 'What you're doing with your money.' 'Where you've been.'

"Q. Did she thank you for coming over and mowing the lawn? A. No, she didn't.

"Q. Were you charging her for this work? A. I certainly was not.

"Q. I am interested in acts, times when you went over there when some acts were done. A. 1944, either the fall of 1944 or 1945, she bought a house in the next block down there. I worked for two days digging the dirt.

"Q. You went down there. What did you go down there for? A. I went down there to do the work for her.

"Q. How did you know about the work? A. Because I went over by there to see her.

"Q. What work needed to be done? A. Yes.

"Q. What work needed to be done? A. It needed to be painted and it needed to be—the gophers had dug up under it. It was packed solid under the house.

"The Court: What did you do?

"The Witness: I had to dig out under the foundation and go up under the house to dig this dirt out.

"Mr. Hart: You were over there for how long a period of time, then? A. It had taken me about two days for this. Then I painted the inside of all the bedrooms, the hall and the kitchen for her.

"The Court: What is there about that episode that you claim is cruelty?

"The Witness: The cruelty is after you get through, I have never—I never did it right. It was always wrong. I never got it done right.

"The Court: You mean she complained that you were not doing it right?

"The Witness: She complained that I wasn't doing the job right and also that I—after I got finished on that job, she told me I was just around nosing around in her business.

"Mr. Hart: Was there any charge made? A. No, sir.

"Q. It was not a business engagement but voluntary work on your part? A. Voluntary work on my part.

"Q. You were over how long during the painting and the under-the-house work? A. I was over there about a week. That is, in spare time.

"Q. How many times when you were over there was this fuss or conversation or complaint made? A. Well, there was some days I was over there and she wasn't there because she was in the real estate business. Then she wouldn't get down there. She was on the other days there.

"Q. How many times did it happen over this time? A. I would say four or five times in that length of time. * * *

"Mr. Hart: I will lay a foundation. You went over there to put in a sprinkler system? A. No, I didn't put it in, it was already in.

"Q. Who asked you to come over to do something about it? A. Nobody, I just dropped by there. She said she was working on it, said it wasn't working. I took the heads all out. She was mad because I wouldn't buy new ones.

"The Court: Do not put it that way. Tell us what she said and what you said.

"The Witness: She says: 'If you was doing it for somebody else, you could go buy new ones.'

"Mr. Hart: What else did she say or do? A. I left.

"Q. You did not finish that job? A. I got the heads back on and left."

In addition, the trial court found: "It is further true that the above course of conduct of defendant toward plaintiff caused him great and grievous mental suffering, mental anguish, and impaired his health, and that because of said course of conduct by defendant toward plaintiff, plaintiff's love and affection for defendant has been totally destroyed." This finding was in conformity with the testimony of plaintiff.

[1-3] In view of the above findings, which are supported by the evidence, which in turn support the interlocutory decree of divorce, no useful purpose would be served in detailing other evidence of acts of cruel-

ty offered by plaintiff. We of course must disregard contrary testimony of defendant. The applicable rule of law is found in *Keener v. Keener*, 18 Cal.2d 445, 447, 116 P.2d 1, 2, where it is said: "In each case the infliction of 'grievous mental suffering' is a question of fact to be deduced from the circumstances of the case, in the light of the intelligence, refinement and delicacy of sentiment of the complaining party. * * * A correct decision must depend upon the sound sense and judgment of the trial court. * * * Its conclusion will not be disturbed unless the evidence is so slight as to indicate an abuse of discretion."

[4] The sufficiency of the corroborative testimony, as in the present case, lies in the sound discretion of the trial court. (*Kirsch v. Kirsch*, 119 Cal.App.2d 271, 275, 259 P.2d 444.) It is likewise settled that it is unnecessary that all of plaintiff's testimony be corroborated. (*Price v. Price*, 71 Cal.App.2d 734, 736, 163 P.2d 501.) It is sufficient if the corroborative evidence strengthens and confirms the testimony of the party seeking a dissolution of the marriage. (*Hill v. Hill*, 106 Cal.App. 309, 312, 289 P. 227.)

[5] The rule is, of course, settled in California that a separate maintenance decree is not a bar to a subsequent action for divorce upon grounds of cruelty committed subsequent to the final separation of the husband and wife. (*Cardinale v. Cardinale*, 8 Cal.2d 762, 768, 68 P.2d 351; *Estate of McNeil*, 155 Cal. 333, 343, 100 P. 1086; *Comfort v. Comfort*, 17 Cal.2d 736, 744, 112 P.2d 259.) Therefore, the separate maintenance decree in the present action was not a bar to the action for divorce upon the acts of cruelty relied on by plaintiff which occurred subsequent to entry of the decree of separate maintenance.

Second: *Did the trial court abuse its discretion in awarding the community property to plaintiff?*

[6, 7] No. The rule is established in California that in a divorce action where the decree is granted to a party upon the ground of extreme cruelty it is within the discretion of the trial court to award to the innocent spouse all of the community

property. (Marshall v. Marshall, 196 Cal. 761, 765, 239 P. 36; Barham v. Barham, 33 Cal.2d 416, 431, 202 P.2d 289; Crouch v. Crouch, 63 Cal.App.2d 747, 756, 147 P.2d 678.) In the instant case there was no showing of an abuse of discretion and this court is bound by the finding of the trial court. (See Meyer v. Meyer, 184 Cal. 687, 689, 195 P. 387.)

Affirmed.

MOORE, P. J., and FOX, J., concur.



129 Cal.App.2d 795

Bessie Lee KNOX, Plaintiff and Respondent,
v.

Lawrence M. KNOX, Defendant and Appellant.
Civ. 20332.

District Court of Appeal, Second District,
Division 3, California.

Dec. 27, 1954.

Divorce action by wife in which court ordered husband to pay cost of medical treatment for wife. Thereafter, on motion, execution was issued to enforce payment for medical treatment as provided in original order. Husband appealed from order of Superior Court, Los Angeles County, John J. Ford, J., and also from later order denying husband's motion to vacate execution. The District Court of Appeal, Shinn, P. J., held that evidence was sufficient to sustain findings as to amount due for medical treatment and to justify order for execution, but that husband's motion to vacate execution order sought only re-examination of matters that had been decided on motion for issuance of execution and was consequently not appealable.

Order for issuance of execution, affirmed, appeal from order denying motion to vacate execution dismissed.

1. Appeal and Error ⇨1011(2)

Where trial court has decided questions of fact on conflicting evidence, reviewing court may not make re-examination of same questions, notwithstanding that evidence before trial court was in form of affidavits.

2. Divorce ⇨263

In proceedings on motion for writ of execution to enforce order in divorce action requiring husband to pay for wife's unpaid medical treatment, evidence was sufficient to sustain findings of court as to amount to be paid for medical treatment and to justify order for execution.

3. Divorce ⇨280

Husband's motion to vacate order for execution to enforce order in divorce action requiring husband to pay for wife's unpaid medical treatment sought only re-examination of matters decided on wife's motion for issuance of execution, and, consequently, its denial was not appealable, although order for execution was appealable.

Lawrence M. Knox, in pro. per.

J. B. Tietz and Edward Raiden, Los Angeles, for respondent.

SHINN, Presiding Justice.

In this action for divorce the court made an order on October 18, 1951, requiring defendant to pay certain support money, medical and other expenses and attorney's fees for the plaintiff's benefit. Thereafter execution was issued to enforce payment of certain accumulated funds. \$1,275 had accrued as support money. Defendant does not question the issuance of the execution for this amount. The court also determined that \$1,370 was due and unpaid for medical treatment and care under the original order and issued execution for this amount. Defendant appeals from this order and from a later order denying his motion to recall the execution. Mrs. Knox passed away November 2, 1953. Lawrence L. Knox, as special administrator, has been substituted as plaintiff.

The writ in question was ordered issued October 7, 1953 on motion of plaintiff after

notice to the defendant. The evidence consisted of affidavits in support of the motion and in opposition thereto. Defendant's principal contention is that the medication and medical services for which the charges were made were unnecessary, excessive and unauthorized. Defendant is a physician and while the parties were living together he rendered to his wife such medical care as she required. After the separation plaintiff was under the care of a Dr. Loomis. The order of October 18, 1951 was entered pursuant to stipulation of the parties. The order read in part: "Defendant shall make arrangements that Plaintiff may go to Dr. Loomis and he will take care of any medical expenses that Dr. Loomis may think necessary." Plaintiff received a great deal of medication. Defendant asserted by affidavit at the hearing that the medicines used by plaintiff were deleterious, unnecessary, were used in excessive quantities, and that their use was ill-advised. He asserted also that he had not been kept informed as to medication prescribed for and used by plaintiff. Dr. Loomis made affidavit to the effect that plaintiff required constant medication and care and would have such need for the remainder of her life; that she had been taking medicines prescribed by defendant and that he (Dr. Loomis) considered it necessary that the same should be continued indefinitely. It appeared from plaintiff's affidavits that the money spent and indebtedness incurred for medicines and medical treatment amounted to \$1,623.95. After considering the evidence, the court fixed the amount at \$1,370. This determination was made upon conflicting evidence consisting largely of the opinions of defendant and of Dr. Loomis with respect to the necessity for the treatment.

[1,2] Where the trial court has decided questions of fact on conflicting evidence, a reviewing court may not make a re-examination of the same questions, and the rule is the same where the evidence before the trial court was in the form of affidavits. *Small v. Small*, 123 Cal.App.2d 870, 268 P.2d 63; *Hayutin v. Rudnick*, 115 Cal.App. 2d 138, 251 P.2d 707. We may only inquire whether there was substantial evidence to justify the factual conclusions of the trial

court. It is clear that the court had before it evidence which, if deemed trustworthy, was sufficient to justify the order for the execution.

[3] The order for execution was appealable. No appeal lies from an order refusing to vacate an order which is subject to appeal where the application to vacate presents only the questions that were decided originally. *Sharpe v. Sharpe*, 55 Cal. App.2d 262, 265, 130 P.2d 462; 3 Cal.Jur.2d, p. 491. Defendant's motion to vacate sought only a re-examination of the matters that had been decided on the motion for issuance of execution.

The order for issuance of execution is affirmed. The appeal from the order denying motion to recall the execution is dismissed.

PARKER WOOD and VALLÉE, JJ.,
concur.



129 Cal.App.2d 791

Max SCHMIDT and Anita Schmidt, Plaintiffs and Appellants,

v.

The CITY OF MILLBRAE, Mayor William F. Leuteneger, Councilman Harold C. Taylor, Councilman James T. Kilpatrick and Councilman George T. Warman, Defendants and Respondents.

Civ. 16039.

District Court of Appeal, First District,
Division 2, California.

Dec. 27, 1954.

Hearing Denied Feb. 24, 1955.

Action by grantor to cancel a deed to defendant city. The Superior Court, County of San Mateo, Edmund Scott, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that mayor's agreement with grantor, not approved by city counsel or made a condition of accept-

ance, that land should be used only for a new city hall, was not effective to modify terms of grant to city.

Judgment affirmed.

Municipal Corporations \S 224

Mayor's agreement with grantor, not approved by city council or made a condition of acceptance, that land should be used only for a new city hall, was not effective to modify terms of grant to city. Civ.Code, \S 1056.

E. C. Mahoney, Burlingame, for appellants.

Richard P. Lyons, Conrad B. Reisch, South San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiffs sued to cancel a deed to described real property within the corporate limits of the defendant city. The complaint alleged, and the evidence supported the allegation, that plaintiff Schmidt had an oral agreement with the mayor of the city in which Schmidt executed and delivered to the mayor a deed to the disputed property with the oral agreement between them that the property would be used solely for a site for a new city hall. The city council accepted the deed and caused to be erected on the site a sign reading: "Site of New Millbrae City Hall." This remained on the property for two years, when the city removed it and repudiated the agreement.

On the trial the plaintiffs fully proved all these facts; the city did not controvert them in any particular, but relied wholly on the defense that the mayor's agreement, not being a legal contract on the part of the city, was not an enforceable contract.

There is no answer to the statement of the trial judge made at the conclusion of the hearing: "I suspect that the Plaintiff was rooked, but legally I can't do anything about it."

There can be no controversy over the law of the case as applicable to these facts. The contract relied on was oral, and made by one member of the city council only. There is no evidence that it was approved

by a majority of the council or that the acceptance of the deed was based on the conditions advocated by appellants.

Manifestly it was a dishonorable and dishonest act on the part of the council to repudiate the conditions under which the deed was executed and delivered to the city, and in all fairness the property should have been restored to the grantors.

However the law is settled that "A grant cannot be delivered to the grantee conditionally." Section 1056, Civil Code; *Security-First Nat. Bank v. Leatart*, 75 Cal.App.2d 211, 214, 170 P.2d 687.

Judgment affirmed.

KAUFMAN, Justice.

I concur.

DOOLING, Justice.

I concur in the judgment but for the sake of clarity it should be said that the theory of appellant is not that the deed was delivered to the mayor on his oral agreement that the land should be used for a city hall. Appellant's theory is that there was no legal delivery of the deed to the city council because the deed was given to the mayor with instructions only to deliver it to the council if the council "approved * * * that this was only deeded for a city hall." It is appellant's position that the mayor's action in giving the deed to the council without such official action by the council was in violation of these instructions and hence constituted no delivery, since "a delivery by the depository contrary to the direction of the grantor does not pass title." *Bilsland v. Kennedy*, 72 Cal.App.2d 23, 24, 163 P.2d 906, 907.

Appellant's difficulty is that the trial court found that the deed was delivered unconditionally. While appellant was the only witness to testify the possession of the deed by the city gives rise to an inference that it was duly delivered and the trial court was entitled to conclude that appellant's oral testimony did not rebut this inference. *Hennelly v. Bank of America*, 102 Cal.App.2d 754, 228 P.2d 79; *Miller v. Jansen*, 21 Cal.2d 473 at page 477, 132 P.2d 801, and cases cited.

Hearing denied; SHENK and SCHAUER, JJ., dissenting.

129 Cal.App.2d 841

Julio PAOLI, Plaintiff and Respondent,
v.

L. C. SMITH COMPANY, a corporation,
Defendant and Appellant.
Civ. 16089.

District Court of Appeal, First District,
Division 2, California.

Dec. 29, 1954.

Action by property owner against contractor on written contract which provided that "in connection with certain proposed modifications of the original procedure" contractor would undertake to make an allowance of \$1,000 from original bid, and an additional rebate of \$500 if contractor was permitted to make a change in specifications. From adverse judgment of Superior Court, San Mateo County, W. T. Belieu, J., the contractor appealed. The District Court of Appeal, Nourse, P. J., held that evidence sustained finding that contractor agreed to pay owner \$1,000 if he withdrew his protest to contractor's bid and it was accepted, and that owner did not agree that contractor could keep the \$500 as compensation for extra costs caused by requirements of the State.

Judgment affirmed.

1. Evidence §455

Where written contract contained an expression which was vague and uncertain, evidence as to preceding oral negotiations was admissible.

2. Contracts §176(2)

After evidence had been received concerning oral negotiations preceding execution of written contract, which contained a vague and uncertain expression, question of meaning of contract was one of fact.

3. Contracts §350(2)

In action by property owner against contractor on written contract which provided that contractor would make owner an allowance of \$1,000 "in connection with certain proposed modifications of the original procedure," and give a \$500 rebate if contractor was permitted to make a certain change in specifications, evidence sus-

tained finding that contractor agreed to pay owner \$1,000 if he withdrew his protest to contractor's bid and it was accepted, and that plaintiff did not agree that contractor could keep \$500 as compensation for extra costs caused by requirements of State.

4. Appeal and Error §717

Opinion of trial judge and his remarks in course of trial cannot impeach findings of the court.

Mullin & Cost, San Mateo, for appellant.
O'Keefe & O'Keefe, James T. O'Keefe, Jr., Redwood City, for respondent.

NOURSE, Presiding Justice.

This is a useless appeal from a purely factual decision for plaintiff on conflicting evidence.

The action was on an agreement in writing to pay \$1500. The agreement was received in evidence and reads:

"Re: Installation of Street Improvements Belvue Heights Subd'n. Belmont

"With further reference to the above matter and particularly in connection with certain proposed modifications of the original procedure: In consideration thereof, we undertake to make you an allowance of \$1,000.00 from the original bid, making the amended total \$46,486.90 instead of the amount heretofore.

"Furthermore, we are prepared to give you an additional rebate of \$500.00, if we are permitted to substitute a suitable 5 inch rock base and 1½ inches of asphaltic concrete, in lieu or in place of the 6 inch rock base and 1 inch armor coat originally specified.

"Your further consideration of this matter will be greatly appreciated.

"Yours truly
"L. C. Smith

"L. C. Smith - President

"Approved and Accepted This Day of
November, 1950

"Julio Paoli"

Plaintiff wished to subdivide lands owned by him in the city of Belmont under the name Belview Heights. The city required certain improvements for streets, sewers, et cetera, and instituted improvement proceedings under the Improvement Act of 1911, Streets and Highways Code, section 5000 et seq. Accordingly the city of Belmont called for bids for the planned improvements in October, 1950. The costs would become an encumbrance on plaintiff's property. Defendant was the lowest bidder with a bid of approximately \$47,500; there would be moreover more than \$8,000 incidental expenses. Plaintiff objected to the high total costs. After the hearing by the City Council had been adjourned, there was a conference between plaintiff and L. C. Smith, the director of defendant, to find out whether the costs could be reduced and to avoid frustration of the improvement proceedings by plaintiff's protest under section 5220 et seq., Streets and Highways Code. The stated letter was the result of said conference. It was signed by plaintiff in the office of the City Attorney of Belmont and his protest was thereupon withdrawn. Defendant's bid was accepted and it performed the work. The change in specifications to which the second paragraph of the letter relates was permitted. Another change in requirements, this time an increase, was caused by a request of the State in relation to an encroachment on the state highway (El Camino Real). The work was completed at the end of December, 1951, and defendant fully paid, the total payment for the improvements being \$47,941.35. As to the above there is hardly any dispute. Plaintiff's testimony is corroborated by that of the City Attorney of Belmont. It is conceded that the amount of \$500 mentioned in the second paragraph of the letter became due.

However there are two points in controversy. Plaintiff testified that in his conference with Smith it was agreed that defendant would pay him \$1,000 if he withdrew his protest and defendant's bid was accepted, and that this was the meaning of the first paragraph of the letter. Mr.

Smith testified that the \$1,000 would be paid only if another change in specifications, not expressed in the letter (use of red rock from the area instead of crusher rock) would be permitted, which change was however refused. The vague and uncertain expression "in connection with certain proposed modifications of the original procedure" could relate to either of the agreements testified to. Moreover, Mr. Smith testified that it was later agreed with plaintiff that defendant would keep the \$500 as compensation for the extra costs caused by the requirements of the state. This was denied by plaintiff who testified that these costs were included in the price paid.

[1-4] Because of the uncertainty of the consideration expressed in the first paragraph of the letter the court correctly heard evidence as to the preceding oral negotiations. When such evidence has been received the question of the meaning of the writing is one of fact, *Walsh v. Walsh*, 18 Cal.2d 439, 444, 116 P.2d 62. As to this and the other point in dispute the trial court believed the testimony of plaintiff. Then this court cannot reject it. That would be so even if plaintiff's evidence had been much less believable than is the case here. *Evje v. City Title Ins. Co.*, 120 Cal.App.2d 488, 492, 261 P.2d 279; *Tinsley v. Bauer*, 125 Cal.App.2d 714, 718, 271 P.2d 110. Appellant's further contention that certain comments of the court at the trial and some alleged minor misstatements in the court's written opinion showed that the court was unable to follow the testimony adduced at the trial cannot be considered by this court. "It has long been established that neither the opinion of a trial judge nor his remarks in the course of trial can impeach the findings of the court." *Saphire v. Los Angeles Transit Lines*, 99 Cal.App.2d 880, 884, 222 P.2d 956, 958; *DeCou v. Howell*, 190 Cal. 741, 751, 214 P. 444.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

129 Cal.App.2d 667

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Richard R. FONG, Defendant and Appellant.
Cr. 3023.

District Court of Appeal, First District,
Division 1, California.

Dec. 20, 1954.

Hearing Denied Jan. 19, 1955.

Defendant was convicted of unlawfully prescribing narcotics and of unlawfully selling narcotics. The Superior Court of Alameda County, James R. Agee, J., entered judgment accordingly and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that defendant's plea of not guilty put in issue his good faith in prescribing narcotics so as to make proper introduction, in prosecution's case in chief, of evidence of similar offenses, and defendant's failure to take stand did not remove issue of good faith from case.

Judgment affirmed.

1. Poisons \S 9

In prosecution for unlawfully prescribing narcotics, state need not, as part of its case in chief, prove that a defendant physician did not act in good faith. Health and Safety Code, §§ 11163, 11330.

2. Criminal Law \S 371(1)

In prosecution of physician for unlawfully prescribing and selling narcotics, defendant's plea of not guilty put in issue his good faith in prescribing narcotics so as to make proper introduction into prosecution's case in chief of evidence of similar offenses, and defendant's failure to take stand did not remove issue of good faith from case. Health and Safety Code, §§ 11163, 11330.

3. Criminal Law \S 371(1)

Fact that defendant physician, in prosecution for unlawfully prescribing narcotics, interposed defense of entrapment, made proper introduction, in state's case in chief, of evidence of similar offenses, admitted for limited purpose of proving intent to commit offense charged. Health and Safety Code, §§ 11163, 11330.

4. Criminal Law \S 37

Defense of entrapment, in criminal prosecution, presents issue of whether intent was furnished by officer or defendant.

5. Criminal Law \S 369(2)

The general test of relevancy, in criminal prosecution, is whether evidence tends logically, naturally, and by reasonable inference to establish any fact material for the people to overcome or any material matter sought to be proved by defense, and if it does so, then evidence is admissible whether or not it embraces commission of another offense and whether other offense be similar or dissimilar.

6. Criminal Law \S 370, 371(1, 12), 372(1)

Evidence of other acts of similar nature, when not too remote, may be admitted, in criminal prosecution, to prove material fact, to show motive, scheme, plan, or system, or to show guilty knowledge and intent.

Leo R. Friedman, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Charles E. McClung, Deputy Atty. Gen., J. F. Coakley, Dist. Atty. of Alameda County, Albert A. Hederman, Jr., Deputy Dist. Atty., Oakland, for respondent.

FRED B. WOOD, Justice.

Fong was convicted on two counts, one for violating section 11163 of the Health and Safety Code, unlawfully prescribing a narcotic, the other for violating section 11500 of the code, unlawful sale of a narcotic.

The sole point upon this appeal is the claim that evidence of similar offenses was erroneously admitted as a part of the People's case in chief. This evidence was received for the limited purpose of such bearing, if any, as it might have on the question whether defendant entertained the intent to commit the offense charged in the first count (unlawfully prescribing a narcotic).

Defendant claims the element of his intent was not in issue.

[1] He directs attention to the rule that in this type of case the good faith of the physician in prescribing or furnishing a narcotic, see Health & Safety Code, § 11330, is a matter of defense; i. e., the state need not, as a part of its case in chief, prove that the defendant physician did not act in good faith. See *People v. Kinsley*, 118 Cal.App. 593, 597-598, 5 P.2d 938. Without such proof, says the defendant, the state makes out a sufficient case and, therefore, is precluded from introducing evidence of similar offenses "in the absence of the defendant testifying that he believed he was prescribing for a patient who needed such medication" (defendant did not take the witness stand); the "fact that defendant was a doctor did not change the character of the offenses charged"; the "State could not anticipate and negative, by proof of so-called similar offenses, the possibility that Dr. Fong might take the stand and claim the relationship of physician and patient existed between him and Gazzola," the person for whom he prescribed; and "where a defendant * * * testifies to facts in an attempt to prove good faith and lack of criminal intent * * * such testimony may be rebutted by the State introducing evidence of similar offenses but, in the absence of these conditions, it is error to permit the State to prove similar offenses."

There are two ready answers to this argument.

[2] Defendant also prescribed certain nonnarcotic medicines but before prescribing anything he examined Gazzola by applying the stethoscope to his chest and saying, "It appears you have a cold." He also took a patient record card and entered Gazzola's name and address upon it. During a later visit the doctor, before prescribing, examined Gazzola's nostrils and said, "It appears like you still have your sinus." These examinations were not very thorough, it would seem, yet defendant's counsel made a good deal of them, with emphasis by repetition, while cross-examining the witness Gazzola. That evidence bore upon the

intent which accompanied the act. It tended to indicate that the doctor might be acting in good faith. In this manner an issue concerning defendant's state of mind came into the case and justified the proof of similar prior offenses to negative an innocent state of mind and to prove criminal intent. That issue was potentially present all the time under defendant's plea of "not guilty." No additional plea upon defendant's part was necessary. His mere failure to take the stand and, by his own testimony, to undertake the burden of proving his good faith did not remove good faith as an issue, an issue which some of the prosecution's evidence had already brought in the case.¹

[3,4] The other answer to defendant's contention is furnished by his defense of entrapment. He presented instructions on entrapment. He argued to the jury that this was a case of entrapment. The trial court gave instructions on entrapment. In his opening brief he says: "Considering the manner in which Gazzola [a law enforcement officer] went to the doctor's office, the story told by him to the doctor; the insistence on the part of Gazzola that narcotics either be prescribed or furnished, etc., the jury were entitled to infer that Gazzola was prodding or instigating Dr. Fong into supplying the narcotics or the prescriptions therefor. At the very least the evidence was sufficient to cause the jury to entertain a reasonable doubt on this proposition." Thus, the defendant, without taking the witness stand, presented an issue concerning the intent with which he did the act. Was he an innocent person whom an officer of the law seduced into committing a criminal offense or did the criminal intent originate with the defendant and the officer merely aid him in carrying out that intent? See *People v. Braddock*, 41 Cal.2d 794, 802, 264 P.2d 521. The evidence of other similar offenses bore directly upon that issue. Defendant argues that the defense of entrapment admits the crime and, therefore, precludes any question of intent

1. By this we do not hold that but for such evidence the state could not have given proof of similar prior offenses. We

are not undertaking to decide that question. The circumstances of this case do not require it.

from becoming an issue in the case. Such an argument overlooks the fact that entrapment presents "intent" as a major question: The intent of the officer or the intent of the defendant?

[5] "The general test of relevancy is whether the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the people or to overcome any material matter sought to be proved by the defense. If it does, then the evidence is admissible whether or not it embraces the commission of another offense and whether the other crime be similar or dissimilar. *People v. Peete*, 28 Cal.2d 306, 315, 169 P.2d 924.

[6] "Evidence of other acts of a similar nature may be admitted when not too remote, to prove a material fact, or where it tends to show motive, scheme, plan or system, or to show *guilty knowledge* and intent. *People v. Henderson*, 79 Cal.App.2d 94, 119, 179 P.2d 406; *People v. Hennessey*, 201 Cal. 568, 582, 258 P. 49; *People v. Brown*, 72 Cal.App.2d 717, 720, 165 P.2d 707; *People v. Bercovitz*, 163 Cal. 636, 639, 126 P. 479, 43 L.R.A.,N.S., 667." *People v. Torres*, 98 Cal.App.2d 189, 192, 219 P.2d 480, 481. Cases relied upon by defendant do not disallow this test, in fact they recognize it. Of those cases we adopt the descriptive words of our Supreme Court in *People v. Williams*, 6 Cal.2d 500, 502, 58 P.2d 917, 918: "In the cases relied upon by the defendant, such as *People v. King*, 23 Cal.App. 259, 137 P. 1076, evidence relating to distinct offenses was held inadmissible, not necessarily because it was evidence of offenses other than that charged in the information, but because under the facts of the particular cases evidence tending to prove such other offenses had no relevancy to prove the charge for which the defendant was then on trial." *People v. King*, *supra*, is relied upon by the defendant in the instant case. In *People v. Byrnes*, 27 Cal. App. 79, 148 P. 944, another of defendant's cases, the questioned evidence "was insufficient to establish a like offense", 27 Cal.App. at page 84, 148 P. at page 946, and the proof of the offense charged "was of a character which could leave no doubt in the minds

of the jurors as to the criminal intent accompanying the act." 27 Cal.App. at pages 84-85, 148 P. at page 946. Significantly, the court expressly recognized the admissibility of evidence of similar offenses "where the intent accompanying the act is equivocal, or where it otherwise becomes an issue in the trial * * *" 27 Cal.App. at page 84, 148 P. at page 946.

In view of this conclusion it is unnecessary to consider additional reasons urged by the state in support of the admissibility of the questioned evidence.

The judgment and the order denying a new trial are affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, J., dissenting.



129 Cal.App.2d 711

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Howard D. MITCHELL, Defendant and
Appellant.

Cr. 978.

District Court of Appeal, Fourth District,
California.

Dec. 21, 1954.

Rehearing Denied Jan. 3, 1955.

Hearing Denied Jan. 19, 1955.

Proceedings on petition for writ of error coram nobis filed twenty years after judgment of conviction for grand theft. No motion for new trial was made and no appeal was taken from the judgment. The Superior Court, Orange County, Robert Gardner, J., entered order denying writ and petitioner appealed. The District Court of Appeal, Mussell, J., held that petitioner failed to allege errors which could not have been corrected on motion for new trial and appeal from judgment and was not entitled to writ of error coram nobis.

Order affirmed.

1. Criminal Law Ⓒ997(17)

In proceedings on petition for writ of error coram nobis filed twenty years after conviction of grand theft, question whether petitioner should have been allowed to be present at time of his hearing on petition was matter within sound discretion of trial court.

2. Criminal Law Ⓒ997(12, 17)

That petition for writ of error coram nobis was filed twenty years after conviction of petitioner, and delay was not accounted for by petitioner, was sufficient to authorize court to deny request for personal appearance at hearing on petition and to deny writ.

3. Criminal Law Ⓒ997(3, 6, 9)

The function of writ of error coram nobis is to correct an error of fact and it never issues to correct an error of law, nor does it issue to redress an irregularity occurring at trial, such as misconduct of jury, or of court, or any officer of court except under circumstances amounting to extrinsic fraud which, in effect, deprived petitioner of trial upon merits.

4. Criminal Law Ⓒ997(2)

Where facts alleged in petition for writ of error coram nobis relative to counsel were known to petitioner and court at time of petitioner's trial for grand theft twenty years prior to petition for writ, and no motion for new trial was made and no appeal taken from judgment of conviction, irregularities in conduct of his then counsel or court could not be corrected by writ of error coram nobis.

5. Criminal Law Ⓒ997(5)

Adequacy of defense furnished petitioner was matter to be considered on motion for new trial or on appeal from judgment, and not for consideration on petition for writ of error coram nobis.

6. Criminal Law Ⓒ997(5)

One who applies for writ of error coram nobis must show that facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ.

7. Criminal Law Ⓒ997(12)

Petitioner for writ of error coram nobis who did not allege when he discovered facts relied on, or that such facts could not have been discovered by him in the exercise of due diligence in the twenty years intervening between conviction for grand theft and application for writ, showed lack of due diligence precluding issuance of writ.

Howard D. Mitchell, in pro. per.

Edmund G. Brown, Atty. Gen., and
William E. James, Deputy Atty. Gen., for
respondent.

MUSSELL, Justice.

On February 19, 1932, an information was filed in the Superior Court of Orange county charging appellant with the crime of grand theft, alleged to have been committed by him on or about December 18, 1929. A jury found appellant guilty as charged and he was committed to the state prison for the term prescribed by law. No motion for new trial was made and no appeal was taken from the judgment. Appellant's term of imprisonment under said judgment has long passed and he is presently confined in the Nebraska state penitentiary.

On June 23, 1954, appellant filed in the Orange county superior court an "Application and Motion in Writ of Error Coram Nobis", stating therein that at his trial in 1934 one Bert West was his counsel; that Mr. West was the district attorney of Orange county when the information was filed (a fact not borne out by the record as the information apparently was signed and filed by Sam Collins, District Attorney); that in 1932 Mr. Kaufman was first assistant district attorney to Mr. West and at the time of trial Mr. Kaufman was district attorney; that in 1932 he retained Mr. Jacobs as his attorney but that he had discharged him after a misunderstanding; that Judge Scovil, who presided at the trial, was a former law partner of Mr. Jacobs; that the complaining witness failed to keep his agreement to "get the case dismissed"; that "the court was being

used as a collection agency in a criminal prosecution"; that by reason of this conviction appellant was denied an insurance license as agent and denied life insurance. He further alleged that he is now serving a prison sentence in Nebraska, the offense being "1 to 5 years, whereas, he received a sentence of 12 years, due to multiple sentence law."

The trial judge herein appointed an attorney to represent the appellant in the proceeding on his application and Mr. West testified at the hearing concerning the proceedings at the trial and in refutation of the allegations of the petition. He stated that during the time he was district attorney a complaint was filed by one of his deputies charging defendant with grand theft; that at a subsequent time, and after he, West, left the district attorney's office, defendant came to him and discussed the case with him; that at the commencement of the trial it was not brought to his attention and he did not realize that he was district attorney when the complaint was filed; that during the trial this fact was brought to his attention and after discussing the matter with the court, it was agreed that he proceed with the defense; that defendant, in open court, stated that he was advised of the situation, that he wanted to waive the disqualification and wanted to proceed and have West defend him.

Appellant contends that the hearing was improper because he was not permitted to be present, that he should have been informed of the appointment of counsel and that the court erred in not granting the writ. These contentions are all without merit.

[1,2] The question of whether appellant should have been allowed to be present at the time of the hearing was a matter within the sound discretion of the trial court. *People v. Kirk*, 76 Cal.App.2d 496, 498, 173 P.2d 367. Appellant has not accounted for the delay of many years in filing his petition and this fact alone is sufficient to authorize the court to deny the writ, and appellant's request for his personal appearance at the hearing.

People v. O'Connor, 114 Cal.App.2d 723, 727, 251 P.2d 64.

[3-7] The facts alleged in appellant's petition relative to his counsel were known to him and to the court at the time of the trial and the irregularities, if any, in the conduct of Mr. West or the court at the trial cannot be corrected by the writ sought. As was said in *People v. Smith*, 109 Cal.App.2d 76, 78, 239 P.2d 903, 905, quoting from *People v. Reid*, 195 Cal. 249, 258, 232 P. 457, 36 A.L.R. 1435:

"The uniform conclusion of the decisions is that the function of a writ of error *coram nobis* is to correct an error of fact. It never issues to correct an error of law nor, so far as we have been able to ascertain, has it ever issued to redress an irregularity occurring at the trial, such as misconduct of the jury, or of the court, or of any officer of the court (except under circumstances amounting to extrinsic fraud which, in effect deprived the petitioner of a trial upon the merits)."

The adequacy of the defense furnished to appellant by his counsel cannot be here considered and that matter also could have been considered on a hearing of a motion for a new trial or on appeal from the judgment. *People v. Krout*, 90 Cal.App.2d 205, 208, 202 P.2d 635; *People v. Houser*, 96 Cal.App. 2d 786, 787, 216 P.2d 171; *People v. Watkins*, 92 Cal.App.2d 375, 376-377, 206 P.2d 1118. Appellant did not allege in his petition when he discovered the facts alleged therein upon which he relies or that they could not have been discovered by him many years prior to the filing of his petition. As was said in *People v. Shorts*, 32 Cal.2d 502, 513, 197 P.2d 330, 336:

"One who applies for a writ of *coram nobis* upon a ground such as the one here presented must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief."

Appellant has failed to allege errors which could not have been corrected on a motion for a new trial or on appeal from the judgment and under such circumstances, is not entitled to a writ of error coram nobis.

The order denying the petition for a writ of error coram nobis is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



130 Cal.App.2d 50

William J. CROXSON, Plaintiff and Respondent,

v.

Steva M. CROXSON; Peoples Federal Savings and Loan, Inglewood; Federal Savings & Loan Insurance Company, Inglewood; Bank of America National Trust & Savings Association, Inglewood Branch; Inglewood Federal Savings & Loan Association, Defendants,

Steva M. Croxson, Appellant.

Civ. 20372.

District Court of Appeal, Second District,
Division 3, California.

Dec. 30, 1954.

Rehearing Denied Jan. 20, 1955.

Husband brought suit for divorce, and wife cross-complained for separate maintenance. The Superior Court of Los Angeles County, Louis H. Burke, J., entered an order, and the wife appealed. The District Court of Appeal, Shinn, P. J., held that order providing that all income of both parties should be deposited in a joint account and that \$500 a month should be withdrawn and be paid to wife as alimony and that \$1,000 a month should be withdrawn for use of husband for payment of expenses of apartment was not an abuse of discretion, as contended by wife.

Order affirmed with \$100 assessed against wife as cost for frivolous appeal.

Vallée, J., dissented from part of judgment assessing costs.

1. Judgment ☞527

Statements of trial court during the trial may not be given effect to alter or modify clear provisions of trial court's judgment or order.

2. Husband and Wife ☞272(1)

Husband, who has management and control of community property, does not lose control on the institution of an action for divorce or separate maintenance.

3. Divorce ☞249(1)

In husband's suit for divorce, wherein wife cross-complained for separate maintenance, order providing that all income of both parties should be deposited in a joint account and that \$500 a month should be withdrawn and be paid to wife as alimony and that \$1,000 a month should be withdrawn for use of husband for payment of expenses of apartments was not an abuse of discretion, as contended by wife.

4. Divorce ☞194

The District Court of Appeal would assess \$100 against appellant as costs for frivolous appeal from order in divorce suit, wherein there was a cross-complaint for separate maintenance.

Hahn, Ross & Saunders, Los Angeles, for appellant.

Wittman, Woodward & Truman, South Gate, for respondent.

SHINN, Presiding Justice.

William J. Croxson brought suit against Steva M. Croxson for divorce, charging cruelty. Mrs. Croxson answered and filed a cross-complaint for separate maintenance charging cruelty. Upon plaintiff's application Mrs. Croxson and certain banking and investment institutions were ordered to show cause why Mrs. Croxson should not be enjoined from disposing of community property except in the ordinary course of business or for the necessities of life. Upon application of defendant, Mr. Croxson was ordered to show cause why he should not be required to pay money for defend-

ant's support, attorneys' fees and costs and restrained from disposing of any community property except such as was reasonably necessary in the ordinary course of business or for the necessities of life. Both the complaint and the cross-complaint alleged in general terms that such restraining orders were necessary in order to prevent dissipation of the community assets.

Mr. Croxson filed an affidavit October 13, 1953 stating that until December 31, 1953 his salary would be \$1,596 per month but that thereafter it would only be \$419 per month. His affidavit listed property of the net value of \$151,000 as community property. It did not state what his necessary living expenses would be. Mrs. Croxson filed an affidavit listing her necessary expenses in the amount of \$515 per month. She stated in the affidavit that her husband had received from General Motors in the previous year \$33,000. She did not list the community property nor place any value upon it. When the matter came on for hearing of the two orders to show cause both plaintiff and defendant testified. Pursuant to stipulation each was restrained from molesting the other and from disposing of any community property except in the ordinary course of business or for the necessities of life; each was ordered to deposit all funds on hand in a joint bank account excepting for \$1,000 which each might retain. All income was ordered to be likewise deposited. Checks on the account were to require signatures of both parties; the husband was to have the exclusive use of a mountain cabin, the wife the exclusive use of the home of the parties. These provisions were in accord with the oral stipulations of the parties in court. The order contained other provisions which were not covered by the stipulations. It was further ordered that all income from certain apartments was to be deposited in a joint account, defendant was to receive \$1,000, which would be replenished from time to time to be used for the payment of expenses of the apartments. From the joint account \$1,000 was ordered paid to plaintiff's attorneys, \$500 having already been paid, and \$1,500 was ordered paid to defendant on account of attorneys' fees.

Defendant appeals from that portion of the order reading as follows: "All income of both parties shall be deposited in a joint account referred to above and \$500 per month payable on the 15th day of each month shall be withdrawn and paid to defendant as alimony and \$1,000 per month shall be withdrawn for the use of the plaintiff."

The entire argument on the appeal is predicated upon a misstatement of the record. The points on appeal are set forth in the opening brief as follows: "I. Before alimony pendente lite may be ordered, there must be a showing of necessity. II. The court cannot give relief beyond that which is requested in the affidavit or that which is ordered to show cause. III. There is no evidence to substantiate the court's order that a \$1,000 per month shall be withdrawn for the support of the plaintiff husband." Throughout the briefs there are statements such as "There is no evidence in the entire Reporter's Transcript that supports the order for \$1,000 for the husband's support."

[1] The order was that "* * * \$1,000 per month shall be withdrawn for the use of plaintiff." While quoting this wording of the order appellant seizes upon the patently inadvertent statement of the court during the hearing that plaintiff might withdraw from the account \$1,000 per month "for his support." Counsel well know that the court ordered the sum to be withdrawn for the use of plaintiff and not merely for his support. We would not expect any lawyer to plead ignorance of the rule that the statements of the court during the trial may not be given effect to alter or modify the clear provisions of the court's judgment or order.

The entire argument of the appellant is to the effect that the court in plain disregard of established principles of law and without any request therefor or showing of necessity granted support money to the plaintiff's husband. This is an attempt to put the trial court in a false light and it is trifling with this court. The order granted the plaintiff nothing except the relief provided by the restraining provisions of the order.

[2] The husband has the management and control of the community property. He does not lose control upon the institution of an action for divorce or separate maintenance. The order took away that control except for \$1,000 per month from his income. He testified, and it was not disputed, that in the following year, 1954, he would receive as dividends, salary and bonus \$24,284. Under the order, to which he consented, half of this money would go into a joint account, to be withdrawn only upon the signatures of himself and his wife. And yet defendant's counsel complained to the court, "Your Honor, you are giving him more than you are giving my client."

All the argument and the authorities cited by appellant relate to the powers of the court to grant support money to a dependent spouse. Appellant's brief closes as follows: "Appellant respectfully submits that this order of \$1,000 per month for the support of the husband should be reversed."

[3] There is no suggestion in the briefs that the substance of the order was merely to place a limitation upon the husband's control of community assets. Although Mrs. Croxson upon the hearing claimed that one of the smaller rental properties standing in the name of herself and her husband belonged to her daughter, it was undisputed that there were community assets, including plaintiff's anticipated income, of some \$165,000. The order gave defendant everything she asked for, support, attorneys' fees, costs and sequestration of the community property. Her complaint is that the court did not take away from plaintiff control and use of the community property except for \$500 per month. No case will be found in the books which would tend to support her unreasonable contention. It would be absurd to assert that in the order in question there was a semblance of abuse of discretion.

We are not unaware of the fact that clients in divorce litigation must be humored by their attorneys in their unreasonable demands, and while we make allowances on that account our forbearance is not unlimited. We expect the claims of the parties to be presented fairly and without dissimula-

tion. We also deem it to be the duty of the courts to discourage obviously groundless appeals.

[4] The order is affirmed with \$100 assessed against appellant as costs for a frivolous appeal.

PARKER WOOD, Justice.
I concur.

VALLÉE, Justice.

I concur in affirmance of the order. I dissent from that part of the judgment of this court assessing \$100 against appellant as costs.

Rehearing denied; VALLÉE, J., dissenting.



129 Cal.App.2d 570

William MULLER, Petitioner and Appellant,
v.

JUSTICE'S COURT OF THIRD TOWNSHIP, SAN MATEO COUNTY, State of California, and Honorable Edward I. McAuliffe, Justice of the Peace of Said Justice's Court, Respondent.

Civ. 16103.

District Court of Appeal, First District,
Division 2, California.

Dec. 16, 1954.

Rehearing Denied Jan. 14, 1955.

Hearing Denied Feb. 10, 1955.

Proceeding for writ of mandate to compel dismissal of misdemeanor prosecution pending in justice court against petitioner for failure to bring case to trial within 30 days. The Superior Court, San Mateo County, Gregory P. Maushart, J., entered judgment denying writ and petitioner appealed. The District Court of Appeal, Kaufman, J., held that pendency of prohibition proceeding to restrain court from further proceeding against petitioner, was good cause for not proceeding with trial within 30 days, and petitioner was not entitled to dismissal of action for failure of prosecution to bring case to trial within 30 days.

Judgment affirmed.

1. Criminal Law ⚖️576(5)

In prosecution for misdemeanor, where defendant entered plea of not guilty on May 16, and, in presence of defendant, acting as his own counsel, trial was set for June 20, and defendant did not object that it was beyond statutory period, he waived any objection he might have had under statute providing for dismissal of misdemeanor cases if defendant is not brought to trial within 30 days after being arrested and brought within jurisdiction of court. Pen.Code, §§ 499, 1382.

2. Criminal Law ⚖️576(2)

Where court did not set misdemeanor prosecution for trial within statutory period because an earlier date would have interfered with court's traffic calendar, the delay was for good cause and defendant was not entitled to dismissal of prosecution for failure of prosecution to bring case to trial within 30 days. Pen.Code, §§ 499, 1382.

3. Criminal Law ⚖️576(2)

Pendency of petition for writ of prohibition to restrain court from further proceeding with misdemeanor prosecution against petitioner was good cause for not proceeding with trial within 30 days after motion for change of venue had been granted. Pen.Code, §§ 499, 1382.

William Muller, San Francisco, in pro. per.

Keith C. Sorenson, Dist. Atty., G. Brooks Ice, Deputy Dist. Atty., Redwood City, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment entered on October 1, 1952, denying a peremptory writ of mandate to compel the dismissal of an action pending in justice court against petitioner, William Muller. The record on appeal is in the form of an amended Engrossed Statement. The dismissal was sought on the ground that the prosecution had not afforded petitioner a speedy trial inasmuch as the prosecution had failed to bring the action to trial within 30 days after defendant was arrested and brought within the jurisdiction of the court,

nor within 30 days after the removal of the cause to the Justice Court of the Third Township, County of San Mateo, following the granting of petitioner's motion for change of venue.

Section 1382, Penal Code, requires that the "court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases: * * * 3. Where the trial has not been postponed upon the defendant's application, if the defendant in a misdemeanor case in an inferior court, is not brought to trial within 30 days after he is arrested and brought within the jurisdiction of the court, * * *."

On April 24, 1952, a criminal complaint charging a violation of Section 499 of the Penal Code, a misdemeanor, was signed and filed in the Justice Court of the Fourth Township, County of San Mateo, and petitioner was arrested on April 27. He appeared for arraignment on May 2, 1952. No appearance was made by the District Attorney and the matter was continued to May 16. Petitioner on May 9 filed in open court a motion to quash execution of warrant of arrest and to exonerate cash bail which was denied. Also on that date he filed a written motion requesting the presence of a court reporter at all oral proceedings, which was partly heard and denied.

[1,2] On May 16, petitioner filed a "Motion to Set Aside and Quash Criminal Complaint", as well as a Demurrer. These matters were partly heard and both were denied. He then, on the same date, entered his plea of Not Guilty, and the case was set for trial by the Court for June 20, 1952, because, as stated by the court, an earlier date within 30 days of May 16 would interfere with the Court's traffic calendar. It is stated in the Engrossed Statement that defendant did not waive his right to be tried within the 30 day period orally or otherwise. However, there is nothing in the record to show that he objected, and it has been held that when the case is set for trial in the presence of defendant and his counsel (here, defendant is his own counsel) and no objection is made that it is beyond the statutory period, the objection is deemed waived. *Krouse v. Justice's Court*, 103 Cal.App.2d 311, 314,

229 P.2d 806. Furthermore, at this point, good cause for the delay of a few days was stated by the Court.

On June 9, 1952, petitioner filed and served a written motion for a continuance, which on June 11, was heard and denied.

On June 19, 1952, petitioner made a Motion for Change of Venue, which on June 20 was granted, and the case ordered transferred to the Justice Court of the Third Township of San Mateo County.

On August 21, 1952, the Notice of Motion to Dismiss the Action for Want of Prosecution was filed and served, as well as a Notice of Motion for Reduction of Bail. On August 25, the Motion to Dismiss was denied; the motion to Reduce Bail was granted and bail reduced from \$500 to \$50. The case was then set for trial for September 17, over the objection of petitioner based on the same ground as his prior Motion to Dismiss. Petitioner then applied for an Alternative Writ of Mandamus which was granted on September 2, 1952. On September 10 an Order Staying Proceeding of Justice's Court of the Third Township, County of San Mateo, pending decision in Mandamus Petition Hearing was filed and served. On October 1, 1952, judgment denying the peremptory Writ of Mandate was made and filed.

Petitioner had, however, on May 29, 1952 filed a Petition for a Writ of Prohibition in the Superior Court of San Mateo County against the Justice Court of the Fourth Township to restrain that court from further proceedings against him. He did not ask in the petition for the writ for a stay of proceedings in the lower court and none was made by the Superior Court during the pendency of the prohibition proceeding.

On June 15, 1952, the application for an Alternative Writ of Prohibition was denied, and on July 28, 1952, the "Judgment Denying Issuance of Alternative Writ of Prohibition" was made and entered in the Superior Court.

[3] It can thus be seen that although the trial had been set for June 20, petitioner on that day prevented a trial of the case because on the previous day he had filed the

Motion for Change of Venue which was heard and granted on June 20. Meanwhile he had instituted proceedings in Prohibition seeking to prevent any trial being held. Although he states that he did not ask for an order staying proceedings of the lower court in his application for the Writ, it would have been very impractical for the prosecution to proceed with a trial until judgment was rendered in the Prohibition proceeding. Certainly the fact that this proceeding was pending is a showing of good cause for not proceeding with the trial within 30 days after June 20, the date when the motion for change of venue was granted. That cause had been created by petitioner. Although the Application for the Alternative Writ was denied on June 15, the judgment denying the writ was not made or entered until July 28. It was less than 30 days after the date of entry of judgment denying the writ, namely, on August 21, that petitioner filed his Motion to Dismiss for want of prosecution. On August 25 the motion was heard and denied and trial set for September 17.

It was held in *People v. Duffy*, 110 Cal. App. 631, 294 P. 496, that where defendants were given the opportunity of being tried within the statutory period, but by changing their pleas they themselves caused a long delay in bringing the case to trial, they could not complain. See, also, *Ray v. Superior Court*, 208 Cal. 357, 281 P. 391. It was said in *In re Lopez*, 39 Cal.2d 118, 120, 245 P.2d 1, that defendant is not entitled to go to trial as of right on the day to which he last consented if good cause appeared for further delay, and that the question of what is a speedy trial depends on the circumstances of each case bearing on the factors of good cause for postponement.

Petitioner cites numerous authorities in his lengthy brief which he contends uphold his position, but they are distinguishable on the facts from the present case, and discussion of them is therefore unnecessary.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

129 Cal.App.2d 593

Mary A. KELLER, Plaintiff and Respondent,
v.**KEY SYSTEM TRANSIT LINES, a corporation, and Darrell W. Reaves, Edward Haines et al., Defendants and Appellants.**
Civ. 16043.District Court of Appeal, First District,
Division 2, California.

Dec. 17, 1954.

Rehearing Denied Jan. 14, 1955.

Hearing Denied Feb. 10, 1955.

Suit against railroad company by woman for injuries sustained when train allegedly struck woman who stood near tracks watching for southbound train and did not see approaching northbound train and did not know what hit her. The Superior Court, Alameda County, Ralph E. Hoyt, J., entered judgment for woman and railroad company appealed. The District Court of Appeal, Kaufman, J., held that instruction that law presumed woman was using ordinary care immediately preceding accident and obeying law and that such presumption could be overcome by contrary evidence was not erroneous and that evidence supported judgment.

Judgment affirmed.

1. Evidence ⇨220(2)

In suit by woman for injuries sustained when allegedly struck by interurban train, evidence that motorman of train was evasive in answer to police officer's question which contained accusation that train struck woman was admissible as an admission to impeach earlier testimony by motorman that he did not know whether train hit woman.

2. Railroads ⇨401(8)

In suit by woman for injuries sustained when allegedly struck by northbound interurban train as she stood near track on pavement instead of curbing with her back turned to northbound train and did not see train or know what hit her, instruction that law presumed she was using ordinary care immediately preceding accident and was obeying law, but that such presumption could be overcome by contrary evidence, was not erroneous where woman could not give complete testimony concerning conduct

immediately prior to accident, and her testimony was not irreconcilable with presumption.

3. Railroads ⇨400(12)

Whether woman was negligent in not keeping lookout for northbound interurban train on same track as one on which she was watching for southbound train was question for jury, in suit by woman allegedly hit by northbound train.

4. Railroads ⇨398(1)

In suit by woman for injuries sustained when allegedly struck by northbound train as she stood on pavement near track rather than on curbing with back turned to northbound train and did not see train or know what hit her, evidence was sufficient to support judgment against railroad company.

Donahue, Richards, Rowell & Gallagher,
George E. Thomas, Oakland, for appellants.

Joseph F. Rankin, M. F. Hallmark, Oakland, for respondent.

KAUFMAN, Justice.

Defendants appeal from a judgment for damages entered against them after jury verdict in the sum of \$18,000 for personal injuries sustained by plaintiff Mary Keller when she was allegedly struck by an interurban train of defendant Key System Transit Lines in the City of Berkeley near the point where defendants' tracks cross Ashby Avenue.

On the date of the alleged accident, March 15, 1952, a single track was being used for both northbound and southbound trains. Northbound trains stopped for passengers on the south side of Ashby Avenue, while southbound trains stopped on the north side of this Avenue. North of Ashby, and paralleling the track on the east is a curbing. East of the curbing is a paved roadway used by northbound vehicular traffic. Gaps occur at regular intervals in the curbing, and at these points the curbing curves toward the track and the area to the track is completely paved. The eastern rail of the track is 4 feet 6 inches from the parallel curbing; the track gauge is 4

feet, 8½ inches; and the overhang on each side of the track of Key System's trains is 22 inches.

All of the witnesses, except plaintiff Mary Keller, who had no recollection of the happening of the accident, agreed that the train stopped before it crossed Ashby Avenue. Plaintiff was waiting to take the southbound train to San Francisco, and had never caught a train at this place. She was standing in the third gap or "divider" north of Ashby, and had waited five or ten minutes, looking to the north. She did not remember walking, moving or facing south. She thought she had been standing about a foot from the track, but had no recollection of that fact. On cross-examination she stated that she was standing as close as she could be to an imaginary line extending the curbing across the gaps.

A passenger on the train, Mr. Humpert, was called as a witness by plaintiff. He had first observed plaintiff standing in the second gap north of Ashby at the time the train was starting up from its stop south of Ashby. He noticed that she was facing north with her back to the train and that she never moved. Her feet were about sixteen inches from the nearest rail. Plaintiff disappeared from his vision just before the front end of the train got to her. His vision was then blocked by the curved corner of the car. He felt a jar and heard a woman scream. Mr. Humpert stated that the speed of the train increased from the time it had made the stop at Ashby until after it passed the plaintiff. It then came to a gradual stop. He at no time heard any signal from the train.

The motorman Reaves testified that his view was unobstructed and he saw plaintiff when the train was two or three blocks south of Ashby, but began to watch her continuously from the time he reached the center of Ashby Avenue, because he realized she was in a position of danger. He stated that he sounded his gong from the stop until he neared plaintiff, and blew the whistle in the north cross-walk of Ashby. He saw that plaintiff was facing north, and that she never moved from where she was standing in line with a continuation of the

curbing. He felt that he could pass her with clearance of a foot. The speed of the train was between five and six miles per hour until the front of the train passed plaintiff, at which time he released the air pressure so that the speed increased to fifteen or twenty miles per hour. He then looked back to the right and saw a woman lying in the street and brought the train to a gradual stop. He had seen her when the train was less than a foot from her, and at that point the train obscured his vision. He did not see the train hit plaintiff. He did not know if there was an impact between plaintiff and the train, and denied that he knew that the train had struck her.

The witness Niculescu, a passenger on the train, did not see plaintiff before or after the accident. He stated that he heard the train's horn as it started on the south side of Ashby. He heard a noise near the door behind him. After the train stopped he saw a green automobile traveling in the same direction as the train, and it also came to a stop.

After the accident, plaintiff was lying in Adeline Street, 26 feet north of the point of impact which was established by scuff marks of plaintiff's shoes on the pavement. The front of the train when it stopped was 162 feet north of plaintiff.

Plaintiff alleged negligence of defendants in operation of the train and maintenance of their station. Defendants denied these allegations and pleaded contributory negligence.

[1] Appellants claim error in the admission of the testimony of Parker, a police officer who had taken a report of the accident from the motorman, Reaves. Over objection the officer was allowed to testify that he had asked Reaves the following question and received the following answer:

"Q. Where was the woman when you first saw her when she was struck by the train? A. You are putting me in an awful spot. I have given you all the information I have been instructed to give by my employers and I greatly appreciate it if you would ask them for details. My hands are tied. You can understand my position as well as I can understand yours."

This conversation was introduced by respondent for the purpose of attempting to prove that Mr. Reaves knew that the train hit the woman, and hence would tend to impeach his testimony that he did not know that the train struck her, and that she was in the clear as the train approached. Appellants emphasize the fact that the question was asked by a police officer in the course of an official investigation, and that the situation is not similar to those cases in which a spontaneous exclamation or accusation is made by a third party at the scene of the accident which it would be natural for the party to deny if it were not true. See *Kohlhauer v. Bronstein*, 21 Cal.App.2d 4, 67 P.2d 1078; *Baldarachi v. Leach*, 44 Cal.App. 603, 186 P. 1060. They say that Reaves had given the police officer all the information that he was required to give under Section 482 of the Vehicle Code, and that he was under no duty, legal or moral, to answer the question. Although it is true that he did not have a duty under that section, if it should be applicable to this type of case, to answer the question, nevertheless his refusal to give information when asked a question undoubtedly making an accusation that the woman was hit by the train, is subject to the inference that he would not answer it because he knew his employers' train was involved. It is certainly unreasonable to infer that his company had instructed him not to make known to the police that it was not involved in the accident! We cannot reasonably infer that the company rules require employees not to give information to the police if they are witnesses to an accident or a crime in which they are not themselves involved. The basis of the rule on admissions made in response to accusations, is the fact that human experience has shown that generally it is natural to deny an accusation if a party considers himself innocent of negligence or wrongdoing. See *People v. Simmons*, 28 Cal.2d 699, 712, 172 P.2d 18. True there is no legal duty to make such response. We do not consider the fact that the accusation was made by a police officer significant enough to make a different rule applicable to such a case. While respondent has found no California case where the accusa-

tion was made by a police officer, she has found a Virginia case, *Sanders v. Newsome*, 179 Va. 582, 19 S.E.2d 883, in which an admission by the silence of defendant when accused by plaintiff, in the presence of a police officer was held admissible in evidence in a suit by plaintiff for personal injuries. Another case in which an admission by silence in the presence of a police officer was held admissible is *Popkin v. Goldman*, 266 Mass. 531, 165 N.E. 655.

The case of *Henderson v. Northam*, 176 Cal. 493, 168 P. 1044, cited by appellants, is not in point, for in that case the alleged admission was held inadmissible because there was no proof that the defendant either heard or understood the statement. Appellants have argued that the question asked here was confusing, that it was compound and would have been objectionable if asked in court, and that no one could clearly understand it. While it is true that the question is not clear as to whether the officer sought to know when the motorman first saw the woman or first saw her after the accident occurred, one thing that is very clear about the question is that it makes the accusation that the train struck the woman. Reaves had answered numerous questions put to him, and it is reasonable to assume that if he did not understand the meaning of this question, he would have so stated, instead of replying as he did.

Appellants cite cases from other jurisdictions in which admissions have been held to be inadmissible. *Hall Motor Freight v. Montgomery*, 357 Mo. 1188, 212 S.W.2d 748, 2 A.L.R.2d 1292; *Masterson v. St. Louis Transit Co.*, 204 Mo. 507, 103 S.W. 48; *Hill v. Missouri Packing Co.*, Mo.App., 24 S.W.2d 196; *Loewenherz v. Merchants' & Mechanics' Bank*, 144 Ga. 556, 87 S.E. 778; *Barnhart v. Martin*, 327 Ill.App. 551, 64 N.E.2d 743. Many of these cases involve attempts to introduce in personal injury suits admissions by refusal to testify at coroner's inquests, grand jury proceedings or in justice court on the ground that the answer might incriminate the party. Many of these jurisdictions base this rule on the theory that to allow such evidence would tend to destroy the constitutional privilege against self-incrimination. However, in

California, it is the rule that a party may be asked if he has not previously refused to testify at a coroner's inquest on the ground of his privilege against self-incrimination. In *Nelson v. Southern Pacific Co.*, 8 Cal.2d 648, 67 P.2d 682, such a question was held proper for impeachment purposes since the claim of privilege gives rise to an inference bearing upon the credibility of the witness' testimony that he was not negligent. Even in criminal cases in this state this type of admission is allowed to impeach the credibility of a witness. See *People v. Simmons*, 28 Cal.2d 699, 712-716, 172 P.2d 18; *People v. Kynette*, 15 Cal.2d 731, 750, 104 P.2d 794; *People v. Graney*, 48 Cal. App. 773, 192 P. 460. In *People v. Graney*, the admission was allowed in evidence even though defendant stated that his counsel had advised him not to talk.

It is our view that the admission which could be inferred from the evasive answer of appellants' motormen to the police officer's question was properly admitted in evidence.

[2] Appellants contend that error was committed in instructing the jury as follows:

"The law presumes that Mary Keller, the plaintiff in this action, in her conduct, at the time of and immediately preceding the accident here in question, was exercising ordinary care and was obeying the law.

"These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof."

An instruction on last clear chance was also given, but the jury were cautioned that such doctrine might only be invoked if they should find that in the events leading up to the accident, both plaintiff and defendants were negligent.

Appellants concede that the instruction on the presumption of due care is proper where a party is unable to testify concerning his conduct at and immediately prior to the accident. *Scott v. Burke*, 39 Cal.2d 388, 394, 247 P.2d 313, 316. They say that the only thing plaintiff did not know here was what hit her. And in *Scott v. Burke*, supra, it is held that the instruction is not proper if the testimony on behalf of the party compels the conclusion that it is "wholly irreconcilable with the presumption". Appellants argue that the fact that plaintiff's testimony was irreconcilable with the presumption, was the only justification for the court's instructing on last clear chance. However, as noted above, the court pointed out that such doctrine could only be applied if the jury should find that both plaintiff and defendants were negligent. They were not told that either plaintiff or defendants were negligent as a matter of law, or that they must apply the doctrine in this case.

There is nothing in respondent's testimony that is wholly irreconcilable with the presumption of due care, for she only testified to the fact that she was standing near the curb line, which was a position of safety, that she was looking to the north and thought she saw the southbound train coming on this track and was watching it. Because of her injury plaintiff had no memory of the happening of the accident, and hence no one can say with certainty just how far prior to the accident her memory extended.

[3] In *Ford v. Chesley Transportation Co.*, 101 Cal.App.2d 548, 225 P.2d 997, 1000, it was said that "the presumption may not be relied on by a party who can and does produce complete and explicit evidence as to his conduct in the premises." It is clear that respondent did not produce such complete and explicit evidence by her own testimony. The witness Humpert testified in behalf of respondent, and he had her with in his line of vision until just before the front of the train reached her. He stated that at no time did she move and that she was standing about 16 inches from the rail. The train's overhang was 22 inches. His testimony placed her in a position of danger

at that time which was at least within a few seconds of the happening of the accident. He did not witness the happening of the accident, however, nor did he observe her conduct in those last few seconds. Therefore, it was not error to instruct on the presumption of due care in favor of respondent. Although, as noted, Humpert's testimony placed respondent within the overhang of the train, her position, if his testimony is believed, cannot be considered as making respondent guilty of negligence as a matter of law, since she was expecting only a southbound train for which she was attentively on the lookout. It was for the jury to say whether or not a person would be negligent in not keeping a lookout for northbound trains on the very same track, when they thought they saw a southbound train approaching.

Appellants cite numerous cases in which the instruction was not held proper. But they are all distinguishable from the case now before the court. In many of them the evidence on behalf of the party whose conduct was in question fully covered said party's conduct prior to and at the time of the accident. *Clary v. Lindley*, 30 Cal.App.2d 571, 86 P.2d 920; *Kelly v. Fretz*, 19 Cal. App.2d 356, 65 P.2d 914; *Paulsen v. McDuffie*, 4 Cal.2d 111, 47 P.2d 709; *Tuttle v. Crawford*, 8 Cal.2d 126, 63 P.2d 1128; *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 297 P. 884; *Lipman v. Ashburn*, 106 Cal.App.2d 616, 235 P.2d 627; *Speck v. Sarver*, 20 Cal.2d 585, 128 P.2d 16. In *Gioldi v. Sartorio*, 119 Cal.App.2d 198, 259 P.2d 62, the instruction was held to have been properly given, and in *Hill v. Ralph*, 117 Cal.App.2d 434, 256 P.2d 48, the judgment was reversed because the instruction had not been given. The case of *Verhaegen v. Guy F. Atkinson Co.*, 126 Cal.App.2d 442, 272 P.2d 855, which appellants cite because of its criticism of an instruction practically identical to that given here, is not at all similar to the instant case on the facts. The court stated that since plaintiff therein testified fully as to his acts and conduct immediately prior to and at the time of the accident there was no room for the presumption.

277 P.2d—55½

We believe that the instruction was properly given in the instant case, and that appellants were not prejudiced thereby.

[4] We conclude that the judgment finds ample support in the record before us and accordingly it must be affirmed.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.



129 Cal.App.2d 550

Joseph L. KROISS,
Plaintiff and Appellant,
v.

Marshall BUTLER et al.,
Defendants and Respondents.
Civ. 20353.

District Court of Appeal, Second District,
Division I, California.
Dec. 15, 1954.

Action for injuries suffered by plaintiff, in collision, while riding in automobile driven by defendant. The Superior Court of the County of Ventura, Walter J. Fourt, J., entered judgment on verdict for plaintiff and granted defendants' motion for new trial and denied plaintiff's motion to dismiss motion for new trial. Plaintiff appealed. The District Court of Appeal, Drapeau, J., held, inter alia, that plaintiff's evidence on issue of whether he was passenger or guest in defendant's automobile was insufficient to support award in his favor and trial court had correctly granted new trial, and that order denying motion to dismiss motion for new trial was not appealable.

Orders affirmed.

I. New Trial ¶3, 4

Under statute governing motions for new trials, litigant may either (1) make his motion for new trial before entry of judg-

ment and while motion for judgment notwithstanding verdict is pending, or (2) he may wait and make his motion for new trial after his motion for judgment notwithstanding verdict has been decided and judgment has been entered. Code Civ.Proc. § 659.

2. New Trial ⇨116(2)

Under statute providing that entry of judgment is automatically stayed while motion for judgment notwithstanding verdict is pending and under statute providing for moving for new trial within ten days after receiving written notice of entry of judgment, motion for new trial served and filed two days after movant received notice of adverse decision on motion for judgment notwithstanding verdict was timely, even though judgment on verdict was filed and entered 30 days earlier. Code Civ.Proc. §§ 629, 659, 664.

3. Automobiles ⇨181(2)

Designations "passenger" and "guest" distinguish person who has given compensation for transportation from one who has been carried gratuitously for purposes of automobile guest statute. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Guest" and "Passenger".

4. Automobiles ⇨181(2)

Person who accepts ride does not cease to be "guest" and become "passenger" merely by extending customary courtesies of road, such as paying bridge or ferry tolls. Vehicle Code, § 403.

5. Automobiles ⇨181(2)

Where driver receives tangible benefit, monetary or otherwise, which is motivating influence for furnishing of transportation, rider is "passenger" and driver is liable to him for ordinary negligence, whether trip is for joint pleasure of participants or is of nonsocial nature. Vehicle Code, § 403.

6. Automobiles ⇨242(1)

The burden of proving that person transported by motorist was not guest passenger was upon such person suing for in-

juries sustained in motor vehicle accident. Vehicle Code, § 403.

7. Automobiles ⇨181(2)

Rider, who was accompanying motorist on hunting trip, was "guest" notwithstanding rider's contention that motorist had requested him to accompany motorist because of rider's superior hunting skill and knowledge of location of game, and rider could not recover for injuries due to motorist's alleged negligence. Vehicle Code, § 403.

8. Automobiles ⇨181(1)

Where motorist, by mistake, turned his automobile into wrong side of divided freeway and, as soon as he perceived that he was on wrong side and that a vehicle was approaching, he applied brakes and had almost completely stopped automobile when it collided with on-coming vehicle, motorist was not guilty of willful misconduct, and motorist's guest could not recover for injuries. Vehicle Code, § 403.

9. New Trial ⇨70

New trial should be granted whenever the evidence is insufficient to justify verdict. Code Civ.Proc. § 659.

10. Appeal and Error ⇨977(1)

Ruling on motion for new trial will not be reversed unless it is affirmatively shown or manifestly appears that court abused sound discretion confided to it. Code Civ. Proc. § 659.

11. Appeal and Error ⇨110

Order denying motion to dismiss motion for new trial was not appealable.

Morton J. Salsberg, Reseda, for appellant.

Murchison & Cumming, Los Angeles, for respondent Butler.

DRAPEAU, Justice.

The first cause of action of the complaint herein alleges that on November 30, 1952, defendant requested plaintiff to accompany him on a trip to hunt quail in Ventura county, in consideration of plaintiff's hunting experience and knowledge of the location of game in said locality.

Just before four o'clock in the afternoon of that day, defendant was driving his truck southerly on Highway 101, a divided freeway. Without warning to plaintiff, he crossed over to the opposite side of the freeway into the northbound traffic lane. And as he was so driving his truck unlawfully and negligently in a southerly direction on the wrong side of the freeway, he collided with an automobile traveling north in the northbound traffic lane.

The second cause of action alleges willful misconduct of defendant in the operation of his truck on the wrong side of the freeway.

The prayer of the complaint asks judgment for \$158,000 against defendant for the alleged injuries sustained by plaintiff in the collision.

The answer admits that defendant and plaintiff were on a hunting trip and that a collision occurred. It denies generally and specifically every other allegation of the complaint. As an affirmative defense it is alleged "that the accident, injuries and damages, if any, were caused by an unavoidable and inevitable accident", and that plaintiff was riding in the truck "voluntarily, as a guest."

At the conclusion of the trial on the issues so joined, defendant made a motion for a nonsuit and for a directed verdict which was denied. And the jury returned its verdict assessing plaintiff's damages at \$17,300. On the very same day, i. e., July 15, 1953, defendant moved for judgment notwithstanding the verdict, reserving the right to move for a new trial. Argument on the motion was continued by stipulation until July 20th, at which time it was submitted.

In the meanwhile, i. e., on July 16, 1953, judgment on the verdict was filed and entered.

On August 7th, the court denied defendant's motion for judgment n. o. v. and the order of denial was filed on August 10th.

On August 15th, notice of entry of judgment was served by plaintiff on defendant and presented for filing.

On August 17th, defendant's notice of intention to move for a new trial was filed

and September 25th was set as the date of hearing same.

On September 11th, plaintiff filed notice of intention to move to dismiss defendant's motion for new trial because it was filed too late. Plaintiff also filed notice of motion *nunc pro tunc* to correct date of entry of judgment from July 16 to August 7, pursuant to section 664, Code of Civil Procedure.

On September 30th, the trial court granted plaintiff's motion to correct date of entry of judgment, and also granted defendant's motion for a new trial. The court denied plaintiff's motion to dismiss defendant's motion for new trial.

Plaintiff has appealed from the order granting a new trial and also from the order denying his motion to dismiss defendant's motion for new trial.

It is first urged that the trial court was without jurisdiction to hear respondent's motion for new trial. This for the reason that the notice of intention to move for a new trial was not filed or served within the time prescribed by sections 629 and 659 of the Code of Civil Procedure, as amended in 1951.

Section 629, *supra*, has reference to motions for judgment notwithstanding the verdict. It provides, among other things, that such motion may be made *either before or after entry of judgment* reserving the right to move for a new trial, and if made *after* entry of judgment, it shall be made within the period specified by section 659, *supra*, as to filing and serving notice of intention to move for new trial.

Section 659, *supra*, reads as follows:

"The party intending to move for a new trial must, either (1) before the entry of judgment and, where a motion for judgment notwithstanding the verdict is pending, then within five (5) days after the making of said motion, or (2) within ten (10) days after receiving written notice of the entry of the judgment, file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial, designating the grounds upon which the motion will be made * * *. The time

above specified shall not be extended by order or stipulation."

So far as this court has been able to ascertain, section 659 of the Code of Civil Procedure, as amended in 1951, has not been judicially construed.

However, in an article by Mr. Alexander Macdonald of the Los Angeles Bar, entitled "New Procedure Affecting Motions for New Trial", published in the Journal of the State Bar of California, Vol. XXVI, page 299, it is stated at page 302:

"The amendment of section 659 requires little comment. Its obvious purpose is to speed up the making of the motion for a new trial *when made before* the entry of judgment, inasmuch as, when a motion n. o. v. is made, section 654, Code of Civil Procedure, automatically stays entry of judgment until the court has ruled on the motion." (Emphasis added.)

[1] Pursuant to section 629, *supra*, a motion for judgment notwithstanding the verdict may be made either before or after entry of the judgment. And it is obvious that the language used in section 659, *supra*, contemplates that a motion for a new trial may likewise be made either before or after entry of the judgment. In other words, a litigant may (1) either make his motion for a new trial before entry of the judgment and while his motion for judgment n. o. v. is pending, or (2) he may wait and make his motion for a new trial after his motion for judgment n. o. v. has been decided and the judgment entered.

[2] Instead of moving for a new trial before the judgment was entered and while his motion for judgment n. o. v. was pending, respondent chose to follow subdivision (2) of section 659, *supra*: Entry of the judgment was automatically stayed by section 664, *supra*, until the court rendered its decision on the motion for judgment n. o. v., to-wit, on August 7, 1953. Respondent received notice of such entry on August 15, 1953. Two days later, on August 17th, he filed and served his notice of intention to move for a new trial. From this it follows, that the instant motion for new trial was made well within the ten day period prescribed by subdivision (2) of section

659, and the trial court had jurisdiction to hear and decide it.

Appellant next contends that the trial court abused its discretion by granting a new trial on the ground of insufficiency of the evidence to justify the verdict. This for the reason that he was a passenger for compensation, and that "there was overwhelming evidence at the trial, and no evidence in contradiction thereto, to remove appellant from the status of a guest", as defined by section 403 of the Vehicle Code.

That section provides: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver."

Appellant testified that on the day in question he went to respondent's store to pick up some groceries. Respondent suggested that they go quail hunting that afternoon. Appellant was reluctant to accept because he had other work to do. Respondent persuaded him to go. It started to rain and they decided to call off the hunting trip. Appellant went on home. About one o'clock it cleared and respondent drove up to appellant's house and said: "Let's go out and hunt, see if we can get some birds."

They went out as far as Conejo grade in Ventura County where they hunted on the south slope. Appellant further testified that he had been hunting quail for twenty or twenty-five years; that in tracking quail a hunter had to have knowledge of the type of terrain offering seclusion, cover and feed for the birds; ability to issue a quail call or whistle, and to recognize signs on the ground, i. e., tracks and wallows. When he started on this trip it was his purpose to use his ability and knowledge to locate quail. He had known respondent for seven or eight years. They were friends

and had previously hunted quail at various places. On this particular occasion he agreed that respondent should use his truck for the trip, but there was no discussion as to payment of costs. Each man had his own gun and shells. Appellant felt that he had greater knowledge than the average in recognizing quail tracks, but he did not communicate this feeling to respondent and the latter made no mention of it, either.

Respondent Butler testified that he considered himself as good a hunter as appellant. At the time in question they had no discussion regarding their relative abilities or knowledge of quail hunting. Respondent selected the place in which to hunt; they got no birds and decided to go to another place, i. e., to Thousand Oaks on their way home and do a little hunting there.

On cross-examination, respondent testified he had been hunting for twenty-five years; knew the neighborhood and had been to Thousand Oaks before.

[3-5] "The designations 'passenger' and 'guest' have been adopted for the purpose of distinguishing a person who has given compensation within the meaning of section 403 of the Vehicle Code from one carried gratuitously. *Kruzie v. Sanders*, 23 Cal.2d 237, 241, 143 P.2d 704. A person who accepts a ride does not cease to be a guest and become a passenger merely by extending customary courtesies of the road, such as paying bridge or ferry tolls (see Rest., Torts, § 490, comment a), and it has been held that the sharing of expenses does not destroy the host and guest relationship if nothing more is involved than the exchange of social amenities and reciprocal hospitality. *McCann v. Hoffman*, 9 Cal.2d 279, 70 P.2d 909. Where, however, the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence. [Citation of authorities.] This is, of course, true whether the trip is for the joint pleasure of the participants or is of a nonsocial nature." *Whitmore v. French*, 37 Cal.2d 744, 746, 235 P.2d 3, 5.

[6] The burden of proving that he was not a guest was upon appellant. *Gosselin v. Hawkins*, 95 Cal.App.2d 857, 860, 214 P.2d 110; *Whittemore v. Lockheed Aircraft Corp.*, 65 Cal.App.2d 737, 151 P.2d 670.

[7] This appellant failed to do in the case now under consideration. The evidence produced and hereinbefore recited was clearly insufficient to establish that appellant was a passenger instead of a guest.

Appellant finally asserts that respondent was guilty of wilful misconduct in that he drove his truck on the wrong side of a divided freeway with a knowledge that serious injury would probably result and with a wanton and reckless disregard of its possible result.

Wilful misconduct within the contemplation of the guest statute is defined in 7 Cal. Jur.2d 225, Sec. 337, "as intentionally doing something in the operation of a motor vehicle which should not be done, or failing to do something which should be done, under circumstances disclosing knowledge, express or implied, that an injury to a guest will probably result. It necessarily involves deliberate, intentional, or wanton conduct in doing, or omitting to do, acts with actual knowledge of the peril involved, and with knowledge, express or implied, or appreciation of the fact that an injury is likely to result therefrom, although there need be no deliberate intention to injure the guest. * * * It means more than mere negligence, however gross, but less than the conventional intentional tort, such as trespass, assault or battery. To render the operator liable to a guest there must be misconduct as distinguished from negligence and the misconduct must be wilful."

In *Stacey v. Hayes*, 31 Cal.App.2d 422, 88 P.2d 165, the court held that a finding of misconduct was not sustained by evidence that defendant, while operating his car around a curve and down a gentle grade at thirty or thirty-five miles per hour, drove it twenty-one inches over the center line of the highway and into the path of an oncoming vehicle.

In the cited case it was said, 31 Cal.App. at page 426, 88 P.2d at page 166: "'The

mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury.'" (Helme v. Great Western Milling Co., 43 Cal.App. 416 [185 P. 510].)"

Respondent Butler testified that he and appellant were on their way home driving easterly in the southerly portion of Highway 101, and that he drove onto the wrong side of the highway by mistake. That when he turned from the southerly portion into the right-hand lane of the northerly portion of the divided highway, he thought he was on the road that turned off to Thousand Oaks. After he had gone seventy-five to one hundred yards he saw the Waite car approximately six hundred yards down the highway coming toward him on the same side of the highway. He then realized for the first time that he was on the wrong side of the highway. Prior to the time he saw the oncoming car, he was traveling at forty to forty-five miles per hour. When he saw the Waite car he stepped on his brakes and "slowed down very slow", to fifteen or twenty miles. At the time of the collision his car "was almost stopped", to five or seven miles per hour. He remained in the right-hand lane "creeping along". It had been raining the night before and the lane to the left was very muddy. He just barely turned to the left when the two cars collided. There were no other cars in the immediate vicinity at that time.

Appellant Kroiss had no memory as to how the accident occurred. He had not been able to remember anything from the time respondent's car reached the top of the Conejo grade.

In answer to the question: "Now, Mr. Kroiss, did you have any particular thing in mind as to what Mr. Butler did that was wilful?"—appellant replied: "I don't remember anything about it."

[8] In this state of the evidence, the propriety of the trial court's action in granting a new trial cannot be questioned.

[9, 10] A motion for a new trial should be granted whenever in the opinion of the trial judge the evidence is insufficient to justify the verdict. And his ruling on such motion will not be reversed "unless it is affirmatively shown or manifestly appears that he has abused the sound discretion confided to him." Lopez v. Capiti, 114 Cal. App.2d 544, 548, 250 P.2d 616, 618.

No such abuse appears here.

[11] The order granting motion for new trial is affirmed. The appeal from the order denying motion to dismiss motion for new trial is dismissed as it is not an appealable order. Griess v. State Investment & Ins. Co., 93 Cal. 411, 28 P. 1041.

WHITE, P. J., and DORAN, J., concur.



**MEMORIAL HOSPITAL ASSOCIATION OF
STANISLAUS COUNTY, a corporation,**
Plaintiff and Respondent,

v.

**PACIFIC GRAPE PRODUCTS COMPANY
and S. F. Triplett, Defendants, ***

Pacific Grape Products Company, Appellant.
Civ. 8501.

District Court of Appeal, Third District,
California.

Dec. 27, 1954.

Rehearing Denied Jan. 24, 1955.

Hearing Granted Feb. 24, 1955.

Action by hospital association against corporation and its president to recover upon written subscription pledge allegedly executed by president on behalf of corporation. The Superior Court, Stanislaus County, Gregory P. Maushart, J., rendered judgment against corporation but in favor of president individually, and corporation

* Opinion vacated 290 P.2d 481.

appealed. The District Court of Appeal, Schottky, J., held, inter alia, that president and general manager of corporation did not have ostensible authority to bind corporation by pledge to contribute \$5,000 toward construction of a hospital.

Judgment reversed.

1. Corporations ⇨406(1), 425(5)

To prove a contract claimed to be binding on a corporation, it must be shown that officer was expressly authorized, or that his act was fairly within the implied powers incidental to his office, or that corporation is estopped to deny his authority by reason of having accepted the benefit of the contract or otherwise.

2. Corporations ⇨406(2)

The authority and power of a president of a corporation is broader when he is also designated its general manager, in that he has prima facie power to make any contract or do any act which board of directors could authorize or ratify in absence of a showing of restriction on such power by board or executive committee, but his authority does not extend to contracts or acts which are not incident to the ordinary business.

3. Corporations ⇨406(4)

Whether a particular contract made by a general manager is within his implied power depends on whether execution is reasonably necessary to, and customary and usual in, the performance of the duty to be discharged by managers.

4. Corporations ⇨397, 398(2)

The board of directors is the governing body of a corporation and other officers and agents exercise representative authority which they derive from the directors or from the by-laws.

5. Corporations ⇨412

President and general manager of corporation did not have ostensible authority to bind corporation by pledge to contribute \$5,000 toward construction of a hospital. Civ.Code, § 2317.

6. Corporations ⇨399(1)

The two essential features of "ostensible authority" are that the third person

must believe that corporate agent had authority and such belief must be generated by some act or neglect of the person to be held. Civ.Code, § 2317.

See publication Words and Phrases, for other judicial constructions and definitions of "Ostensible Authority".

7. Corporations ⇨432(12)

In action by hospital against corporation to recover on written pledge for contribution, evidence established that hospital was charged with notice that corporation's president and general manager needed prior authorization from board of directors and did not establish that board had acquiesced in president's exercise of practically unlimited authority.

8. Corporations ⇨412

Where hospital which was soliciting pledges for contributions was charged with notice that corporation's president needed prior authorization from board of directors to make pledge, corporation's liability upon pledge executed by president could not be predicated on doctrine of ostensible authority. Civ.Code, § 2317.

9. Corporations ⇨1

A corporation is a distinct legal entity separate and apart from its members or stockholders and from its directors or officers.

10. Corporations ⇨1

Corporate entity will be disregarded in certain cases, as where corporation is but the instrumentality through which an individual transacts his business, and fraud or injustice to third persons results, but it is not enough, in order to cast aside the legal fiction, that corporation be organized and controlled and its affairs so managed as to make it merely an instrumentality, conduit, or adjunct of its stockholders, and it must appear that one is the alter ego of the other and that to recognize separate entities would aid consummation of a wrong.

11. Appeal and Error ⇨172(1)

Record disclosed that action against corporation to recover on a pledge of charitable contribution written by corporation's president had not been tried upon theory of disregard of the corporate entity, and

that pleadings had not raised this issue, and, therefore, that issue could not be considered by reviewing court.

12. Corporations ☞

In action against corporation to recover upon a written pledge for a charitable contribution written by corporation's president, who owned 73 per cent of the outstanding shares of stock, evidence was insufficient to support a finding that the corporate veil was pierced.

13. Corporations ☞

More than control is required before corporate entity may be disregarded, and mere circumstance that all of the capital stock of a corporation is owned or controlled by one or more persons does not destroy its separate existence.

Nathan B. McVay, Modesto, for appellant.

Vernon F. Gant, Modesto, for respondent.

SCHOTTKY, Justice.

Plaintiff corporation, a hospital association, commenced an action against defendant corporation, a canning company, and its president and general manager to recover upon a written subscription pledge of \$5,000 which it was alleged that defendant had made to plaintiff for the building of a hospital. Defendants answered separately, defendant Triplett setting up as an affirmative defense that the pledge was signed by him as president and general manager of Pacific Grape Products Company and not in his individual capacity, and defendant corporation setting up as an affirmative defense that defendant Triplett did not have authority to bind the corporation to such an agreement. The case with the issues thus framed was tried before the court sitting without a jury. The trial court found:

"* * * that at the time of the making of said subscription agreement the said S. F. Triplett was the president and general manager of Pacific Grape Products Company, a corporation duly incorporated under the laws of the

State of California and that said subscription agreement was signed by the said S. F. Triplett as such president and general manager and not in his individual capacity.

"The Court further finds that the said defendant S. F. Triplett at the time that said subscription agreement was signed and delivered, owned approximately 73% of the issued and outstanding stock of the defendant Pacific Grape Products Company and that the said defendant S. F. Triplett had and exercised almost complete control of and over the affairs of said corporation defendant. That the said S. F. Triplett as the president and general manager of said defendant Pacific Grape Products Company, had, at the time said subscription agreement was signed, full power and authority to bind said corporation and that said subscription agreement was and is a valid, binding and sustaining obligation of said corporation."

In accordance with said findings, judgment was entered in favor of plaintiff against defendant corporation Pacific Grape Products Company, but in favor of defendant Triplett.

Defendant corporation has appealed from the judgment and its sole contention is that the evidence is insufficient to support the judgment. Appellant asserts that there is no evidence to indicate that Triplett had the authority either actual, implied or ostensible to bind the appellant on the agreement, and that, assuming without conceding that the issue was properly before the court, there was insufficient evidence to warrant the court in piercing the corporate veil, thereby making the act of Triplett in fact the act of the corporation.

The record shows that for a considerable period of time prior to November 12, 1947, respondent corporation was actively engaged in the solicitation of pledges of funds for the construction of a general hospital near Modesto, California. Pursuant to this plan, on three occasions workers in the campaign called at appellant's plant. On the first visit the workers were informed by defendant S. F. Triplett, president and

general manager of appellant corporation, that he would have to take the matter up with the Board of Directors. On the second call Triplett told the solicitors for respondent that he had not had an opportunity to discuss it with the board of directors and that they would have to come back again. The third and final visit occurred on November 12, 1947, at which time the workers received a written pledge signed by Triplett, with the donor's name being designated as Pacific Grape Products Company and containing an agreement to pay the sum of \$5,000. According to respondent's witness Lawrence Robinson, the written pledge was delivered to Lynn Hodgert and himself upon said third visit. The following appears in the record: "As I stated, we went down to an ante room or an outer office and sent in word through someone, I can't recall whom, that we were there for the purpose of picking up the pledge. In due course, whoever this party was, came out with the pledge. Q. And you didn't even see Mr. Triplett? A. We didn't see Mr. Triplett."

The appellant is a canning company which buys, processes and sells canned goods. Defendant Triplett was the president and general manager of appellant corporation since its inception in 1926; he owned 73 per cent of the outstanding shares of stock in the corporation, and the general conduct of the business, including general supervision of the departments, the operation of the factory, in the field and in sales, was placed in his hands. The Board of Directors met at infrequent intervals, all mostly on the call of Triplett. There was testimony that in the history of the appellant donations to the Red Cross and Community Chest were made without express authorization from the Board of Directors.

It is not clear whether the matter of the pledge was ever discussed with the members of the Board of Directors, although it appears that the assistant secretary may have had some knowledge of it. At any rate, Triplett did not have express authority, either by virtue of the by-laws or by virtue of a resolution of the Board of Directors, to enter into the subscription

agreement, nor was there any formal ratification thereof.

[1] The general rule is well expressed in *Magnavox Company v. Jones*, 105 Cal. App. 98, at page 103, 286 P. 1084, 1086, as follows:

"To properly prove a contract claimed to be binding on a corporation, it should be shown that it was made on its behalf by someone who had authority to act for it. It must be shown that the officer was expressly authorized, or that the act was fairly within the implied powers incidental to his office, or that the corporation is estopped to deny his authority by reason of having accepted the benefit of the contract or otherwise."

It is clear that Triplett had no express authority to sign the subscription pledge on behalf of appellant corporation. Indeed respondent concedes this and states that it does not contend that there was any showing during the trial of express actual authority on the part of S. F. Triplett to bind the corporation by virtue of the charter, the by-laws or any resolutions of the directors at directors' meetings. However, respondent argues "that the evidence is sufficient to show his authority to bind the corporation at the time he entered into the pledge agreement on behalf of the corporation, both by virtue of the general authority of his office as general manager and president to supervise and manage the business and by virtue of the implied acquiescence on the part of the board of directors. These authorities are in their nature implied rather than expressed but nevertheless are deemed to be actual authority."

[2,3] Although the authority and power of the president of a corporation to act on its behalf is broader when he is also designated its general manager, the authority of such corporate agent is not entirely unlimited. As is said in 2 *Fletcher Cyclopedia Corporations*, at page 669 et seq.:

"* * * where the president of a corporation is, by the by-laws of such corporation, given power as a general manager to superintend and conduct

the business of the company, subject to the control of the board of directors and executive committee, he has prima facie power to make any contract or do any act which the board of directors could authorize or ratify in the absence of a showing of restriction on such power by the board of directors or executive committee. But his authority does not extend to contracts or other acts which are not incident to the ordinary business. If the transactions are not within the scope of the business which either a president or a general manager is, by virtue of his office, qualified to transact for the corporation, the company will not be bound thereby."

And at page 876:

"* * * whether a particular contract made by a general manager is within his implied power depends on whether its execution is reasonably necessary to, and customary and usual in, the performance of the duties to be discharged by managers."

See also 6A Cal.Jur., p. 1156, and 29 Cal. L.Rev. 422.

In support of its contention that the subscription agreement here in controversy was within the implied authority vested in Triplett as president and general manager of appellant corporation respondent cites a number of authorities. However, it is apparent from these authorities, as well as many others that we have read relating to the subject of corporate liability based on the implied authority of an agent or officer, that courts impose such liability only after a determination that the act performed or the contract executed is incident to the ordinary business of the corporation and within the scope of such business. We have been cited to no cases, and have found none, which are authority for the proposition that a subscription for the building of a hospital in a community is impliedly within the scope of the duties to be discharged by the president and general manager of a canning corporation.

Respondent quotes the following from Ballantine on Corporations, at page 144:

"When an officer or agent of a corporation is intrusted by the shareholders or directors with the general charge and management of the business of the corporation, the general rule is that, he has implied authority to make any contract or do any other act appropriate in the ordinary business of the corporation."

Respondent also cites *Freeman v. River Farms Co.*, 5 Cal.2d 431, 55 P.2d 199, in support of its position. In the *Freeman* case, which involved an action by a contractor on warrants drawn by a levee district and guaranteed by virtue of an agreement to that effect entered into with the president of the defendant corporation for and on behalf of the corporation, the court held, 5 Cal.2d at page 435, 55 P.2d at page 200:

"Finally, with respect to the argument that the president of the company was not authorized to bind the company by either actual or ostensible authority, it must be said that appellant cannot prevail. The by-laws of appellant disclose that the president was given the power to 'make and sign agreements in the name and behalf of the company,' and also 'the general and active management of the business and affairs of the company.' It cannot be successfully contended that under this provision the president would not have been authorized to take action to prevent the flooding of appellant's land. See *Western Lithograph Co. v. Vanomar Producers*, 185 Cal. 366, 197 P. 103, and cases there cited. The fact that the contract took a form different from the one we might ordinarily expect to find should make no difference. In truth, apt language is found in *Woods Lbr. Co. v. Moore*, 183 Cal. 497, 502, 191 P. 905, 907, 11 A.L.R. 549, as follows: 'With respect to the means which the corporation may adopt to further its objects and promote its business its managers "are not limited in law to the use of such means as are usual or necessary to the objects contemplated by their organization, but, where not restricted by law,

may choose such means as are convenient and adapted to the end, though that be neither the usual means, nor absolutely necessary" for the purpose intended. *Winterfield v. Cream City B. Co.*, 96 Wis. 239, 71 N.W. 101.'"

Respondent argues that it is clear from the above quotation that the court felt that since the action of the president was beneficial to the corporation it must be held to have been within the general authority of the president and general manager even though it was not absolutely necessary nor the usual type of thing done by the corporation. However, as pointed out by appellant, the distinction between the cited case and the instant case lies in the fact that in the *Freeman* case the act sought to be accomplished was the protection of the valuable farming property of the corporation from damage by flood waters, while in the instant case it is difficult to understand how it could be held that a pledge of corporate funds for the building of a memorial hospital is impliedly within the scope of the duties to be performed by the president and general manager of the respondent canning corporation.

[4] Respondent states: "It is a matter of common knowledge that the trend on the part of prosperous business concerns is steadily in the direction of making larger and more numerous charitable contributions in the communities in which they do business * * * as a means of increasing its business, promoting patronage, and increasing its good-will." While this observation of respondent may be true, it cannot change the rule that the board of directors is the governing body of a corporation and that other officers and agents exercise representative authority which they derive from the directors or from the by-laws. 13 Cal.Jur.2d sec. 308, page 76. To sustain respondent's contention in the instant case would undermine the essential protection afforded to stockholders by the corporate structure because it would make it possible for a philanthropically inclined president and general manager, without authority of the directors, to bankrupt the corporation by mak-

ing large pledges to worthy charitable enterprises.

[5] We do not believe that it can be held that Triplett had ostensible authority to bind the appellant corporation.

Ostensible authority is defined by Civil Code, section 2317, as follows:

"Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess."

[6] "There are two essential features of ostensible authority, viz., the third person must believe that the agent had authority and such belief must be generated by some act or neglect of the person to be held." *Walsh v. American Trust Co.*, 7 Cal.App.2d 654, 660, 47 P.2d 323, 325.

[7, 8] The evidence clearly establishes that respondent was charged with notice that Triplett needed prior authorization from the board of directors and precludes the imposition of liability on the theory of ostensible authority. See *Smith v. Sleepy Hollow Inv. Co.*, 65 Cal.App.2d 75, 149 P.2d 754. Nor does the evidence establish, as respondent asserts, "that there was a long course of acquiescence on the part of the board of directors, holding out Mr. Triplett to the public and to those dealing with the corporation as having practically unlimited authority in carrying on the business of the corporation, including the discretionary matter of making contributions and donations." Although the testimony would indicate that donations to other charitable organizations had been made in the past without special action being taken by the board of directors, the character and manner of making such contributions is not so like the execution of a subscription agreement as to be deemed evidence of corporate acquiescence in a similar course of dealing, and this should be true even though the objects of both are comparable. See *Black v. Harrison Home Co.*, 155 Cal. 121, 99 P. 494.

Respondent makes the further contention that the circumstances of the instant case were such that the court was warranted

in piercing the corporate veil so as to make the act of S. F. Triplett the act of the corporation.

[9, 10] We are unable to agree with this contention. As stated in 12 Cal.Jur.2d, at page 604:

"A corporation is a distinct legal entity separate and apart from its members or stockholders and from its directors or officers. * * *

"There are circumstances in which the corporate entity will be disregarded and the corporation will be considered in law as the alter ego of the persons composing it, as for instance when the corporation is but the instrumentality through which an individual, the sole owner of the capital stock, for convenience transacts his business, and fraud or injustice to third persons results from the double relationship. In order to cast aside the legal fiction of distinct corporate existence, it is not enough that the company is organized and controlled and its affairs so managed as to make it merely an instrumentality, conduit, or adjunct of its stockholders, but it must further appear that one is the business conduit and the alter ego of the other, and that to recognize their separate entities would aid the consummation of a wrong."

No allegation appears in the complaint from which it may be drawn that the corporate veil should be pierced, and it is clear that the case was not tried upon that theory. In his opening statement to the trial court counsel for respondent stated:

"Mr. Gant: * * * The only issues, as I understand it from the pleadings and in my conversations with Mr. McVay, are these: (1) Was Mr. Triplett at the time he signed the pledge on behalf of the Pacific Grape Products Company Association authorized to do so expressly or by implication. Secondly, if not and if he didn't bind the corporation, did he create any personal liability on his part by reason of his signing the authority; in other words, for signing the pledge. Putting

it another way, is the corporation liable, is Mr. Triplett personally liable or is nobody liable. Now, that is the question that we present to the court.

"Mr. McVay: That's correct."

And at the close of the testimony:

"The Court: The question is did Mr. Triplett, or was Mr. Triplett ostensibly an agent to bind the corporation without the action of the Board of directors. Ordinarily we know that the corporation can't act without or through the Board of Directors unless the party acting has ostensible power." Respondent's counsel replied:

"Mr. Gant: That's the only point so far as he is concerned; secondly, if he attempted to act and didn't have the authority is he personally liable.

"The Court: Yes, those are the two points. * * *

In *H. Moffat Co. v. Rosasco*, 119 Cal. App.2d 432, at page 439, 260 P.2d 126, 131, this court said:

"In *MacKenzie v. Angle*, 82 Cal. App.2d 254 at page 263, 186 P.2d 30, 35, this court said: 'A rule, early established and long adhered to in the courts of this state, is that questions not raised in a lower court will not be considered on appeal. (Citing cases.)' As stated in 3 Cal.Jur.2d, Appeal and Error, section 140: 'The rule is founded upon considerations of practical necessity in the orderly administration of the law and of fairness to the court and the opposite party, and upon the principles underlying the doctrines of waiver and estoppel.'

"And as this court said in *Munfrey v. Cleary*, 75 Cal.App.2d 779, at page 785, 171 P.2d 750, at page 753: 'Also as a general rule where a case has been tried upon one theory that theory must be adhered to on appeal, and a party who has tried his case wholly or in part on a certain theory, which theory was acted upon by the trial court, cannot, on appeal, change his position and adopt a different theory, since to do so would be unfair to the trial court and to opposing counsel. (Citing cases.)'

[11] We are, therefore, of the opinion that the question of liability through a disregard of the corporate entity was not raised by the pleadings, and also that the case was not tried upon that theory, and that, this being so, the issue may not properly be considered by this court upon this appeal.

[12] But even assuming that the issue is properly before this court on this appeal, there is no substantial evidence upon which a finding that the corporate veil was pierced could be sustained. As hereinbefore pointed out, the evidence shows that Triplett was president-general manager, owned 73 per cent of the outstanding shares of stock, and meetings of the board of directors were held as often as twelve to fifteen times per year, usually upon call of Triplett. These facts are not sufficient to support a judgment based upon a piercing of the corporate veil. The only factor not present in most corporations is the ownership of 73 per cent of the capital stock by Triplett.

The statement contained in respondent's brief to the effect that "Triplett for all intents and purposes exercised with the acquiescence and blessings of the board of directors practically all of the power which the corporation itself possessed" finds no support in the evidence. Giving to the testimony quoted by respondent every inference favorable to the respondent, it merely shows that Triplett exercised the duties of a president and general manager and that he called all of the meetings of the board of directors.

[13] However, more than control is required before a court is authorized to disregard the corporate identity. The rule is clearly expressed in the leading case of *Erkenbrecher v. Grant*, 187 Cal. 7, at page 11, 200 P. 641, at page 642:

"In order to cast aside the legal fiction of distinct corporate existence as distinguished from those who own its capital stock, it is not enough that it is so organized and controlled and its affairs so managed as to make it 'merely an instrumentality, conduit or adjunct' of its stockholders, but it must further appear that they are the 'busi-

ness' conduits and alter ego of one another,' and that to recognize their separate entities would aid the consummation of a wrong. Divested of the essentials which we have enumerated, the mere circumstance that all the capital stock of a corporation is owned or controlled by one or more persons does not, and should not, destroy its separate existence; were it otherwise, few private corporations could preserve their distinct identity, which would mean the complete destruction of the primary object of their organization."

See also *Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, Incorporated*, 217 Cal. 124, 17 P.2d 709; *Dos Pueblos Ranch & Improvement Company v. Ellis*, 8 Cal.2d 617, 67 P.2d 340, and *Wood Estate Co. v. Chanslor*, 209 Cal. 241, 286 P. 1001.

There was no testimony to the effect that the affairs of the corporation and those of Triplett were confused. There is nothing to show that the individuality of both has ceased.

There is no evidence to indicate that Triplett and appellant corporation were one and the same, and as stated in *Consolidated Photographic Industries, Inc. v. Marks*, 109 Cal.App.2d 310, 240 P.2d 718, 721, "the existence of a corporation * * * cannot be destroyed upon mere suspicion or surmise."

It must be borne in mind that the trial court found that the subscription agreement was signed by Triplett as president and general manager and not in his individual capacity and that judgment was rendered against respondent corporation but in favor of defendant Triplett. It may be that the acts of Triplett may have justified a judgment against him individually, but the court did not so hold and respondent has not appealed from the judgment in favor of Triplett.

In view of the foregoing we conclude that the judgment against appellant corporation is not supported by the evidence.

The judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

129 Cal.App.2d 783

In the Matter of the ESTATE of Abraham L. GUMP, also known as Abraham Livingston Gump, also known as A. Livingston Gump, also known as A. L. Gump, Deceased.

Daniel W. HONE, Appellant,

v.

Robert L. GUMP, Marilyn Gump Sinatra, Suzanne Gump Harriss, Marcella Gump Phillips, Richard B. Gump, Individually and Richard B. Gump and Ralph P. Simmons, as Executors and Trustees under the Will of Abraham L. Gump, Alias, Deceased, Antoinette Gump, Catherine T. Gump and Susan Widney Gump, Respondents.

Civ. 15844.

District Court of Appeal, First District,
Division 2, California.

Dec. 27, 1954.

Rehearing Denied Jan. 26, 1955.

Hearing Denied Feb. 24, 1955.

Probate proceedings. The Superior Court, San Francisco County, T. I. Fitzpatrick, J., made award of compensation for extraordinary services to executor's attorney. Attorney appealed. The District Court of Appeal, Kaufman, J., held that amount allowed by trial court as compensation for extraordinary legal services in probate of estate was supported by record, and trial court did not abuse its discretion.

Decree affirmed.

1. Executors and Administrators

⇒216(2), 256(6)

Probate Court's determination of compensation to be awarded executor's attorney for extraordinary services will not be disturbed except for a clear abuse of discretion, and Probate Court's discretion is very wide, although it is a legal discretion.

2. Executors and Administrators ⇒216(2)

In probate proceedings, \$10,000 compensation awarded executor's attorney for extraordinary legal services was supported by record, and trial court did not abuse its discretion in making award.

Daniel W. Hone, San Francisco, in pro.
per.

Hubert D. Forsyth, Peter L. Levy, San Francisco, for appellant.

Lloyd W. Dinkelspiel, Michael J. Cullen, Heller, Ehrman, White & McAuliffe, San Francisco, for respondents, Richard B. Gump, Individually, and Richard B. Gump and Ralph P. Simmons, as Executors and Trustees under the Will of Abraham L. Gump, Deceased.

Arthur P. Shapro, San Francisco, for respondents, Robert L. Gump, Marilyn Gump Sinatra and Suzanne Gump Harriss.

John D. Costello, John L. Mace, San Francisco, for respondent, Marcella Gump Philips.

KAUFMAN, Justice.

This is an appeal by Daniel W. Hone, attorney for executors of the Estate of Abraham L. Gump, deceased, from Decree of Settlement of Fourth and Final Account, and of Supplemental Account of Executors, allowing Compensation for Extraordinary Services, and of Final Distribution, of the Superior Court in and for the City and County of San Francisco, and particularly from that portion thereof allowing appellant \$10,000 compensation for extraordinary services and decreeing that the executors should withhold \$11,338.66 to defray possible tax deficiencies and additional expenses of administration.

Appellant contends that the Probate Court abused its discretion in allowing only \$10,000 for extraordinary services performed during a five year period, and that he is entitled to \$25,000 for extraordinary services rendered from September 1947 to September 1951, and an additional \$5,000 for services rendered thereafter. He contends further that it was error to limit withholding by executors to \$11,338.66, and that they should have had to withhold sufficient funds to cover the claim of appellant.

Petition for probate of the will of Abraham L. Gump, deceased, was filed September 3, 1947, and Letters Testamentary were issued September 16, 1947, to Richard Gump and Ralph Simmons. Following a hearing, the decree appealed from was issued November 28 and filed December 3,

1952. The sum of \$14,027.14 was awarded as the statutory fee for ordinary services.

The testator was survived by three adult children, Richard, Robert and Marcella Gump. The holdings in common and preferred stock of S & G Gump Company constituted the principal asset of the estate. The will expressed the desire of the testator that the Gump Company's operations be continued and its stock retained by executors and by trustees under the testamentary trust created by the will. The obligations of the estate (excluding two principal legacies) exceeded 90% of its total appraised value.

The sole question on appeal is whether or not a clear abuse of discretion was committed by the trial court in limiting appellant's compensation for extraordinary services to \$10,000 and in not requiring the executors to withhold sufficient funds to cover the amount claimed by appellant for such services. He contends that the amount awarded does not even cover his costs, stating that the services required in excess of 1,300 hours work over a period of 5 years in dealing with complicated and unusual problems in an estate exceeding one million dollars, that several contested matters were handled which resulted in a saving to the estate of several times the amount claimed.

At the hearing of this matter on October 7, 1952, appellant introduced three affidavits in support of his claim for extraordinary services performed. The Probate File was also admitted in evidence.

Appellant's voluminous affidavits (126 pages, legal size) which he contends are descriptive of extraordinary services performed by him, were filed in open court. Respondents had not had an opportunity to examine them until a few moments before the hearing began. In one affidavit appellant summarized what in his opinion were complex problems existing at the outset of the probate proceedings. S & G Company, of which testator had been president for more than 50 years, owned stores in San Francisco, Carmel and Honolulu. Of its 5,600 shares of common stock, 4,064 $\frac{3}{4}$ shares were owned by testator, and of its

preferred stock of 6,727 shares, testator owned 2,656 $\frac{1}{2}$ shares. The Gump Company stock was the principal asset of the estate. Other assets sold during administration were testator's residence for \$5,000; securities, \$75,000; personal property, \$13,000. The estate was inventoried and appraised at a little more than \$1,000,000. Liabilities, including debts, taxes, administration expenses and specific legacies (with the exception of two principal legacies to testator's son, Richard, and the trust) amounted to approximately \$995,000.

It was necessary during administration to continue the Gump Company's operations and to retain the estate's stock in the Company. To achieve this it was required that sufficient cash be raised to pay a debt of \$509,065.81 owed by the estate to Gump Company. Claims and suit had been filed. This was handled without loss of stock control by the estate. Part of this debt—\$415,891.13—was owing by testator on an open book account and a promissory note. Litigation was avoided, and the estate did not have to dispose of its stock to satisfy the claim. Interest was waived, saving the estate \$14,901.00 annually, and the Company consented in writing to accept a promissory note without any personal liability of executors or others and without any cash payment on the part of the estate.

A creditor's claim was filed showing that the Gump children were indebted to the Company in the sum of \$93,174.68. The daughter of testator, Marcella Gump, contested the amount of her indebtedness, and filed a Notice of Motion to set aside the approval of the claim, which was granted on April 5, 1948. The Company filed suit against the executors, and Marcella filed a complaint in intervention. Appellant conducted negotiations for a year to avoid litigation and to obtain a compromise settlement. He filed a Petition for Instructions to determine the indebtedness of the children, the amount payable to them under Article Sixth of the Will, and to raise sufficient cash to pay said legacies. As a result of his work all matters connected with this claim by the Company were settled, contested court hearings on the executors' Petitions were avoided, a trial of the Com-

pany's suit against the executors was avoided, and the executors' responsibilities under Article Sixth of the Will were determined. Appellant's affidavit shows work connected with these matters performed on 95 different days from February 9, 1948 through November 4, 1949.

Other services rendered in connection with problems of Marcella Gump were handled by appellant at the executors' request. They were concerned with Article Sixth of the Will; her interest as beneficiary under the testamentary trust; her indebtedness to Gump Company; her interest in the Mabel Gump Estate of which testator had been a trustee. Miscellaneous claims of Marcella against the executors were settled through negotiations carried on by appellant.

In Exhibit G of the third affidavit, appellant listed services performed in connection with what he described as complicated and difficult Federal Estate Tax problems. Herein are listed items of work performed on 115 different days from September 1947 through February 19, 1952. Described in detail are the negotiations involved in arriving at a valuation of \$300 per share of stock for Federal Estate Tax purposes, when Internal Revenue agents had indicated that the value might be set as high as \$470 per share. Appellant contends that he thereby secured a saving to the estate of between \$30,000 and \$60,000, and the tax was thus fixed at an amount which the estate was able to pay without losing control of the Company.

Compensation for extraordinary services is also claimed in connection with work relating to the California Inheritance Tax which involved many conferences with the executors, their accountants and the Inheritance Tax Appraiser. An appraisal figure of \$150 per share of Gump common stock was agreed upon for Inheritance Tax purposes. Appellant succeeded in having excluded legacies under Article Sixth of the Will, and property previously taxed in the William Gump Estate, in arriving at the state inheritance tax.

The affidavits also enumerate in detail the proceedings involved in the sale of

stocks of 17 different corporations as well as some Gump Company preferred and common stock. Six petitions and six separate orders and proceedings were required.

Appellant was requested by the executors to examine all matters pertaining to the Mabel Gump Trust in order to clear the A. L. Gump Estate of liability. This was an inter-vivos trust created in 1935. It had been administered by testator for 12 years, during which time he collected income and disbursed moneys for the trust, but kept no books other than a check book. Appellant arranged for an audit, studied the accounts and receipts, and prepared plans whereby distributions not made according to the trust terms were equalized and the estate discharged from liability. Appellant conferred with Marcella's attorney, successfully avoiding a claim being filed by her in regard to trust realty sold in 1945 for \$45,000 for which A. L. Gump had failed to file an accounting.

The estate was also cleared of liability for an error of testator in making distribution of the Mabel Gump Estate. Appellant succeeded in compromising this claim of more than \$2,000 for \$500.

Included also in the list of extraordinary services is work with accountants and executors in regard to gift tax returns as well as income tax returns for the 5 years of administration; 9 hearings on sales, 4 on Petitions, and one on a contested motion.

While the closing of an estate is ordinarily a routine matter, appellant says that in this case closing involved nine difficult problems requiring extraordinary services from March 7, 1952 to October 1952, namely: (1) disposition of debt to Gump Company; (2) agreement to determine which legatees were to receive cash and which Gump stock; (3) segregation between principal and income; (4) approval by all parties of final account; (5) tax problems involved in closing; (6) final selection of one of several plans formulated by appellant for assumption of Company debt or distribution subject thereto; (7) determination of period for allocating income and principal; (8) apportionment of income between trustees and Richard Gump; (9)

determination of whether estate and inheritance taxes would be chargeable to beneficiaries.

A hearing on the final draft of all documents was had on October 7, 1952, at which attorney George Cronin testified that he had devoted 77¼ hours to preparing the petition for distribution, that distribution was difficult because many plans were discussed and devised; that tax questions were complicated; that 90% of the estate was subject to creditors' claims; that the principal asset was Gump stock; that claims questions were complicated; that there were various sales of realty and personalty, and that the value of the extraordinary legal services rendered up to September 9, 1951 was \$25,000.

The attorney for respondents herein, opposed the payment of \$25,000 in extraordinary fees at the hearing, contending that the affidavits included reference to many ordinary services, and also because there remained only \$21,000 cash available in the estate. He stated also that he knew that appellant received \$35,000 in the same period as involved herein from S & G Gump Company and had pending against said company a bill for \$10,000. This statement was not refuted at the hearing, nor is it denied in appellant's briefs. Respondents maintain that when the fact of appellant's representation of the Gump Company during this period is taken together with the fact that both executors and the other attorney in appellant's firm were directors of the Company, it is clear that it would not be possible in many matters to keep separate, services to the Company and to the Estate, particularly in debt negotiations to which a large part of the extraordinary services herein have been attributed.

Section 910 of the Probate Code provides that attorneys for executors and administrators shall be allowed fees in the same amount as the commissions of executors and administrators, "and such further amount as the court may deem just and reasonable for extraordinary services."

The subject of the wide discretion that may be exercised by the Probate Court in determination of what is a proper amount

for extraordinary services is discussed in the article on Executors and Administrators, 11B Cal.Jur., § 1056, p. 506, where it is said that the Probate Court "has a large discretion, which is always regulated or controlled by a showing directly made before the court to which the question is committed. It has been said to be difficult for the appellate court to form any satisfactory conclusion upon the subject. When, therefore, the trial court has made its determination, its judgment will be interfered with on appeal only when a plain abuse of discretion has occurred. In other words, the appellate court must plainly see and be able to say that the order is an abuse of discretion—one far out of proportion to the value of the services rendered."

The same section of the above article then points out that the court "is not bound to fix the amount of the fee in accordance with the opinions of experts learned in the law, and should temper such testimony with the court's own knowledge and judgment; though such opinion evidence is always admissible by way of assisting the court in arriving at a conclusion. In fact, it has been observed, evidence of a professional nature is not necessary. The court of its own knowledge and experience may determine what is a reasonable fee."

We agree with appellant that the general nature of the services performed which the executors listed as extraordinary services in their Fourth and Final Report, and for which they requested the court to allow appellant "such reasonable compensation as this court may deem just" were extraordinary. The Probate Court found all allegations in that report to be true. However, the trial court was not bound by the conclusions in appellant's affidavits referring to the great difficulty and complicated nature of the legal work performed or the number of hours required to do the work. It was for the trial court to determine the nature and quality of the work and the time required to perform it.

Appellant relies upon the case of *Berry v. Chaplin*, 74 Cal.App.2d 669, 169 P.2d 453, 456, in which an allowance of attorney's fees in the sum of \$5,000 was reversed as

unreasonably small. The facts of that case are not at all similar to the case before us and it is not here in point. That case stated the general rule that "in a legal sense discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered."

An examination of the record herein does not impress us as presenting any unusual questions of law for counsel to solve nor was any trial conducted in the present case. There was but one contested motion. It is true that there was a great deal of work in negotiating with S & G Gump Company, the principal debtor, but as noted earlier, appellant was an attorney for that company. The executors as directors of that company, played an important part in those negotiations, and therefore appellant's efforts might well have been considered by the court below as less arduous than would have been the case if there was the normal debtor-creditor relationship between the estate and the creditor. The court might well have inferred that the parties were cooperating in an attempt to work out a mutually beneficial arrangement.

The trial court could also take cognizance of the fact that there was only \$21,000 available cash remaining in the estate, as well as the fact that one of the principal beneficiaries under the will had offered to accept stock instead of cash in order that the estate might be settled.

[1] Appellant cites numerous cases from this jurisdiction concerned with abuse of discretion which are not particularly applicable here, since they are not concerned with fixing fees for extraordinary services in probate proceedings. We deem it unnecessary to comment on the cases collected from other jurisdictions by appellant with relation to attorney's fees, for the rule is well established in this state that the Probate Court's determination of the matter will not be disturbed except for a clear abuse of discretion, and that such discretion is very wide, although it is a legal discretion. In *re Estate of Parker*, 186 Cal. 671, 200 P. 620; In *re Estate of Durham*, 108 Cal.App.2d 148, 238 P.2d 1057;

In *re Estate of Neff*, 56 Cal.App.2d 728, 133 P.2d 413; In *re Estate of Iser*, 52 Cal. App. 405, 198 P. 1014. See, In *re Estate of Merritt*, 98 Cal.App.2d 70, 76-77, 219 P.2d 40, for concise discussion of this subject.

[2] It is our view that the decree allowing the extra compensation finds support in the record before us and that no abuse of discretion on the part of the trial court is shown.

Decree affirmed

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; SCHAUER, J., dissenting.



129 Cal.App.2d 747

H. L. GARNER and Patience E. Garner,
Plaintiffs and Respondents,

v.

John KNUDSEN, Jr., Howard W. Reynolds,
Jr., Fred H. Sperber, and Morton N.
D'Evelyn, Defendants and Appellants.
Civ. 20155.

District Court of Appeal, Second District,
Division 3, California.

Dec. 23, 1954.

As Modified on Denial of Rehearing

Jan. 20, 1955.

Hearing Denied Feb. 16, 1955.

Action by lessees of oil and gas lease for judgment declaring rights in overriding royalties. Defendants cross-complained. The Superior Court, Los Angeles County, Kenneth C. Newell, J., rendered judgment for plaintiffs upon the complaint and cross-complaint, and defendants appealed. The District Court of Appeal, Wood, J., held that instrument by which lessees transferred their interest to operator and which contained provision relating to re-transfer upon operator's option or noncompliance with agreement was a sublease rather than an assignment, and, therefore, defendants' interests, based on sublessee's estate, terminated upon sublessee's re-transfer.

Judgment affirmed.

1. Mines and Minerals \S 74

Instrument by which lessees of oil and gas lease transferred their interest to operator and which contained provision relating to re-transfer upon operator's option or noncompliance with agreement was a sublease, rather than an assignment, and, therefore, third party's interests, based on sublessee's estate, terminated upon sublessee's re-transfer.

2. Mines and Minerals \S 79(1)

Where oil and gas sublease provided that lessees reserved certain percentages of oil and gas produced which should be paid by sublessee from production of oil and gas, and lessees assigned to third parties a certain percentage of the overriding royalty reserved under the sublease, third parties' interests were royalty interests under the sublease rather than under the original leases, and their rights terminated upon termination of the sublease.

Conron, Heard & James, and W. E. James, Bakersfield, for appellants.

Girard F. Baker and John W. Erpelding, Los Angeles, for respondents.

PARKER WOOD, Justice.

In this action for declaratory relief, judgment was in favor of plaintiffs upon the complaint and cross-complaint. Defend-

ants and cross-complainants appeal from the judgment.

Plaintiffs were lessees under two oil leases. One of the leases, known as the Portals-Grayson lease or the lease south of the tracks (railroad), will be referred to as lease No. 1. The other lease, known as the Portals-Haddad lease or the lease north of the tracks, will be referred to as lease No. 2.

Plaintiffs wanted to obtain an operator to drill oil and gas wells on the property covered by both leases. At the request of plaintiff Mr. Garner, the defendants Knudsen and Sperber made efforts to obtain such an operator. The other defendants Reynolds and D'Evelyn, with the knowledge of Mr. Garner, assisted defendants Knudsen and Sperber. Through the defendant Knudsen, the plaintiff Mr. Garner was introduced to Tevis F. Morrow as such a prospective operator. On July 13, 1950, after that introduction and after preliminary conferences with Mr. Morrow and some of the defendants, Mr. Garner sent a letter¹ to defendants Knudsen and Sperber which stated the general terms of a proposed assignment to Morrow and stated the amounts of the royalty divisions agreed upon by plaintiffs and by Knudsen, Sperber and their associates.

On July 21, 1950, plaintiffs and Morrow entered into a written agreement which was entitled "Assignment of Oil and Gas Lease."²

4. The letter stated, in substance, as follows:

Mr. Morrow agreed to accept assignment of both leases and to commence drilling a well on lease No. 2 before August 15, 1950, and on lease No. 1 before December 10, 1950, or pay rent for ensuing year, or quitclaim same to Mr. Garner; terms of assignment include payment of \$6,000 cash, and \$4,000 out of 10% of net oil and gas after deducting royalties; royalties amount to 20% on both leases, including landowner's royalty of 14 $\frac{3}{4}$ % on No. 2 and 12 $\frac{1}{2}$ % on No. 1; royalty interest on No. 2 to Knudsen and associate $\frac{3}{4}$ ths of 1%, and royalty interest on No. 2 to Sperber and associate 1%; royalty interest on No. 1 to Knudsen and associate 1%, and royalty interest on No. 1 to Sperber and associate 1.5%; assignments and royalty interests subject to approval of Corporation Commissioner are subject "to the limitations of the leases under which the reservation of same is to be made"; this letter to serve as memorandum until status of assignments has been clarified and production secured justifying the assignments.

2. "Assignment of Oil and Gas Lease"

"This assignment, made * * * this 21st day of July 1950, by and between H. L. Garner and Patience E. Garner, his wife, hereinafter called 'Assignors,' and Tevis F. Morrow, hereinafter called 'Assignee,' Witnesseth:

"For a good and valuable consideration * * * Assignors do hereby sell, assign, transfer, convey, and set over unto Assignee the Oil and Gas Leases [Nos. 1 and 2] * * * together with all of the estate * * * of the Lessees * * * to the real property covered thereby, Reserving, Excepting and Retaining unto Assignors, however, the limited overriding royalty interest hereinafter described in Paragraph 1 and the overriding royalty interest hereinafter described in Paragraph 2.

"1. Assignors reserve * * * unto themselves a limited overriding royalty interest of Ten Per Cent (10%) of the proceeds of sale of 'Production runs,' * * * said limited overriding royalty interest to continue until Assignors shall have received from said Ten Per Cent (10%) * * * the total principal

Thereafter Morrow drilled on lease No. 1 to a depth of approximately 1,720 feet and then abandoned that hole. He drilled a well on lease No. 2 which was placed on production.

On October 19, 1950, after the well on lease No. 2 was placed on production, the Corporation Commissioner issued a permit authorizing plaintiffs to assign to each defendant a specified percentage of the overriding royalty, on lease No. 2, as reserved by plaintiffs under the agreement of July 21, 1950, between plaintiffs and Morrow. On October 30, 1950, pursuant to said permit, plaintiffs issued an assignment of a part of such royalty to defendant Knudsen which provided in part: "Whereas, on July 21, 1950, H. L. Garner and Patience E.

Garner, his wife, sold and transferred to Tevis F. Morrow all of their right, title and interest in and to said lease dated May 15, 1950, reserving unto themselves an overriding royalty in and to said lease of 5.714290% * * * Now, therefore, * * * H. L. Garner and Patience E. Garner, his wife, do hereby grant, sell, assign, transfer and convey over unto John Knudsen, Jr., an interest equivalent to 0.357145% of said overriding royalty as reserved under the terms of the assignment of said oil and gas lease dated July 21, 1950, between Assignors and said Tevis F. Morrow." Reassignments to the other three defendants contained the same words as the assignment to Knudsen, except as to the name of the assignee and the amount of the royalty.

amount of Four Thousand Dollars (\$4,000.00) * * *.

"2. Assignors reserve, except and retain unto themselves * * * an overriding royalty interest in each of the Oil and Gas Leases [Nos. 1 and 2] * * * equal to the difference between the Lessors' royalty payable under each of the particular Oil and Gas Leases * * * and Twenty Per Cent (20%) of the proceeds of sale of all oil, gas, and other hydrocarbon substances produced, saved, and sold from any of the lands covered by * * * each such particular Oil and Gas Lease * * *.

"3. Assignee shall not by reason of the reservation of said limited overriding and overriding royalty interests be under any obligation to Assignors to preserve the Oil and Gas Leases * * * by operations thereon for the discovery, development, or production of oil, gas, or other hydrocarbon substances, or otherwise.

"4. Assignee may at any time and from time to time surrender or otherwise terminate the Oil and Gas Leases * * * as to the whole or any part of the lands covered thereby and upon such termination shall thereafter be discharged of any further obligations to accrue to Assignors with respect to the lands * * * and Assignors expressly agree that any such surrender or quitclaim shall effect a termination of the interest of Assignors in such Oil and Gas Lease or Leases and the lands embraced thereby * * * without the necessity of obtaining the consent or signature of Assignors to any instrument of surrender or quitclaim * * * provided, however, that if Assignee at any time

shall elect to surrender or quitclaim said Oil and Gas Lease or Leases to the Lessor or Lessors thereunder or to surrender or quitclaim as to part of said leased lands, Assignee shall give Assignors written notice of such election specifying in the notice the lands as to which he proposes to make the surrender or quitclaim. * * * If within fifteen (15) days after the giving of such notice Assignors shall so request in writing, Assignee will execute and deliver to Assignors an appropriate reassignment of said Oil and Gas Lease as to the lands specified in Assignee's said notice * * *.

"5. Subject to the rights, privileges, elections, and immunities of the Lessees under the Oil and Gas Leases * * * and subject to the right of Assignee to quitclaim to Lessors or to reassign to Assignors * * * Assignee agrees to keep and perform all of the terms and conditions of said Oil and Gas Lease(s) to be kept and performed by Lessee * * *. It is understood and agreed, however, that Assignors shall not have * * * under the terms * * * hereof any right to enforce any of the terms or provisions of said Oil and Gas Lease (s) as against Assignee. * * *

"7. In so far as Assignors are concerned, Assignee shall have the right to obtain from the owner * * * of the lands * * * covered by the Oil and Gas Leases * * * such agreements of modification or time extensions * * * as Assignee may elect, provided, however, that no such agreements of modification or time extensions shall reduce the amount of the limited overriding or overriding royalty interests reserved and retained by Assignors hereunder."

Those assignments were recorded on January 30, 1951. As to lease No. 1 (where there was no production), there was no assignment of royalty to any of the defendants. The consideration for the royalty interests, so assigned, was the services of defendants in obtaining Morrow as the operator.

On October 5, 1950, Morrow notified plaintiffs (pursuant to the provision of said agreement between them) that he elected to quitclaim lease No. 1. Within due time thereafter plaintiffs notified Morrow that they wanted lease No. 1 reassigned to them. On October 18, 1950, Morrow executed a document entitled "Reassignment of Oil and Gas Lease," covering lease No. 1, and delivered it to plaintiffs. Thereafter Morrow notified plaintiffs by telephone that he wished to quitclaim lease No. 2 except as to the 10 acres on which he had drilled the producing well. On November 22, 1950, Morrow executed a document entitled "Partial Reassignment of Oil and Gas Lease," covering lease No. 2 except said 10 acres, and delivered it to plaintiffs. The court found that promptly after the reassignments were made plaintiffs notified the defendants that Morrow had abandoned both leases except said 10 acres, and had reassigned the leases (except the 10 acres) to plaintiffs, and that by said abandonment and termination of said sublease by Morrow all right, title and interest of defendants under the assignments to them ceased except as to the 10 acres. The court also found that plaintiffs informed the defendants that there were pressing drilling obligations under the leases which it was necessary for plaintiffs to meet promptly, and it was necessary for plaintiffs to obtain a new sublease with another operator who was qualified to fulfill the drilling obligations under the leases; that plaintiffs asked defendants to assist in finding a new sublessee to save the leases and preserve plaintiffs' rights; that each defendant, except Knudsen, informed plaintiffs that he knew of no one who would be willing to undertake the development of the properties as required under the leases. Plaintiff Mr. Garner testified that he told

defendants Knudsen and Sperber that if they hoped to have any continued interest in any work on the properties they would have to find somebody to take over, that their interest in the overriding royalty had died with the Morrow reassignment.

Plaintiffs, with the assistance of other persons, obtained Mr. Cabeen as new operator for lease No. 2, and they obtained Mr. Meek as new operator for lease No. 1. On January 3, 1951, plaintiffs entered into an agreement with Cabeen, and an agreement with Meek, which agreements were entitled "Assignment of Oil and Gas Lease." Plaintiffs reserved a 5% overriding royalty under the Cabeen agreement and a 5% overriding royalty under the Meek agreement. About two or three days thereafter, Cabeen and Meek assigned their agreements to Mr. Rheem as the new operator. Rheem drilled several producing wells on both leases. After Rheem succeeded in producing oil on lands covered by the leases, defendants notified him that they claimed overriding royalties under both leases. As a result of such notices, the royalties so claimed by defendants were withheld from the royalties reserved by plaintiffs under the new agreements with Cabeen and Meek (which agreements were assigned to Rheem), and said claimed royalties have been impounded pending the determination of the rights of plaintiffs and defendants.

The overriding royalties from the producing well, drilled by Morrow on the 10 acres reserved by him, have been and are being paid to defendants as provided in their royalty assignments.

The court found as follows: Morrow entered into a sublease, dated July 21, 1950, with plaintiffs which sublease covered leases Nos. 1 and 2, and which sublease was in the form of an assignment of said two leases. The overriding royalty reserved by plaintiffs under said sublease of lease No. 1 was 7.5%, and under the sublease of lease No. 2 was 5.714290%. (Said royalties being in addition to the 10% royalty which was to continue only until \$4,000 was paid to plaintiffs.) Morrow commenced the drilling of a well on lease No. 1, and at the

instigation and on the advice of defendants Sperber and D'Evelyn he abandoned the well; and thereafter the well was completed and put on production by Rheem under a new sublease. Morrow elected to abandon the sublease (between plaintiffs and Morrow) except the 10 acres surrounding the producing well drilled by Morrow on lease No. 2. Pursuant to demand by plaintiffs, Morrow executed "to plaintiffs" said "Reassignments" pursuant to provisions of the sublease from plaintiffs to Morrow and pursuant to plaintiffs' right to have said reassignments made to them upon the abandonment of said lease by Morrow. Said reassignments from Morrow to plaintiffs terminated the Morrow sublease (except as to the 10 acres) and all royalties of plaintiffs and defendants thereunder. After said abandonment, plaintiffs again subleased said premises by subleases denominated "Assignments," and Rheem became the sublessee of said premises. Defendants are estopped to claim any right or royalty resulting from the operation of said premises by Rheem under the sublease now held by him or otherwise, except as to the 10 acres reserved by Morrow upon the abandonment of his sublease.

The trial court, in its conclusions of law, stated as follows: The document denominated "Assignment," executed by plaintiffs to Morrow, constituted a sublease in which plaintiffs were sublessors and Morrow was sublessee. The assignments by plaintiffs to defendants of a share of plaintiffs' overriding royalties, reserved by plaintiffs under the Morrow subleases, were not unlimited, but were limited to the duration of the Morrow subleases. Morrow reserved the 10 acres surrounding the well he drilled on lease No. 2, and as to the remainder of the leased lands, the Morrow subleases were terminated by the documents executed by Morrow which were designated "Reassignments"; and upon said termination of said subleases said overriding royalties and all interest of defendants therein terminated, except as to said 10 acres so reserved by Morrow. Rheem holds the property, except the 10 acres, as a sublessee by virtue of documents executed by plaintiffs and others subsequent to said termination of the Morrow subleases. Defendants have no right, title or interest in the royalties reserved by plaintiffs from property covered by the Rheem subleases. Defendants are entitled to their respective interests in the royalties from the 10 acres.

The judgment of the trial court, declaring the rights of the parties, was that plaintiffs were at the commencement of the action and now are owners of the following property: Leasehold estate created by leases Nos. 1 and 2; overriding royalties reserved by plaintiffs in the sublease denominated "Assignment of Oil and Gas Lease (with royalty reserved)," executed by plaintiff H. L. Garner and Cabeen; overriding royalties reserved by plaintiffs in sublease denominated "Partial Assignment of Oil and Gas Lease (with royalty reserved)," executed by plaintiffs and Meek; all free of any rights, titles, interests and claims of defendants. The defendants, or any of them, have no right, title, interest or claim in any part of said leaseholds or any part of said overriding royalties. The defendants, and each of them, are enjoined from asserting any right, title or interest in any part of said leaseholds of said overriding royalties.

Appellants (defendants) contend that their royalty interests survived, and were not terminated by Morrow's reassignments of his leasehold estate to plaintiffs; and therefore they have royalty interests in the Rheem leasehold. They argue that an oil royalty interest is an incorporeal interest in real property, is not a mere personal obligation of the transferor thereof, but is the transfer of a right to the stated percentage of oil produced from the land during the continuance of the lease upon which it is based, and is binding upon subsequent transferees of the leasehold estate. They say that it thus appears that the question here is whether the document referred to as the Garner-Morrow assignment (agreement between plaintiffs and Morrow) was an assignment or a sublease. They say further that if it (agreement between plaintiffs and Morrow) was an assignment then the reassignments by Morrow to plaintiffs, after the abandonment by Morrow, were subject to the outstanding overriding royalty interests conveyed by plaintiffs to defendants, and those royalty interests continued in force and effect under subsequent transfers of the leasehold estates (that is under the new transfers by plaintiffs to Cabeen, Meek, and Rheem). They say further that, on the other hand, if the Garner-Morrow assignment is a sublease, then the reassignments by Morrow to plaintiffs would operate as a surrender of the subleasehold estate and that the overriding royalties reserved thereunder would terminate. In other words

(as stated as another place in their brief), appellants state that their contention is that the question is whether the Garner-Morrow assignment is an assignment or a sublease, for if such instrument is a sublease then the subleasehold estate was extinguished by the reassignments to Morrow to plaintiffs, and then of course appellants' interests would terminate with the extinguishment of the leasehold estate upon which their interests were based; but, on the other hand, if such instrument is an assignment then no new estate would be created by the transfer, and of course the reassignments by Morrow to plaintiffs would merely be a further transfer of the estates created by the original leases Nos. 1 and 2, and the royalty interests of appellants, being based not on a subleasehold but on the original leasehold, would continue in force and effect.

Respondents (plaintiffs) contend that the Garner-Morrow agreement was a sublease. They argue that the entire estate of plaintiffs as lessees was not transferred to Morrow but that they reserved a limited overriding royalty (the 10% until \$4,000 was paid) and a further overriding royalty (the difference between 20% and the landowner's royalty of 12½% or 14%). They argue further that Morrow's right to surrender or terminate the master leases in whole or in part was conditioned upon his notifying plaintiffs of his election to terminate, and conditioned further that upon the request of plaintiffs within 15 days after such notice Morrow was required to reassign to plaintiffs.

In Glassmire, Oil and Gas Leases and Royalties, Second Edition (1938) it was said at page 319: "There is a clear distinction between an assignment of an oil lease and a 'sub-lease.' An assignment signifies parting with the whole unexpired term and all interest therein; anything short of this, or for a part of it only, or where the lessee conveys or assigns anything less than all of his rights, creates a sub-lease. * * * *Where the assignor assigned the whole lease and reserved an over-riding royalty, the transfer amounts to a sub-lease and not an assignment proper.*" (Italics added.)

In Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, at page 242, 73 P.2d 1163, 1168, it was said: "The generally stated distinction between an assignment and a sublease is that an assignment transfers the entire unexpired term."

In La Laguna Ranch Co. v. Dodge, 18 Cal.2d 132, 114 P.2d 351, 135 A.L.R. 546, the

plaintiff entered into an oil lease with Boatright and Meacham, as lessees. The lessees assigned overriding royalties in the oil to defendants therein. After the plaintiff had indicated to the lessees that it was about to declare a forfeiture for failure of lessees to drill within the required time, the lessees quitclaimed their rights under the lease to the plaintiff, the lessor. The action was by the owner of the land (lessor) to quiet title. The defendants claimed interests in the land by reason of the royalty interests which the lessee had assigned to them. The question was whether the royalty interests survived after the lessee had surrendered the leasehold by quitclaim deeds. The court therein said, 18 Cal.2d at page 140, 114 P.2d at page 355: "Defendants' overriding royalties were, therefore, interests in real property. [Citation.] The interests thus created were not unlimited but were determinable interests limited to the duration of the existing lease. Termination of the oil and gas lease would result in the termination of the interests created under it." It was held therein that the royalty interests did not survive the surrender, and that the quitclaim deeds terminated the interests of defendants.

In 24 American Jurisprudence, page 591, section 84 (Gas and Oil), it was said: "[T]here is a marked distinction between an assignment and a sublease. An assignment merely transfers an existing estate into new hands, but a sublease creates a new estate * * *. Thus, a transfer of the leasehold or of a specific portion thereof is to be regarded as an assignment if the transferor retains no right of any kind therein, but will be deemed a sublease if he reserves a rental or an overriding royalty."

In Halbert v. Hendrix, 1951, 121 Ind.App. 43, 48, 95 N.E.2d 221, 223, a statement was made which was similar to the above quoted statement from American Jurisprudence.

In Roberson v. Pioneer Gas Co., 1931, 173 La. 314, at pages 318 and 319, 137 So. 46, 48, 82 A.L.R. 1264, it was said: "The reason for that is that the defendant thereby disposed absolutely of its interests in the lease on the 40 acres of land, and left no contractual relation whatever between the parties, or obligation on the part of the assignee in favor of the assignor. If the Pioneer Gas Company had retained an overriding royalty, or excess royalty, to be paid by Pipes & Mack to the Pioneer Gas Company, in addition to the one-eighth royalty to be paid by Pipes & Mack to the

original lessors, *the contract between the Pioneer Gas Company and Pipes & Mack would have been a sublease, and not merely an assignment of the lease on the 40 acres of land.*" (Italics added.)

[1] It therefore appears that there are cases and other authorities to the effect that if an overriding royalty is reserved by a lessee, who transfers his lease (except for such reservation), the transfer is a sublease. In the present case, however, in view of a provision in the Garner-Morrow agreement regarding the condition under which Morrow might terminate his lease, it is not necessary to decide whether reserving an overriding royalty by plaintiffs was such a reservation that the agreement with Morrow was a sublease. The provision in the Garner-Morrow agreement, regarding termination of the lease by Morrow, was as follows: "* * * provided, however, that if Assignee at any time shall elect to surrender or quitclaim said Oil and Gas Lease or Leases to the Lessor or Lessors thereunder or to surrender or quitclaim as to part of said leased lands, Assignee shall give Assignors written notice of such election specifying in the notice the lands as to which he proposes to make the surrender or quitclaim. * * * If within fifteen (15) days after the giving of such notice Assignors shall so request in writing, Assignee will execute and deliver to Assignors an appropriate reassignment of said Oil and Gas Lease as to the lands specified in Assignee's said notice * * *." In *Hartman Ranch Co. v. Associated Oil Co.*, supra, 10 Cal.2d 232, at page 243, 73 P.2d 1163, 1168, it was said: "[W]e are committed to the so-called Massachusetts rule that where the transferor reserves the right of re-entry for breach of conditions he has a 'contingent reversionary interest' which prevents his transfer from operating as an assignment of the whole of the unexpired term. Instead, a sublease arises." The said provision in the Garner-Morrow agreement whereby plaintiffs were entitled to have the leases retransferred to them was in effect a reservation of a right of re-entry upon the failure of Morrow to comply with the leases. Plaintiffs reserved the right to regain possession of the premises by reassignment from Morrow, and to hold possession of the premises under the original leases, in the event Morrow elected not to fulfill the requirements of the leases. Plaintiffs had a contingent reversionary interest in the leases. The agreement be-

tween plaintiffs and Morrow was a sublease.

[2] At the oral argument herein appellants presented a further contention which had not been presented in their briefs. They argued that the assignments of royalty interests to appellants did not involve royalty interests which were created by the Garner-Morrow agreement but did involve royalty interests which were portions of the two leasehold estates (main leases Nos. 1 and 2), which portions or interests were excepted and held out from the operation of the Garner-Morrow agreement, and therefore such royalty interests of appellants continue in duration for the terms of the main leases (between the landowners and the Garners), irrespective of the termination of the Garner-Morrow agreement. Under the main leases, the Garners, as lessees, were entitled to the oil and gas produced under both leases except as to the amount for landowners' royalty. The assignments of royalty interests by the Garners to appellants recited that the Garners assigned to each appellant a certain percentage of the overriding royalty as reserved (by the Garners) under the assignment (sublease) between the Garners and Morrow. In the Garner-Morrow assignment (sublease) it was provided in substance that the Garners "reserve, except and retain unto themselves" certain percentages of the oil and gas produced from the lands covered by the leases; and that the said percentages should be paid by Morrow to the Garners from the production of oil and gas, in the same manner as is provided in the main leases for payment of royalties to the landowners. Upon the termination of the Garner-Morrow agreement by Morrow, there was no production under that agreement (except from said 10 acres) from which said percentages could be paid. Appellants' interests were interests in production under the sublease and were not interests under the main leases, and their interests did not continue for the duration of the main leases. The said further contention presented at the oral argument is not sustainable.

By reason of the above conclusion, it is not necessary to discuss the finding (and the contention of plaintiffs) that defendants are estopped to claim any royalty from the operation by Rheem.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

129 Cal.App.2d 608

Burdette G. RISLEY, by his general guardian, **Hilda S. Risley**, and **Hilda S. Risley**,
Plaintiffs and Respondents,

v.

Earl Whitney LENWELL, **William E. Bennett**, **Warren E. Raddatz**, **Simplot Investment Company**, a corporation doing business under the firm name and style of **Cal-Ida Lumber Company**, Defendants and Appellants.

Violet R. RISLEY, Plaintiff and Respondent,
v.

Earl Whitney LENWELL, **William E. Bennett**, **Warren E. Raddatz**, **Simplot Investment Company**, a corporation doing business under the firm name and style of **Cal-Ida Lumber Company**, Defendants and Appellants.

Jay D. HUMBIRD, by his guardians ad litem, **T. E. Humbird** and **Novella Humbird**, Plaintiff and Respondent,

v.

Earl Whitney LENWELL, **William E. Bennett**, **Warren E. Raddatz**, **Simplot Investment Company**, a corporation doing business under the firm name and style of **Cal-Ida Lumber Company**, Defendants and Appellants.

Civ. 8137.

District Court of Appeal. Third District.
California.

Dec. 17, 1954.

Rehearing Denied Jan. 14, 1955.

Hearing Denied Feb. 10, 1955.

Actions were brought against lumber company, independent contractor, who owned and operated logging truck, and his employees for injuries sustained by occupants of automobile when portion of load of lumber fell from on-coming logging truck onto or in front of automobile. The Superior Court, Placer County, **Sherrill Halbert, J.**, entered judgment in favor of occupants, and lumber company, independent contractor, and its employees appealed. The District Court of Appeal, **Schottky, J.**, held that evidence sustained judgment.

Affirmed.

1. Master and Servant §315

Generally, an employer is not liable for the torts of an independent contractor, but

there are many exceptions to the general rule.

2. Appeal and Error §930(1)

In passing on sufficiency of evidence to support judgment, all conflicts must be resolved by reviewing court in favor of respondent, and all legitimate and reasonable inferences must be indulged in to uphold verdict if possible.

3. Appeal and Error §989

When a verdict is attacked on appeal as being unsupported, power of reviewing court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

4. Appeal and Error §996

When two or more inferences can reasonably be deduced from the facts, reviewing court is without power to substitute its deductions for those of the trial court.

5. Evidence §43(1)

It is common knowledge that many cases are determined to entire satisfaction of trial judges or juries on factual issues by evidence, which is overwhelming in its persuasiveness but which may appear relatively unsubstantial, if it can be reflected at all, in a phonographic record.

6. Appeal and Error §931(1)

Reviewing courts, if there be any reasonable doubt as to sufficiency of evidence to sustain finding, should resolve doubt in favor of finding, and, in searching record and exploring inferences, which may arise from what is found there, to discover whether such doubt or conflict exists, reviewing court should be realistic and practical.

7. Automobiles §244(18)

In actions against lumber company for injuries sustained by occupants of automobile when portion of load of lumber fell from on-coming logging truck onto or in front of automobile, evidence sustained implied findings of jury that lumber company was negligent in employing independent contractor to haul the lumber when lumber company not only knew type of equipment

that independent contractor had but supplied part of that equipment, and that equipment used was dangerous.

8. Automobiles ⚡244(36)

In actions against lumber company for injuries sustained by occupants of automobile when portion of load of lumber fell from on-coming logging truck onto or in front of automobile, evidence sustained implied finding of jury that negligence of lumber company in employing independent contractor to haul the lumber, knowing that equipment of independent contractor was dangerous, was the proximate cause of the accident.

9. Appeal and Error ⚡169

Generally, an issue not presented by the pleadings cannot be considered on appeal.

10. Appeal and Error ⚡882(3)

Where a case has been tried on a definite theory and particular issues, it may not be reasonably contended for first time on appeal that some of the issues were not properly pleaded.

11. Evidence ⚡44

It is common knowledge that highway patrol officers are required to attend Highway Patrol Training Center and are instructed as to provisions of Motor Vehicle Act. Vehicle Code, § 1 et seq.

12. Evidence ⚡44

It is common knowledge that highway patrol officers have duty in a lumber area of observing and inspecting logging and lumber trucks to determine whether the equipment is safe and is in accordance with provisions of the Vehicle Code. Vehicle Code, § 700.

13. Evidence ⚡539

Traffic officers, whose duties include investigations of automobile accidents, are qualified experts and may properly testify concerning their opinions as to various factors involved in such accidents, based on their own observations.

14. Evidence ⚡539

In actions against lumber company for injuries sustained by occupants of automobile when portion of load of lumber fell

from on-coming logging truck onto or in front of automobile, highway patrol officers were properly permitted to express their opinions as to whether or not logging truck was properly equipped and loaded.

15. Evidence ⚡546

Question whether expert testimony is admissible must be left to the discretion of the trial judge.

16. Appeal and Error ⚡971(2)

Trial judge's determination of the competency of a witness will not be overturned on appeal unless there is an actual want of evidence to support it or a clear abuse of discretion in ruling on evidence offered on the subject.

17. Appeal and Error ⚡1051(1)

In actions against lumber company for injuries sustained by occupants of automobile when portion of load of lumber fell from on-coming logging truck onto or in front of automobile, alleged error in permitting highway patrol officers to give their opinions that logging truck was not properly equipped and loaded was not reversible error, in view of other evidence that logging truck was not properly equipped and loaded, and in view of photographs. Const. art. 6, § 4½.

18. Trial ⚡260(8)

In actions against lumber company for injuries sustained by occupants of automobile when portion of load of lumber fell from on-coming logging truck onto or in front of automobile, refusal of lumber company's requested instruction that one who engages an independent contractor is not subject to liability for bodily harm caused to another by a negligent act or omission of the independent contractor or his servants was not reversible error, in view of instructions given.

19. Trial ⚡260(8)

In actions against lumber company for injuries sustained by occupants of automobile when portion of load of lumber fell from on-coming logging truck onto or in front of automobile, refusal of lumber company's requested instruction that one engaging independent contractor to haul materials on public highways has no duty

to anticipate that independent contractor or his employees will not use proper equipment or will improperly load equipment or will travel over highways at excessive speed was not reversible error, in view of instructions given.

20. Trial ⚡260(8)

In actions against lumber company for injuries sustained by occupants of automobile when portion of load of lumber fell from on-coming logging truck onto or in front of automobile, refusal of lumber company's requested instruction that mere fact that lumber company furnished independent contractor's employee's timbers used by them in making deck on logging truck did not impose liability on lumber company, was not reversible error, in view of instructions given.

21. Trial ⚡296(2)

In actions against lumber company for injuries sustained by occupants of automobile when portion of load of lumber fell from on-coming logging truck onto or in front of automobile, modification of lumber company's proposed instruction that one who hauled the lumber was an independent contractor and that if jury believed that accident resulted solely from manner in which independent contractor's employee drove truck, then verdict was required to be in favor of lumber company by inclusion of the quoted clause "unless you find such defendant liable under other instructions which I am giving to you," was not reversible error, in view of all instructions given to jury. Const. art. 6, § 4½.

22. Automobiles ⚡246(40)

In actions against lumber company for injuries sustained by occupants of automobile when portion of load of lumber fell from on-coming logging truck onto or in front of automobile, evidence justified instruction dealing with provision of the Vehicle Code that it is unlawful for owner, or any other person, employing or otherwise directing driver of any vehicle to require operation of such vehicle on highway in any manner contrary to law. Vehicle Code, § 731(a).

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23. Automobiles ⚡246(40)

In actions against lumber company for injuries sustained by occupants of automobile when portion of load of lumber fell from on-coming logging truck into or in front of automobile, evidence justified giving of instruction dealing with provision of the Vehicle Code that no person shall operate a train of vehicles when any trailer, semi-trailer, or other vehicle being towed whips or swerves from side to side dangerously or unreasonably or fails to follow substantially in path of towing vehicle. Vehicle Code, § 701(e).

24. Automobiles ⚡246(2)

In actions against lumber company for injuries sustained by occupants of automobile when portion of load of lumber fell from on-coming logging truck onto or in front of automobile, wherein jury was instructed that one hauling lumber was an independent contractor as to lumber company and that a verdict could not be returned against lumber company unless jury found that lumber company was negligent and that such negligence was proximate cause of the accident, it was not error to instruct that if one hires another to haul lumber when he knows or, in exercise of reasonable care, would have known that he would have the lumber negligently, improperly, and unsafely loaded, then the hirer is liable for any damages proximately caused by any such negligent, improper, and unsafe loading of the lumber.

25. Trial ⚡296(3)

In actions against lumber company for injuries sustained by occupants of automobile when portion of load of lumber fell from on-coming logging truck onto or in front of automobile, giving of instruction requested by plaintiffs that if jury found that truck was improperly and unsafely loaded and that any employee or employees of lumber company "helped" independent contractor's employees load truck in improper and unsafe manner and that such improper and unsafe loading, if any, was proximate cause of accident, verdict was required to be in favor of plaintiffs, was not reversible error, because of the use of

the word "helped," in view of all instructions given.

26. Trial ⚡296(3)

In actions against lumber company for injuries sustained by occupants of automobile when portion of load of lumber fell from on-coming logging truck onto or in front of automobile, giving of plaintiffs' requested instruction that if jury found that any employee of lumber company helped employees of independent contractor to load truck, and that such employee was guilty of any negligence, which caused truck to be improperly and unsafely loaded, and that negligence was proximate cause of accident verdict was required to be in favor of plaintiff, was not reversible error, in view of all instructions given.

27. Trial ⚡296(3)

In actions against lumber company for injuries sustained by occupants of automobile when portion of load of lumber fell from on-coming logging truck onto or in front of automobile, giving of instruction that if jury found from evidence that lumber was improperly and unsafely loaded on truck and that any employee or employees of lumber company knew of such fact, or should have known in exercise of ordinary care, and if they permitted the truck to haul improperly and unsafely loaded lumber, lumber company was negligent and, if such negligence was proximate cause of accident, verdicts were required to be in favor of plaintiffs, was not reversible error, in view of all instructions given.

28. Trial ⚡296(3)

In actions against lumber company for injuries sustained by occupants of automobile when portion of load of lumber fell from on-coming logging truck onto or in front of automobile, giving of instruction that if jury believed from evidence that truck was inadequate or unsafe to haul lumber, and that any employee or employees of lumber company knew of such fact, or in exercise of ordinary care, would have known it, then they were negligent in permitting lumber to be hauled on truck, and that such negligence was proximate cause of accident, then verdict was required to

be in favor of plaintiffs, was not reversible error in view of all instructions given.

29. Trial ⚡296(3)

In actions against lumber company for injuries sustained by occupants of automobile when portion of load of lumber fell from on-coming logging truck onto or in front of automobile, giving of plaintiffs' requested instruction that if one engages another to perform work when he knows, or, in exercise of ordinary care, would know, that such other person will use improper and unsafe equipment, which is liable to cause damage to others, then hirer of such person is liable for any damage proximately caused by performance of such work because of use of any such improper or unsafe equipment, was not reversible error, in view of all instructions given.

30. Appeal and Error ⚡1064(1)

Prejudicial error does not necessarily result from giving of instruction which, subject to meticulous analysis, might be given a possible construction making it subject to criticism.

31. Damages ⚡95

Measure of damages in action for personal injuries is amount which will compensate for all detriment proximately caused by negligence of defendant. Civ. Code, § 3333.

32. Damages ⚡95

What is a reasonable amount of damages in an action for personal injuries, within meaning of statutory requirement that damages must be reasonable, is a question on which there may legitimately be a wide difference of opinion. Civ. Code, § 3359.

33. Damages ⚡208(1)

An allowance of damages in a personal injury action is primarily a factual matter. Civ. Code, §§ 3333, 3359.

34. Appeal and Error ⚡1004(1)

Even though award of damages in personal injury action may seem large to reviewing court, reviewing court will not interfere, unless allowance is so grossly disproportionate to a sum reasonably war-

ranted by facts as to shock sense of justice and raise presumption that it was result of passion and prejudice. Civ.Code, §§ 3333, 3359.

35. Damages ⇨208(1)

New Trial ⇨74

Amount of damages in personal injury action is committed, first to sound discretion of jury, and next to discretion of trial judge, who, in ruling on the motion for new trial, may consider evidence anew, determine anew the facts, and set aside the verdict if it is not just. Civ.Code, §§ 3333, 3359.

36. Appeal and Error ⇨1004(3)

On appeal, decision of trial court and jury on subject of damages in personal injury case cannot be set aside unless verdict is so plainly and outrageously excessive as to suggest, at first blush, passion or prejudice or corruption on part of jury. Civ.Code, §§ 3333, 3359.

37. Damages ⇨228

If trial judge believes that damages awarded by jury in personal injury action are excessive, and the question of excessive damages is presented, it becomes his duty to reduce them. Civ.Code, §§ 3333, 3359.

38. Appeal and Error ⇨994(2), 1003

A reviewing court cannot weigh evidence and pass on credibility of witnesses.

39. Appeal and Error ⇨1004(1)

A reviewing court can hold an award of damages in a personal injury action excessive only if the award is so large as to indicate passion or prejudice on part of jurors. Civ.Code, §§ 3333, 3359.

40. Damages ⇨132(7)

Award of \$125,000 to one, who at time of accident was nineteen years of age, whose probable annual earnings were \$3,472, for chest injuries, multiple abrasions and bruises on both arms and legs and hands, and fractures of right ankle, both knees, and pelvis, was not excessive. Civ. Code, §§ 3333, 3359.

41. Damages ⇨132(7)

Award of \$75,000 to wife, who was seventeen years of age at time of accident,

and who was in ninth month of pregnancy at time of accident and delivered a dead fetus day following accident, for four inch laceration extending from above right eye back into hairline, miscellaneous abrasions about face, hands, and left foot, a large hematoma in muscle of left thigh, bruised chest, fractures of both bones in right ankle, and small bones of left foot was not excessive. Civ.Code, §§ 3333, 3359.

42. Appeal and Error ⇨1004(1)

It is not the function of a reviewing court to interfere with a jury's award of damages, unless award is so grossly disproportionate to any reasonable limit of compensation warranted by facts that it shocks court's sense of justice and raises presumption that it was result of passion and prejudice. Civ.Code, §§ 3333, 3359.

43. Trial ⇨296(7, 8, 10)

Where instructions other than instruction relating to opinions of expert witnesses, fully instructed jury as to burden of proof, preponderance of evidence, and function of jury to weigh evidence, and that jurors were exclusive judges of credibility of witnesses and were to resolve conflicts in evidence, court did not err in deleting from instruction dealing with opinions of expert witnesses provision that there was a conflict in testimony of expert witnesses concerning extent and permanency of plaintiffs' injuries, and that jury must resolve that conflict in favor of expert testimony which was entitled to the greater weight and that expert testimony could not be contradicted by opinion of a nonexpert.

44. Appeal and Error ⇨882(14)

Where, at close of trial, counsel for three individual defendants stated in open court that he made no contention that there was any difference in liability of those defendants and stated in argument to jury that if any one of them was guilty of negligence, they were responsible to plaintiffs, one of the individual defendants was in no position to urge on appeal that instruction providing that if jury desired to return verdict against any of the individual defendants, jury was required to return a

verdict against all three of the individual defendants, was erroneous.

45. Damages ⇨216(1)

In personal injury actions, it was not error to give instruction that it is common knowledge, of which jury could take notice, that purchasing power of dollar has substantially decreased in recent years, and that if jury determined that plaintiffs were entitled to damages, jury could take factor of reduced purchasing power of dollar into consideration in determining amount of damage.

46. Damages ⇨216(5)

In personal injury actions, it was not error to give instruction that if jury decided from evidence that plaintiffs were entitled to verdict, jury, in fixing amount of damages, if any, could consider as evidence of fact that life expectancy of person aged nineteen years is 51.2 years and of a person aged 20 years is 50.2, but that such expectancy is merely the average for one of ordinary health and exposure to danger of people that age, and that jury should consider all other evidence bearing on same issue, such as occupation, health, habits, and activity of person whose life expectancy is in question.

47. Evidence ⇨12

Courts take judicial notice of standard mortality tables and of their contents showing natural expectancy of life at given age of healthy persons in employments not extrahazardous.

48. Trial ⇨244(6)

In actions for injuries sustained by three persons, court, by giving separate instructions on damages as to each of the three persons, did not prejudice defendants on ground that the instructions over-emphasized issue of damages to prejudice of the defendants.

49. Damages ⇨216(1)

Where actions were brought to recover for injuries sustained by husband, wife, and another in automobile accident, and wife, who at time of accident was in ninth month of her pregnancy, delivered a dead fetus the day after the accident, it was not error for court, upon its own motion to

give instruction that the actions did not seek damages for death of wife's child, but that if jury should find from evidence that some or all of the defendants were liable, jury could include, as items of damage in the wife's action, the pain, suffering, and anxiety proximately caused by any injuries received by wife, which were proximately caused by and resulted from miscarriage in which wife's child was born dead.

50. Trial ⇨260(10)

In actions for injuries sustained by husband, wife, and another in automobile accident, wherein jury was fully and correctly instructed on question of damages, court did not err in refusing to give defendant's requested instruction that wife was not entitled to recover because of grief, sorrow, or resentment on account of any injuries sustained by her husband.

51. Trial ⇨260(10)

In actions for injuries sustained by husband, wife, and another in automobile accident, wherein jury was fully and correctly instructed on question of damages, court did not err in refusing to give defendant's requested instruction that husband was not entitled to recover because of grief, sorrow, or resentment, on account of any injuries sustained by his wife or because of any scars, blemishes, or disfigurements on face of wife.

52. Trial ⇨260(10)

In actions for injuries sustained by husband, wife, and another in automobile accident, wherein jury was fully and correctly instructed on question of damages, court did not err in refusing to give defendant's requested instruction that the law does not permit jury to award husband and wife any sums for shock, sorrow, mental distress, and grief, or injury consequent thereto that they suffered by reason of death of their unborn child.

53. Trial ⇨260(10)

In actions for injuries sustained by husband, wife, and another in automobile accident, wherein jury was fully and correctly instructed on question of damages, court did not err in refusing to give de-

fendant's requested instruction that even if jury should find that defendants negligently caused death of unborn child then being carried by the wife, death of unborn child could not be included as an element of injury to husband or wife and that no recovery could be allowed therefor.

54. Trial ⚡260(10)

In actions for injuries sustained by husband, wife, and another in automobile accident, wherein jury was fully and correctly instructed on question of damages, court did not err in refusing to give defendant's requested instruction that the law does not permit jury to award husband or wife any sum for suffering, if any, occasioned unborn child which was delivered dead after accident.

55. Trial ⚡203(1)

Court is not required to give every instruction requested, even if, considered by itself, it may state a correct and pertinent principle of law, and all that is required is that jury be fully and fairly instructed on all issues presented.

56. Appeal and Error ⚡1067

Where failure of trial court to give requested instruction in personal injury actions that no insurance company was a party to the actions and that whether there was or was not insurance had no bearing whatever on verdict, which jury should render, did not effect final outcome of actions or amount awarded, failure to give requested instruction did not constitute reversible error, though corporate defendant had introduced public utility permit of one of the individual defendants, who owned logging truck involved in accident, and permit contained provision that no vehicle should be operated unless adequately covered by public liability and property damage insurance policy.

57. Appeal and Error ⚡207

Where no objections or assignments of misconduct were made at the trial concerning alleged misconduct on part of counsel, with one exception, and court was not asked to instruct jury to disregard challenged remarks of counsel, it was too late to raise the point on appeal.

58. Appeal and Error ⚡207

Misconduct of an attorney is not a ground for reversal where the other party, even though objecting to the remarks, fails to request that jury be charged to disregard them.

59. Appeal and Error ⚡207

Since effect of misconduct can ordinarily be removed by an instruction to jury to disregard misconduct, it is generally essential, in order that such act be reviewed on appeal, that it shall first be called to attention of trial court at the time, to give trial court an opportunity to so act in the premises, if possible, to correct error and avoid a mistrial.

60. Appeal and Error ⚡207

A party should not be permitted to remain quiet with respect to misconduct of counsel and take a chance of a favorable verdict, and then, if verdict is unfavorable, raise the objection on appeal.

61. Trial ⚡111

Counsel in summing up a case is given wide latitude and may indulge in all fair arguments in favor of his client's case.

62. Trial ⚡119

Where one of the plaintiffs was in the ninth month of pregnancy at time of accident, and day after accident a dead fetus was delivered, it was not outside bounds of legitimate argument for her counsel in personal injury actions by her and her husband to refer to the death of her baby and pain and suffering in connection with baby's death.

63. Automobiles ⚡244(18)

In actions against lumber company, owner of logging truck, and his employees for injuries sustained by occupants of automobile when portion of load of lumber fell from on-coming logging truck onto or in front of automobile, evidence sustained judgment for occupants of automobile.

Leland J. Propp, Auburn, for appellants
Lenwell & Raddatz.

Archibald D. McDougall, Frank A. Morrow, Sacramento, for other appellants.

C. Ray Robinson, Merced, and John L. Larue, Nevada City, for respondents.

SCHOTTKY, Justice.

Respondents Burdette G. Risley, Violet R. Risley and Jay D. Humbird each suffered personal injuries when a portion of a load of lumber fell from a logging truck onto or in front of the automobile in which they were riding when the vehicles, approaching from opposite directions, were passing each other on a public highway. Each of the said respondents brought a separate action. Burdette and Violet Risley were husband and wife, and Burdette, being also a minor, appeared by his mother and general guardian, Hilda S. Risley, who also sued in her own right for recovery of Burdette's medical expenses. The actions were consolidated for trial and tried by a jury which returned verdicts against defendants Lenwell, Bennett, Raddatz and Simplot Investment Company, a corporation, and in favor of Burdette G. Risley in the sum of \$125,000, in favor of Hilda S. Risley in the sum of \$1,753.35, in favor of Violet R. Risley in the sum of \$75,000, and in favor of Jay Humbird in the sum of \$2,000. During the trial the actions were dismissed as to a fifth defendant, Cal-Ida Lumber Company, a corporation. Motions for new trial on the part of all four defendants were denied, and defendant Simplot Investment Company has appealed from the judgments and from the order denying its motion for judgment notwithstanding the verdict. Defendants Lenwell and Raddatz have appealed from the judgment, but the judgments are final as to defendant Bennett who did not appeal. It appears that Simplot Investment Company, hereinafter called "Simplot", was doing business under the name of Cal-Ida Lumber Company, and that references in the record to "Cal-Ida" should be taken to refer to Simplot doing business under that name.

The record shows that appellant Simplot was engaged in the lumber business and operated a mill at Downieville and a yard at Auburn, both in California. In connection with this operation logs had to be hauled from the woods to the mill at Downieville, and lumber had to be hauled from the mill

to the yard at Auburn. Some of this hauling was done by independent contractors who furnished their own equipment and operators. Defendant Bennett was such a contractor and he owned the logging truck involved in this accident. This truck was originally a lumber truck consisting of a tractor and trailer with lumber rolls attached, but some months prior to the accident it had been converted into a logging truck. This involved the removal of the lumber rolls from the tractor and the installation of a so-called bunk as a resting place for the logs. A logging dolly, also having a bunk, was substituted for the trailer. The two bunks were each about eight feet in width and had chock blocks or cheese blocks at each end to keep the logs from rolling off. These blocks were approximately 14 or 15 inches wide at the base and were about 12 inches high. They were curved on the inner side so as to fit the general contour of the logs, and were so installed that they could be moved inward or outward along the bunks. Once placed in a given position, their further outward movement could be stopped by a chain and hook device, and presumably the logs kept them from moving inward when loaded.

It appears that on July 28, 1950, the date of the accident, and for some time prior thereto, Bennett was engaged in hauling logs for Simplot, using the truck involved in the accident. Appellant Raddatz actually drove the truck during these log-hauling operations. The record shows, and respondents do not deny, that Bennett was doing the hauling as an independent contractor and that Raddatz was his employee.

About three weeks before the accident Raddatz made arrangements with Harold Hallman, who was the superintendent in charge of Simplot's operations at Downieville, to haul lumber for Simplot, using the Bennett logging truck. Simplot hauled lumber from Downieville to Auburn with its own trucks, which were regular lumber trucks, but it had been operating the mill on two shifts and was behind in its hauling schedule. At least four other truckers were using their logging trucks to haul lumber for Simplot, apparently at night or when

it was raining and the trucks could not be used in log hauling. In order to prepare the Bennett truck for lumber hauling it was necessary to provide some sort of bed or platform upon which the lumber could be placed. Raddatz discussed this with Hallman and it was decided to bridge the space between the two bunks with long timbers or stringers. Accordingly, Simplot cut 8 six by eight inch stringers about 29 or 30 feet in length which, when placed on the bunks, extended from about four feet in front of the tractor bunk to a like distance behind the dolly bunk. These stringers did not form a solid bed, but were spaced about four inches apart, with the six-inch side resting on the bunks. The outside stringers were placed up against the chock blocks which, being curved to accommodate logs, did not fit against the straight sides of the stringers. After the stringers were placed on the bunks, six cross pieces, consisting of four by four inch timbers and known as stickers, were placed at intervals crosswise on top of the stringers, and it was on these stickers that the lumber load was placed. The stickers were not nailed to the stringers. Apparently the other truckers, hauling lumber with logging trucks, used the same arrangement, for another set of the timbers was kept on the mill property. The evidence indicates that Simplot owned the timbers and kept them there for the convenience of the truckers. Raddatz, who claimed that he made four or five trips hauling lumber before the accident, stated that he did not always use the same set of timbers.

At the time of the accident the Bennett truck was being driven by appellant Lenwell. Raddatz testified that he was unable to continue hauling logs by day and lumber by night, so he engaged Lenwell to drive the truck in connection with the lumber hauling. Raddatz had authority from Bennett to do the hiring in this instance, and there is no question regarding Lenwell's status as an employee of Bennett. Lenwell had worked for Raddatz for several months, some four years before. On July 28, 1950, which was the day of the accident, Lenwell was at the mill waiting for Raddatz when the latter came in with the truck that even-

ing. Raddatz had been hauling logs and Lenwell was to haul lumber with the truck that night. It was Lenwell's first trip. The loading of the truck took place around 6:00 p. m. that evening. The evidence shows that Simplot's lift truck operator picked the stringers up from the ground with the lift truck, took them over to the Bennett truck, and dumped them in a pile onto the tractor and dolly bunks. These timbers were green lumber and weighed about 500 pounds each. Raddatz and Lenwell, assisted by the lift truck operator, put the timbers in place on the bunks. Apparently Raddatz and Lenwell placed the stickers or cross-members on without any help, and after this decking was completed the lift truck operator placed six units of lumber on it, consisting of about 8,000 board feet of green fir lumber. The stickers were placed so that there would be one in front, one behind and one on top of each bunk. This was done to equalize the load on each bunk, and two units of lumber were placed side by side on each of these two sets of stickers, with a third unit centered on top. The units were placed on the truck one at a time, and after the loading was completed Raddatz and Lenwell put chains around the load to bind it and cinched the chains tight with chain binders. There is no claim that any employee of Simplot helped to bind the load or inspected the load or bindings before the truck left. Raddatz testified that they put five chains around this particular load, and that the front chain was fastened to the tractor bunk. He could not recall whether the rear chain was fastened to the dolly bunk, but Lenwell in his deposition testified that it was not. Two state highway patrolmen were at the scene shortly after the accident occurred. One of them testified that the load was not bound to either bunk, but admitted that he had not made a detailed observation. The other testified positively that the load was not bound to the dolly bunk, but that he did not observe how the load was bound in front.

After the load was secured Lenwell took the truck and started on the trip to Auburn. He testified that before the accident he stopped the truck twice and checked the chains which bound the load. The first

time, he took up slack in two of the chains, but no adjustment was necessary when he stopped the second time. The accident occurred at about 11:20 p. m., at a turn in the highway approximately midway between Nevada City and Grass Valley. Lenwell was traveling downgrade when he approached the turn which was a sharp right turn for him. The pavement is about 21 feet wide at the turn. There is evidence that he was traveling at a speed of about 45 to 50 miles per hour and was over the center line and on the wrong side of the highway, when he went around the turn. Lenwell himself testified that he was traveling at a speed of 35 miles per hour as he approached the turn and that he reduced his speed. He also testified that he released the brakes when the cab was halfway around the turn and did not in rounding the turn go over the center line. It appears that just as he was straightening the truck out, after making the turn, the rear units of lumber were thrown from the truck toward the left onto the highway or perhaps onto the Risley car which was coming from the opposite direction and was then about even with the tractor part of the truck. The evidence shows that the binder on the rear chain broke when the rear portion of the load was lost, and that a flange or hook, which was part of the chain device to keep one of the chock blocks from sliding outward on the dolly bunk, also broke. There is no claim that any occupant of the Risley car was at fault, and contributory negligence is not an issue in these cases. The truck came to a stop about 275 feet from the point where the lumber went off the truck. The accident resulted in the injuries which are the basis for these suits.

Other facts shown by the record will be detailed in the course of this opinion.

As hereinbefore stated, defendant Simplot Investment Company and defendants Lenwell and Raddatz have appealed from the judgment. These appellants have filed separate briefs. The major contentions made by appellant Simplot are as follows:

"I. The evidence is insufficient to support the verdicts against appellant Simplot Investment Company."

"II. The court committed prejudicial error in allowing traffic officers Kitts and Steuber to give opinion evidence that use of the trucking equipment here involved constituted improper practice."

"III. The court committed prejudicial error in refusing, modifying and giving various instructions."

"IV. The damages awarded respondents Burdette G. Risley and Violet R. Risley are excessive as a matter of law and were influenced by passion and prejudice on the part of the jury."

The major contentions made by appellants Lenwell and Raddatz are as follows:

I. Misconduct of plaintiff's counsel during the trial; II. Excessive damages; III. Errors of law in the admission of evidence and in the giving and refusing of instructions.

Appeal of Simplot Investment Company.

We shall first discuss the contentions of appellant Simplot in the order of their statement.

The jury was instructed that Bennett was doing the hauling as an independent contractor and that Raddatz and Lenwell were his employees. Relying on this relationship between it and Bennett, Simplot contends that it cannot be held liable for the accident and resulting injuries, because (a) there is no evidence showing any negligence on its part in the loading of the truck or that anything done by it in connection with the loading contributed proximately to the accident, (b) the evidence is insufficient to bring the case within any exception to the independent contractor rule of nonliability, and (c) there is no evidence showing any proximate causal connection between the accident and anything done or omitted by it (Simplot) or between the accident and the manner in which the equipment involved was set up for hauling lumber. In essence, Simplot's argument is that the evidence shows that the accident was caused solely by the manner in which Lenwell, the driver, propelled the loaded truck around the turn in the highway, with the rear portion of the load not bound to the dolly bunk, and

driving at an excessive rate of speed on the wrong side of the highway. Simplot points to Burdette Risley's testimony that the rear load came off when Lenwell attempted to swerve back onto his own side of the highway (presumably to avoid a head-on collision with the Risley car), and argues that the same thing would have happened if an ordinary lumber truck had been used. Simplot admits the part played by its lift truck operator in placing the stringers on the bunks and in placing the lumber on the decking, but denies that there is any evidence that this was done improperly or that it proximately contributed in any way to the accident. Simplot also denies that it is chargeable with the failure of Bennett's employees to bind the load properly. Finally, with reference to the rule that one cannot escape liability by employing an independent contractor to do work which is inherently dangerous unless proper precautions are taken, Simplot argues that there is no showing that the hauling with the equipment here involved was inherently dangerous. The test, says Simplot, is whether or not the work is of such a nature that it probably will, and not merely may, cause injury if proper precautions are not taken. Simplot points to testimony that other truckers were using similar equipment to haul lumber, without accident or mishap, and concludes that there was no showing that the use of such equipment for such purpose was inherently dangerous.

Respondents contend, in reply, that there is ample evidence to support the verdicts against Simplot under any of the following theories: (a) That Simplot was negligent in hiring an incompetent contractor; (b) that Simplot was negligent in failing to put a stop to unnecessary dangerous practices; (c) that Simplot was negligent in contracting for work which was unlawful; (d) that Simplot was negligent in supplying defective and inadequate chattels; (e) that Simplot negligently participated in the unlawful equipping and loading of Bennett's logging truck; (f) that Simplot is vicariously liable in contracting for work which was inherently dangerous; and (g) that there is ample evidence that Simplot's

negligence was a proximate cause of the accident.

[1] The general rule as to the liability of the employer of an independent contractor has been aptly stated in Prosser on Torts at page 483, as follows:

"For the torts of an independent contractor, as distinguished from a servant, it has long been said to be the general rule that there is no vicarious liability upon the employer. This doctrine developed, both in English and in American law, at a time when such liability for the torts of a servant was well established, and it seems to have been, in its inception, something of a retreat from the rigors of that rule. Various reasons have been advanced for it, but the one most commonly accepted is that, since the employer has no right of control over the manner in which the work is to be done, it is to be regarded as the contractor's own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and administering and distributing it."

Dean Prosser then goes on to state that the American courts "have whittled away at the rule of non-liability with exceptions, to the point where it is not easy to say that any 'general rule' remains." Also:

"In the first place, quite apart from any question of vicarious responsibility, the employer may be liable for any negligence of his own in connection with the work to be done. Where there is a foreseeable risk of harm to others unless precautions are taken, it is his duty to exercise reasonable care to select a competent contractor, and to provide, in the contract or otherwise, for such precautions. So far as he gives directions for the work, furnishes equipment for it, or retains control over any part of it, he is required to exercise reasonable care for the protection of others; and he must likewise interfere to put a stop to any unnecessarily dangerous practices, and make a reasonable inspection of the work

after it is completed, to be sure that it is safe. In all of these cases, he is liable for his personal negligence, rather than that of the contractor."

In Restatement of Torts, page 1108, the term "competent contractor" is defined as follows:

"The words 'competent contractor' denote a contractor who possesses the knowledge, skill, experience and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others and who also possesses the personal characteristics which are equally necessary thereto."

It is conceded that the relationship of appellant Bennett to appellant Simplot was that of independent contractor. In order to support the verdicts against appellant Simplot it must appear from the evidence and the inferences that may reasonably be drawn therefrom that Simplot was negligent in employing Bennett to haul the lumber, knowing that Bennett would use equipment that was dangerous, and also that the negligence of Simplot in so doing was a proximate cause of the injuries to respondents.

There is ample evidence that both Simplot's general manager, Duff, and its superintendent in charge at Downieville, Hallman, knew what type of equipment Bennett would use and how it would be set up for hauling lumber. In fact, Simplot furnished the stringers and stickers used in the loading. Duff, himself, testified that hauling lumber on a logging truck was an unusual operation, and that this was the only time that Simplot had utilized such equipment and it was just a matter of maybe two or three weeks. It appears from Duff's testimony that Simplot normally hauled its lumber on its own trucks (which were regular lumber trucks), but that at the time here involved it was some 54 loads behind in its hauling schedule.

Two state highway patrolmen, who were called to the scene just after the accident, were permitted to state their opinions regarding the equipment and method of load-

ing. Officer Steuber, when asked whether it was proper practice to put a load of lumber upon a tractor and dolly "in that manner at that time and place," replied that he had never seen one loaded like that and that he did not consider it proper practice. When asked whether he considered it proper practice to load a logging dolly with lumber "when you have put upon the bunks stringers such as you have described existed here, eight in number, six inches in width, which were not attached to or bound to the bunks," Steuber replied, "No." And when asked: "Do you consider it proper practice—and these questions are directed to July 28, 1950, and naturally have reference to the particular equipment that you have testified that you examined in question—do you consider it proper practice to use a logging dolly and a tractor equipped and set up in the manner this dolly and tractor were at that time and place, for the purpose of hauling lumber?", he again answered in the negative. Steuber had testified earlier that the load and stringers had not been bound to the tractor and dolly bunks, but later admitted that the front part of the load could have been bound to the tractor bunk and that he just did not observe it. He also testified that the load had been bound to the stringers with chains, but that he did not know how many chains, and that the binder on the rear chain was broken.

Officer Kitts, having testified that he did not make any observation to determine whether the load and stringers were bound to the tractor bunk and that there was no binding of the load or the stringers to the dolly bunk, was asked: "With reference to the manner in which you have testified that the stringers were placed upon the bunks upon that tractor and upon that dolly at that time and place, was that, in your opinion, good practice to so construct a lumber truck to be used upon the public highway such as this?", and replied, "Absolutely not." He was also asked the following question: "Now, then, with reference to the manner in which the rear end of that load—I am speaking now of the rear end of the load where you determined there was

no chain attaching the stringers or the load to the bunk—was the manner in which the rear end of that load was placed upon the bunk and where the load was attached only to the stringers and not to the bunk, in your opinion, good practice at that time and place, that type of equipment?”, and replied, “No.” Finally, after testifying that he had observed the equipment used and the method of loading, he was asked whether “that equipment and that loading at that time and place was, in your opinion, a proper method and manner of loading and equipping a piece of equipment,” to which he replied “No.”

There was testimony that the load was bound to the stringers by chains, but that neither the stringers nor the load were bound to the tractor or dolly. The stickers and stringers were held in place by the weight of the lumber and the load was in effect a “floating load.” The stringers did not form a solid deck and it may well be doubted whether the concave chock blocks furnished adequate lateral support for the lumber. The chock blocks on appellant Bennett’s truck are typical of logging trucks and are not used on ordinary lumber trucks; their function is to keep logs from slipping sideways. While logs, which are round, would fit into the concave chock blocks, the six by eight stringers would only go to the bottom of the inner base of the chock blocks. Appellant Radatz testified: “Q. Then, prior to the time you placed any weight upon top of the stringers or the stickers, if you attempted to bring together the cheese blocks, they would simply push the stringers closer together, would not they, or they would go up the side of the concave side of the cheese blocks? A. If you applied enough power to them, yes.” It is the contention of respondents that “The photographs of Bennett’s truck demonstrate that the centrifugal force in making the turn to the right at the scene of the accident, combined with the arrangement of the stringers four inches apart and up against the smooth steel concave side of the chock blocks in such a manner that the load on the dolly and the load on the tractor were tied together, caused the stringers to slide together and

go up the left side of the left chock block on the dolly.”

The implied findings of the jury were that appellant Simplot was negligent in employing appellant Bennett to haul the lumber when it not only knew the type of equipment Bennett had but supplied part of that equipment, that the equipment used was dangerous, and that the negligence of appellant Simplot in so employing appellant Bennett to use said equipment was a proximate cause of the accident. If it can be held that the evidence sustains these implied findings we are satisfied that the instant case comes within the exceptions to the general rule as to the liability of the employer of an independent contractor, as hereinbefore set forth.

[2-4] The well-settled rule as to the power of an appellate tribunal in passing upon the sufficiency of the evidence to support a judgment is aptly stated in *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, at page 429, 45 P.2d 183, at page 184, as follows:

“In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.”

[5,6] In discussing the rule it is said in *Estate of Bristol*, 23 Cal.2d 221, at page 223, 143 P.2d 689, at page 690:

“* * * The critical word in the definition is ‘substantial’; it is a door which can lead as readily to abuse as to practical or enlightened justice. It is common knowledge among judges

and lawyers that many cases are determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence which is overwhelming in its persuasiveness but which may appear relatively unsubstantial—if it can be reflected at all—in a phonographic record. Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover, whether such doubt or conflict exists, the court should be realistic and practical.”

[7] Bearing in mind the rule just stated, and after a careful study of the entire record, including the numerous photographs introduced as exhibits, we have concluded that there is substantial evidence in the record to support the implied findings of the jury that appellant Simplot was negligent in employing appellant Bennett to haul the lumber when it not only knew the type of equipment that Bennett had but supplied part of that equipment, that the equipment used was dangerous, and that the negligence of appellant Simplot in so employing Bennett to use said equipment was a proximate cause of the accident.

We believe that it could reasonably be inferred from the evidence that Bennett was not a competent contractor within the meaning of the term as defined in the quotation from Restatement on Torts as hereinbefore set forth, because he did not have adequate or suitable equipment for the job; and that appellant Simplot was aware of the inadequacy of the equipment for it furnished the timbers and helped Bennett's employees set up the rig for hauling. We believe also that the evidence supports the inference that the equipment was inadequate because it was designed for hauling logs and was converted into a lumber carrier by the addition of a flimsy and makeshift platform which did not form a solid deck or receive adequate lateral support from the concave blocks against which the outside stringers were placed. We be-

lieve further that the jury was justified in concluding as it undoubtedly did conclude, that the hauling of lumber on such equipment over a mountain highway was a dangerous operation; that appellant Simplot knew that it was unsafe; and that appellant Simplot was negligent in employing Bennett to haul the lumber with such equipment under the circumstances present in the instant case.

Appellant Simplot argues that none of the factors relied upon by respondents show that the equipment was a dangerous instrumentality apart from the negligent manner in which it was handled, and that there was no showing in the evidence that danger was to be expected from the use of the equipment as distinguished from the manner of its use. However, appellant Simplot erroneously assumes that the evidence is not susceptible of any other construction than that appellant Lenwell, the driver of the truck, was operating it at an excessive rate and in a negligent manner. There is, of course, evidence from which it can be inferred that Lenwell did operate the truck in a highly negligent manner, and the jury would have been justified in finding that his negligence was the sole proximate cause of the accident. But, unfortunately for appellant Simplot, the jury did not so find, and there is evidence in the record from which it can be inferred that Lenwell was not operating the truck in a negligent manner. For it appears from Lenwell's testimony that he drove down the hill toward the point of the accident at a speed of about 35 miles per hour. During at least the last 500 feet before the final turn he applied his brakes. At a point about halfway around the last turn his speed was about 30 miles per hour. He had straightened out and was about 100 feet past the turn when the lumber came off the logging dolly. Lenwell's speed at that time was about 30 miles per hour. Lenwell further testified:

“A. I had drove around the corner there with regular truck and trailer loads of lumber at that speed several times.

“Q. What kind of loads? A. Regular truck and trailer with lumber rolls with lumber on it.

"Q. You had gone around that turn on many other occasions where you had a regular lumber truck and lumber trailer? A. Yes.

"Q. At 30 to 35 miles an hour, safely? A. Yes."

Lenwell also testified that he came to a gradual stop after spilling the lumber because the front part of the load on the tractor was about to come off.

[8] Appellant Simplot contends also that there is no evidence showing any proximate causal connection between the accident and the manner in which the equipment involved was set up for hauling lumber. But we believe it is fairly inferable from the evidence hereinbefore set out that the hauling of a heavy load of lumber on such equipment was not only an unusual and improper way of hauling lumber but that it was dangerous and unsafe; that the instability of such load was likely to put too much strain upon the chains binding the load and cause said chains to break and the lumber to go off the truck. We believe that the jury could reasonably conclude that Lenwell's manner of driving would not have resulted in the accident if it had not been for the flimsy makeshift platform for hauling lumber on the logging rig and that appellant Simplot knew that such equipment was the only equipment that Bennett had to use in said hauling and supplied the stringers and stickers upon which the lumber was to be placed. Under such circumstances whether or not there was any proximate causal connection between the accident and the manner in which the equipment involved was set up was a question for the jury and we cannot hold that the implied finding of the jury against appellant Simplot upon this issue is unsupported.

In its closing brief appellant Simplot contends that the incompetent contractor exception to the independent contractor rule is outside of the issues as presented by the pleadings and may not be relied upon to support the verdicts against Simplot. The charging allegations against Simplot are set out in paragraph VII of Burdette

Risley's second amended complaint, as follows:

"That on or about the 28th day of July, 1950, defendant, Cal-Ida Lumber Company, a corporation [Simplot], and each and all of the remaining defendants here, by and through their agents, servants, representatives and employees, negligently and carelessly loaded said 1947 Peterbilt Log Tractor, bearing California License No. BE HH 7261; that on or about the 28th day of July, 1950, defendant, Earl Whitney Lenwell, drove, operated, maintained and propelled said 1947 Peterbilt Log Tractor, bearing California License No. BE HH 7261, at which time and place said 1947 Peterbilt Log Tractor was carrying the lumber which was carelessly and negligently loaded by defendant, Cal-Ida Lumber Company a corporation, and each and all of the remaining defendants herein, by and through their agents, servants, representatives and employees, along and upon Highway 20 and 49, a public highway and thoroughfare in the County of Nevada, State of California, at or about a point on said Highway 20 and 49 approximately 1.5 miles south of Nevada City, County of Nevada, State of California, in such a reckless, careless and negligent manner that as a direct and proximate result thereof, that certain load of lumber which was then and there being carried on said 1947 Peterbilt Log Tractor was caused to and did, with great force and violence, fall from said 1947 Peterbilt Log Tractor and strike that certain 1947 Chevrolet Club Coupe which was then and there being driven by this plaintiff."

An identical paragraph is set out in Violet Risley's second amended complaint, as paragraph VI thereof, except that this paragraph alleges that the plaintiff was *riding* in the club coupe. The trial court, over Simplot's objection, permitted the above two paragraphs to be amended by insertion of the following after the words "negligently and carelessly loaded said 1947 Peterbilt Log Tractor, bearing California License No. BE HH 7261,":

"that on or about the 28th day of July, 1950, defendant, Cal-Ida Lumber Company, a corporation, and each and all of the remaining defendants herein, by and through their agents, servants, representatives and employees, negligently, carelessly and knowingly permitted said loaded 1947 Peterbilt Log Tractor, bearing California License No. BE HH 7261 to be driven and operated along and upon Highway 20 and 49, a public highway and thoroughfare in the County of Nevada, State of California, at or about a point on said Highway 20 and 49 approximately 1.5 miles south of Nevada City, County of Nevada, State of California, in an unsafe and dangerous condition and improperly loaded and equipped."

This was done at the commencement of the trial, notice of the motion having been given some four days before.

It is apparent from the record that throughout the trial respondents were proceeding on the theory that appellant Simplot in employing appellant Bennett to haul the lumber under the circumstances hereinbefore set forth was employing an incompetent contractor. In fact, in the argument of respondents' counsel to the jury he states:

"So far as Simplot Investment Company, doing business as Cal-Ida, was concerned, the theory upon which liability is predicated in that case is, as you have undoubtedly suspected, it is not predicated upon an employer-employee relationship, it is predicated upon the law of the State of California to this effect: That anyone who hires an individual contractor, an independent contractor knowingly, and knows that that independent contractor has defective equipment which is negligently constructed, and which will be negligently operated, and if injury is caused as a proximate result of that negligent, knowing hiring and that equipment, then that independent contractor can not escape liability solely by virtue of the fact that it is an independent contractor, rather than an employer."

Counsel for appellant Simplot met this issue squarely in his argument to the jury, discussing it on the merits and in no way suggesting that it was outside of the issues in the cases. Furthermore, the jury was given two instructions along the line of the argument of respondents' counsel hereinbefore set forth and while appellant Simplot contends in its brief that such instructions were erroneous (which contention will be discussed hereinafter), it does not criticize said instructions upon the ground that they are outside the issues.

[9,10] While it is true that as a general rule an issue not presented by the pleadings cannot be considered on appeal, *Munfrey v. Clearly*, 75 Cal.App.2d 779, 784, 171 P.2d 750, it is also true that where a case has been tried upon a definite theory and particular issues it may not be reasonably contended for the first time on appeal that some of the issues were not properly pleaded. *Guardianship of Romine*, 91 Cal. App.2d 389, 393, 205 P.2d 733.

So even if there were merit in appellant Simplot's contention that the incompetent contractor exception to the independent contractor rule is outside of the issues as presented by the pleading, it is well to bear in mind Section 4½ of Article VI of our State Constitution, which provides that:

"No judgment shall be set aside, or new trial granted, in any case, * * for any error as to any matter of pleading, or for any error as to any matter of procedure, unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

[11,12] Appellant Simplot next contends that the court erred in admitting the testimony of Highway Patrol Officers Stauber and Kitts (hereinbefore summarized) in which each officer was permitted to testify, over appellants' objections, that in his opinion it was not proper practice to use a tractor and logging dolly, equipped as shown in the instant case, for the purpose of hauling lumber. Appellant Simplot complains that the admission of

this evidence was prejudicial error in that (1) neither of the officers was qualified as an expert in the field of hauling lumber, (2) that the subject matter was not properly a matter for expert testimony, since any ordinary layman was competent to judge whether the truck was loaded properly, and (3) that the testimony invaded the province of the jury, involving the very questions of fact which the jury was called upon to decide, i. e., whether the equipment was safe for use in hauling lumber and whether the lumber was loaded in a negligent manner. The record shows that both officers, during their employment by the highway patrol, had observed and inspected literally hundreds of logging and lumber trucks, and it is a fair inference that they were thoroughly familiar with the construction of such equipment and the manner in which the equipment was normally loaded and operated. It appears from the record, and is a matter of common knowledge, that highway patrol officers are required to attend a Highway Patrol Training Center and are instructed as to the provisions of the Motor Vehicle Act and that their duties in a lumber area include observing and inspection of logging and lumber trucks to determine whether the equipment is safe and is in accordance with the provisions of the Vehicle Code, section 700 of which provides:

"No vehicle shall be driven or moved on any highway unless such vehicle is so constructed or loaded as to prevent any of its contents or load other than clear water from dropping, sifting, leaking or otherwise escaping therefrom."

[13] It seems to be well established that traffic officers whose duties include investigations of automobile accidents are qualified experts and may properly testify concerning their opinions as to the various factors involved in such accidents, based upon their own observations. In what may be considered the leading case upon the subject, the recent case of *Zelayeta v. Pacific Greyhound Lines*, 104 Cal.App.2d 716, 721, 232 P.2d 572 (hearing denied), a witness, Harry W. Edwards, Jr., testified that he had been a traffic officer for seven years, during which time he had investigated, of-

ficially, about one accident a day; that it was his duty to investigate accidents and to report to his superiors his conclusions and opinions as to what caused the accidents and how they happened. He observed the points of rest of the two cars and the nature of the damage to them, the extent, course, location, and nature of the debris, and the scrape marks, their course and nature. He was then asked his opinion, based solely on what he had observed at the scene "as to the approximate point of impact on the highway between the vehicles." Objection was made that the question called for expert testimony and was incompetent, irrelevant and immaterial. The objection was overruled and the witness was permitted to answer the question. Upon appeal it was urged that it was error to admit such testimony, but the court held that the testimony had been properly admitted. Presiding Justice Peters in a well-reasoned opinion reviewed numerous earlier cases, and stated, 104 Cal.App.2d at pages 723-727, 232 P.2d at page 577:

"Moreover, in our opinion, it was within the discretion of the trial court to admit this opinion evidence. Appellants assume that Edwards was permitted to give his opinion solely as a nonexpert, and contend that the exception to the rule that a nonexpert cannot give his opinion is limited to cases of necessity where the opinion is not only based on probabilities, but where the subject matter is so complex or subtle that, from a practical necessity, the ultimate fact can only be conveyed to a jury by means of an opinion. Appellants then urge that these conditions did not here exist. They seem to argue that the only time an expert can give an opinion is when he bases his opinion upon a hypothetical question. The expert is not permitted, so they seem to argue, to base his opinion upon facts which he himself observed.

"Such arguments are based upon a misconception of the nature of expert testimony. In a proper case, an expert can give his opinion whether or not he bases such opinion on facts presented in a hypothetical question, or upon facts he observed for himself. The key ques-

tion is whether or not the subject under discussion is one permitting expert testimony, not the source of the facts upon which the opinion is predicated.

* * * * *

"Thus, expert testimony is admissible or not dependent upon whether the subject matter is within common experience or whether it is a special field where the opinion of one of skill and experience will be of greater validity than that of the ordinary jurymen. It is quite obvious that the conclusion, based upon the facts of the particular case, as to just where a collision between two vehicles occurred, may be so obvious that any reasonable person, trained or not, can draw that inference from the facts. It is equally clear that cases may occur where the opinions of trained experts in the field on this subject will be of great assistance to the members of the jury in arriving at their conclusions. In such cases a traffic officer who has spent years investigating accidents in which he has been required to render official reports not only as to the facts of the accidents but also as to his opinion as to their causes, including his opinion, where necessary, as to the point of impact, is an expert. Necessarily, in this field, much must be left to the common sense and discretion of the trial court. *Nolan v. Nolan*, 155 Cal. 476, 101 P. 520 [132 Am.St.Rep. 99, 17 Ann.Cas. 1056]; *Lacy Mfg. Co. v. Gold Crown Mining Co.*, 52 Cal. App.2d 568, 126 P.2d 644."

Appellant Simplot argues:

"There would seem no doubt, therefore, that although counsel for respondents endeavored to predicate his various questions to the witnesses Steuber and Kitts on the matter of whether the loading and use of the equipment here involved was or was not proper or improper practice, the real purpose of respondents' counsel was to make it appear that in their opinion this equipment was unsafe and dangerous to use upon the public highways, and to also make it appear that the use of such

equipment was in violation of the California Vehicle Code, when in fact it was not. This, clearly, was a round-about way of having the witnesses testify to the very issue the jury was called upon to decide, namely, whether the equipment was unsafe and improperly loaded, an issue which was of vital importance to the rights of Simplot, in view of the independent contractor relationship of Bennett."

In reply respondents argue:

"* * * But the officers did *not* testify that the conduct of Simplot's employees and of Lenwell and Raddatz in so constructing, equipping and loading the truck constituted negligence or was dangerous and unsafe, and no amount of ingenious argument can change the actual facts as they appear in the record and as quoted above. The officers testified simply that such practice was not proper, leaving it to the jury to decide from that testimony, together with all the other evidence in the record, whether or not such practice was a negligent one."

[14-16] We do not believe that the court erred in permitting the traffic officers to answer the questions objected to by appellants. The officers in the course of their specialized work had observed and inspected hundreds of trucks on the highway, and by reason of their training and experience were better qualified than a layman to express an opinion as to whether or not the logging truck involved in the instant case was properly equipped and loaded. Whether or not expert testimony is admissible must necessarily be left to the discretion of the trial judge. The determination of the competency of a witness to testify as an expert is in itself in the nature of a trial of a question of fact addressed to the trial judge alone, and as in other decisions on questions of fact by a trial judge, his ruling thereon will not be overturned on appeal unless there is an actual want of evidence to support it or a clear abuse of discretion in ruling upon the evidence offered on the subject. *Mirich v. Balsinger*, 53 Cal.App.2d 103, 114, 127 P.2d 639.

[17] Furthermore, we believe that in view of the photographs and the other evidence in the case, the ruling of the court permitting the Highway Patrol officers to answer the questions complained of by appellants, even if erroneous, was not reversible error.

Appellant Simplot says the error in admitting the opinion evidence above referred to was accentuated by the following instruction wherein the court told the jury that it should consider such evidence:

"The rules of evidence ordinarily do not permit the opinion of a witness to be received in evidence. An exception to this rule exists in the case of expert witnesses. A person who, by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it."

It appears from the clerk's transcript that said instruction was given at the request of defendants. Appellant Simplot does not argue that it is not a correct statement of the law or that it is not the instruction usually given in personal injury cases, especially where, as in the instant case, there has been considerable medical testimony. In the instant case the said instruction was certainly applicable to the testimony of the physicians.

Appellant Simplot complains further that the court committed prejudicial error in refusing, modifying and giving various instructions. The following instructions, offered by Simplot, were refused:

(1) "One who engages an independent contractor is not subject to liability for bodily harm caused to another by a negligent act or omission of the independent contractor or his servants."

(2) "One engaging an independent contractor for the purpose of hauling materials on the public highways has no duty to anticipate that such independent contractor or his employees will not use proper equipment or will

improperly load the same or will travel over the highways at an excessive speed."

(3) "The mere fact that defendants Simplot Investment Company or Cal-Ida Lumber Company furnished defendants Raddatz and Lenwell the timbers used by them in making the deck on the truck of defendant Bennett does not impose liability in this case upon defendants Simplot Investment Company and Cal-Ida Lumber Company."

Regarding these refused instructions, Simplot says, as to the first, that the failure to give it deprived Simplot of the right to have the jury instructed on Simplot's theory of the case, i. e., the principle upon which it relied to escape liability; as to the second, that without it the jury would have no way of knowing where Simplot's duty began or ended with respect to the independent contractor relationship; and as to the last, that it was necessary, in view of other instructions (not identified) which were given.

[18-20] We are unable to agree with appellant Simplot's contention that the refusal of these instructions constituted reversible error because the jury was given an instruction that Bennett was an independent contractor as to Simplot, that Simplot would not be liable if the jury found that the injuries resulted solely from the manner in which Lenwell operated the truck, and that a verdict should not be returned against Simplot unless the jury found that Simplot was negligent and that such negligence was a proximate cause of the accident.

It is clear from the record, including all of the instructions and the arguments of counsel, that Simplot's contention throughout was that Bennett was an independent contractor and that it was not liable for the negligence of Lenwell in the operation of the logging truck. Respondents' contention that their case against Simplot was predicated upon the proposition "that anyone who hires an individual contractor knowingly, and knows that that independent contractor has defective equipment which is

negligently constructed, and which will be negligently operated, and if injury is caused as a proximate result of that negligent, knowing hiring and that equipment, then that independent contractor can not escape liability solely by virtue of the fact that it is an independent contractor, rather than an employer," was clearly and forcibly presented to the jury.

Appellant Simplot next contends that the court committed prejudicial error in modifying one of the instructions offered by it.

The following instruction, proposed by Simplot, was modified by the addition of the clause italicized, and was given as so modified:

"* * * Defendant William E. Bennett, at the time and place of the accident here involved was an independent contractor as to the defendant Simplot Investment Company, doing business as Cal-Ida Lumber Company, and if you believe from the evidence that the injuries complained of by plaintiffs resulted solely from the manner in which defendant Earl Whitney Lenwell drove and operated the truck of said defendant William E. Bennett, at the time and place of the accident complained of, then your verdict must be in favor of the defendant Simplot Investment Company, doing business as Cal-Ida Lumber Company, *unless you find such defendant liable under the other instructions which I am giving to you.*"

The addition of the italicized portion, says Simplot, nullified the effect of the proposed instruction and might well have created confusion and brought about a conflict in the minds of the jurors as to the law applicable to the facts set forth in the proposed instruction.

[21] While it is no doubt true that the portion of the instruction added by the court might ordinarily be confusing to a jury, yet when it is considered with all of the instructions given to the jury we do not believe that appellant Simplot was prejudiced by it in the instant case. For the jury was instructed that appellant Simplot was an independent contractor and was also instructed:

"If one engages another to perform work when he knows, or in the exercise of ordinary care would know, that he will use improper and unsafe equipment which is liable to cause damage to others, then the hirer of such a person is liable for any damage proximately caused by the performance of such work because of the use of any such improper or unsafe equipment. If you find from the evidence that any employee or employees while acting within the course and scope of employment for the defendant Simplot Investment Company, a corporation, doing business under the firm name and style of Cal-Ida Lumber Company, engaged William Bennett to haul this lumber when he knew or in the exercise of reasonable care would have known that the defendant William Bennett would furnish improper or unsafe equipment to haul the lumber, if you find that he did, and if you further find that the proximate cause of this accident was the use of improper and unsafe equipment, if any, furnished by the defendant William Bennett, then your verdict must be in favor of the plaintiffs."

As hereinbefore pointed out, it is clear from the evidence, the instructions and the arguments of counsel to the jury (which are in the record) that respondents were seeking to fasten liability upon appellant Simplot upon the theory that it engaged an independent contractor knowing that said contractor had unsafe and defective equipment which he would use in hauling the lumber, and that the negligence of appellant Simplot in engaging said independent contractor under such circumstances was a proximate cause of the injuries to respondents. We believe that in view of the instructions previously given the court intended to tell the jury by this instruction that appellant Simplot could not be held liable if the injuries to respondents resulted solely from the manner in which Lenwell drove the logging truck, but that appellant Simplot could be held liable if the jury found it liable under the other instructions given by the court. It must be

borne in mind that the instant case was one in which several actions were consolidated for trial and that it was one requiring a great many instructions on the various phases of the law involved, and we do not believe that the addition by the court of the italicized portion added to the instruction offered by appellant Simplot resulted in any prejudice to said appellant or that it constituted reversible error.

Simplot complains that the following instructions, which state the provisions of sections 731(a) and 701(e) of the Vehicle Code, were erroneously given at the instance of respondents:

(1) "It is unlawful for the owner, or any other person, employing or otherwise directing the driver of any vehicle to require the operation of such vehicle upon a highway in any manner contrary to law."

(2) "No person shall operate a train of vehicles when any trailer, semitrailer or other vehicle being towed whips or swerves from side to side dangerously or unreasonably or fails to follow substantially in the path of the towing vehicle."

Simplot points out that the court also instructed the jury that if the latter believed from the evidence that the truck and trailer were inadequate or unsafe on which to haul lumber, and that Simplot knew this or in the exercise of ordinary care would have known it, then Simplot was guilty of negligence in permitting its lumber to be hauled on the truck and trailer; and further instructed the jury that if one engages another to perform work when he knows or in the exercise of ordinary care would know, that he will use improper and unsafe equipment which is liable to cause damage to others, then the hirer of such a person is liable for any damage proximately caused by the performance of such work because of the use of such improper or unsafe equipment; and, finally, that the jury was also instructed that if it found that Simplot engaged Bennett to haul lumber when Simplot knew or in the exercise of reasonable care would have known that Bennett would furnish improper or

unsafe equipment to haul the lumber, and that if the jury further found that Bennett did furnish improper or unsafe equipment and its use was the proximate cause of the accident, then the jury's verdict must be in favor of plaintiffs (respondents here), and not only against Bennett, but also against Simplot.

Appellant Simplot argues that there is no evidence that it required Lenwell to drive the truck as he did, i. e., at excessive speed, etc., or that the dolly whipped or swerved from side to side or did not follow substantially in the path of the tractor, and Simplot concludes that not only were the two instructions—the ones covering the Vehicle Code provisions—inapplicable, but that when given with the other instructions they were misleading and prejudicial in that they suggested to the jury that the dolly did in fact swerve from side to side and that the equipment was therefore being operated in a manner contrary to law, and the jury, says Simplot, acting on this suggestion may have found that Simplot was negligent merely because it permitted its lumber to be hauled on the truck.

[22, 23] We are unable to agree with appellant Simplot's contention that there was error in the reading of these sections of the Vehicle Code to the jury or that said appellant was prejudiced thereby. Said instructions must be read and considered together with all of the other instructions given by the court, and it would appear that said instructions were certainly pertinent to the liability of defendants Lenwell, Raddatz and Bennett.

[24] Appellant Simplot next complains of the following instruction, also given at the request of respondents:

"If a person hires another to haul lumber when he knows or in the exercise of reasonable care would have known that he would have the lumber negligently, improperly and unsafely loaded, then the hirer of such person would be liable for any damages proximately caused by any such negligent, improper, and unsafe loading, if any, of any such lumber."

Appellant Simplot argues that the word "hires" implies a master and servant relationship; that the meaning of the word "loaded" is not clear; that even if the instruction refers to an independent contractor relationship it is erroneous in that it assumes that the party engaging the contractor is under a duty to ascertain whether the latter will perform the work properly, whereas the rule is that the engaging party may assume that the work will be done properly; and that there is no evidence showing either that Simplot knew that the truck was negligently, improperly or unsafely loaded or that there were facts from which Simplot should have known that the truck would not be properly loaded. The only particular in which the loading could be deemed improper, says Simplot, would be in the failure of Bennett's employees to bind the rear portion of the load to the dolly bunk, and there is no evidence that Simplot had anything to do with this. However, as pointed out by respondents, the jury was instructed that Bennett was an independent contractor as to Simplot and that a verdict could not be returned against Simplot unless the jury found that Simplot was negligent and such negligence was a proximate cause of the accident.

Appellant Simplot next complains of the following five instructions given at the request of respondents:

(a) "If you find from the evidence that the truck and trailer were improperly and unsafely loaded and that any employee or employees of the defendant Simplot Investment Company, a corporation, doing business as Cal-Ida Lumber Company, helped the defendants Earl Lenwell and Warren Raddatz load the truck and trailer in an improper and unsafe manner, if any, and if you further find from the evidence that such improper and unsafeloading, if any, were the proximate cause of the accident, then your verdict must be in favor of the plaintiffs, Burdette G. Risley, Hilda Risley, Violet Risley, and Jay Humbird, and against the defendant Simplot Investment Company, doing business as Cal-Ida Lumber Company."

(b) "If you find from the evidence that any employee or employees of the defendant Simplot Investment Company, doing business as Cal-Ida Lumber Company, helped the defendant Earl Lenwell, defendants Earl Lenwell and Warren Raddatz to load the truck and trailer, and that such employee or employees, if any, were guilty of any negligence, no matter how slight, which caused the truck to be improperly and unsafely loaded, if you find from the evidence that it were, and that such negligence, if any, were the proximate cause of the accident, then your verdict must be in favor of the plaintiffs Burdette Risley, Hilda Risley, Violet Risley and Jay Humbird, and against the Simplot Investment Company, doing business as Cal-Ida Lumber Company."

(c) "If you find from the evidence that the lumber was improperly and unsafely loaded on the truck and trailer, and that any employee or employees of the defendant Simplot Investment Company, a corporation, doing business as Cal-Ida Lumber Company, knew this, and should have known—or should have known it in the exercise of ordinary care, and if they permitted the truck and trailer to haul their lumber which was improperly and unsafely loaded, if it were, then you must find that the defendant Simplot Investment Company, doing business as Cal-Ida Lumber Company, guilty of negligence, and if you further find that such negligence, if any, was the proximate cause of the accident, then your verdicts must be in favor of the plaintiffs Burdette Risley, Hilda Risley, Violet Risley, and Jay Humbird, and against the defendant Simplot Investment Company, doing business as Cal-Ida Lumber Company."

(d) "If you believe from the evidence that the truck and trailer involved in this accident were inadequate or unsafe on which to haul lumber, and if you further find from the evidence that any employee or employees of the defendant Simplot Investment Compa-

ny, a corporation, doing business as Cal-Ida Lumber Company, knew this, or in the exercise of ordinary care would have known it, then they were guilty of negligence in permitting their lumber to be hauled on this truck and trailer and if such negligence, if any, was the proximate cause of the accident, then your verdict must be in favor of the plaintiffs Burdette Risley, Hilda Risley, Violet Risley, and Jay Humbird, and against the defendant Simplot Investment Company, a corporation, doing business as Cal-Ida Lumber Company."

(e) "If one engages another to perform work when he knows, or in the exercise of ordinary care would know, that he will use improper and unsafe equipment which is liable to cause damage to others, then the hirer of such a person is liable for any damage proximately caused by the performance of such work because of the use of any such improper or unsafe equipment. If you find from the evidence that any employee or employees while acting within the course and scope of employment for the defendant Simplot Investment Company, a corporation, doing business under the firm name and style of Cal-Ida Lumber Company, engaged William Bennett to haul this lumber when he knew or in the exercise of reasonable care would have known that the defendant William Bennett would furnish improper or unsafe equipment to haul the lumber, if you find that he did, and if you further find that the proximate cause of this accident was the use of improper and unsafe equipment, if any, furnished by the defendant William Bennett, then your verdict must be in favor of the plaintiffs, Burdette Risley, Hilda Risley, Violet Risley, and Jay Humbird, and against the defendant not only William Bennett, but also against the Simplot Investment Company, doing business under the firm name and style of Cal-Ida Lumber Company."

Appellant Simplot contends that these instructions are formula instructions which

not only are misleading and are not in accord with the law on the independent contractor relationship, but do not contain all of the elements essential to recovery. As to instructions (a) and (b), Simplot objects to the use of the word "helped" in both instructions and to the word "loaded" in instruction (b), arguing that the instructions do not sufficiently differentiate between the activities of Simplot's employees and the activities of Raddatz and Lenwell in loading the truck, and that the jury could easily have been led to believe that by placing the stringers and lumber units on the truck (which Simplot says was properly done) Simplot's employee helped to load the truck in a negligent manner, even though the negligence, if any, lay in the failure of Raddatz and Lenwell to bind the load. Simplot also claims that the reference to negligence "no matter how slight," in instruction (b), erroneously infers that there are different degrees of negligence. Respondents point to the evidence showing Simplot's participation in equipping and loading the truck and argue that these instructions left it to the jury to determine whether such participation constituted negligence which contributed proximately to the accident. Respondents also point out that Simplot did not request more specific instructions regarding its liability for participation in the loading operation, and also that the jury was fully informed, in other instructions, that there were no degrees of negligence, that Simplot could not be held liable unless it was guilty of negligence which was a proximate cause of the accident, and that Simplot would not be liable for failing to use exceptional care.

Appellant Simplot argues that by instructions (c) and (d) the jury was told in effect that Simplot, having permitted its lumber to be hauled on the equipment in question, would be negligent and liable as a matter of law if it should have known that the equipment was unsafely loaded (instruction (c)) or was unsafe equipment for hauling of lumber (instruction (e)). This, appellant Simplot says, would nullify the independent contractor rule—would leave out of consideration entirely the matter of the contractor's negligence in loading or using

the equipment and render the hirer liable merely because he should have known that the contractor might not safely load his equipment or might render the equipment unsafe solely by the manner in which he drives it over the highway. Further, with reference to instruction (d), Simplot questions the use of the words "inadequate or unsafe" without defining them in the instructions. Equipment, says Simplot, might be inadequate to accomplish a particular result, yet it does not follow that such equipment would be unsafe or that the use of such equipment would be a failure to exercise ordinary care, and therefore there is no justification, under the circumstances of these cases, to advise the jury that merely because the equipment might be inadequate the use thereof constituted negligence as a matter of law. Instruction (e), appellant Simplot says, states in effect that if Simplot knew or should have known that Bennett would use equipment which was improper and unsafe and which was *liable* to cause damage to others, Simplot, by engaging Bennett to haul its lumber, would be responsible along with Bennett for any accident resulting from the use of the equipment. Simplot points to the use of the word "liable" as the chief vice of this instruction. The exception to the independent contractor rule, Simplot says, is predicated on the proposition that damage or injury to another is the *probable*, and not merely the *possible*, result of using a particular instrumentality to carry out the work. Here, says Simplot, the instruction purports to establish liability if the instrumentality is merely "liable" to cause injury and that is not a correct statement of the law. Simplot also complains that instructions (c), (d) and (e) omit all reference to the manner in which the truck was operated and place undue emphasis on situations which have for their only purpose the imposition of liability on Simplot, and Simplot argues that this could not help but unduly impress the jury that the manner in which the truck was operated was of no particular consequence or importance as compared to the manner in which it was equipped and loaded. Formula instructions which do not contain all the elements essential to recovery are preju-

dicially erroneous, Simplot says, and the error is not overcome by other instructions. Citing *Pierce v. United Gas and Electric Co.*, 161 Cal. 176, 184, 118 P. 700, and other California cases.

Respondents reply that instruction (c) incorporates the rules that Simplot would be liable if it failed to use reasonable care to put a stop to unnecessarily dangerous practices carried on by its contractor or if it contracted for work which was unlawful, or if it failed to exercise its control over the loading operations with reasonable care, and that instructions (d) and (e) apply the rule that a hirer must use reasonable care to select a competent contractor and that a contractor is not competent if his equipment is inadequate. They deny that undue emphasis was placed on Simplot's liability, stating that the instructions, considered as a whole, fairly covered all aspects of the cases. In this regard they point out that separate instructions were given which involved various Vehicle Code sections and dealt with Lenwell's operation of the truck, and still another instruction which covered Lenwell's duties as a driver. They deny that the so-called formula instructions omitted any element necessary for plaintiffs' recovery, but argue that if there was such omission it was adequately covered by other instructions, citing *Martens v. Redi-Spuds, Inc.*, 113 Cal.App.2d 10, 247 P.2d 605, and other California cases.

[25-30] If these instructions, so strongly criticised by appellant Simplot, were the only instructions given on the question of liability, there would be considerable merit in said appellant's argument with reference to them. However, as already hereinbefore pointed out, the instant case was one in which several actions were consolidated for trial, requiring a great many instructions on the various phases of the law involved. These particular instructions must be read and considered along with all of the other instructions given by the court. Furthermore, it is clear from the record, including all of the instructions and the arguments of counsel, that appellant Simplot's contention throughout was that it employed an independent contractor and that it was

not liable for negligence in the operation of the logging truck and that respondents' contention was that appellant Simplot had hired a contractor knowing he had defective and dangerous equipment and would use same in hauling said lumber and that therefore appellant Simplot could not escape liability by claiming that Bennett was an independent contractor. We are of the opinion that when the entire record is reviewed and all of the instructions considered together, the giving of these five instructions complained of by appellant Simplot does not constitute reversible error. What our Supreme Court said in *Popejoy v. Hannon*, 37 Cal.2d 159, at page 168, 231 P.2d 484, at page 490, is apropos:

"Prejudicial error does not necessarily result from the giving of an instruction which, subjected to meticulous analysis, might be given a 'possible construction' making it subject to 'criticism'. It is extremely doubtful that the jurors analyzed the instruction with such exactitude as counsel for the Hannon."

Appellant Simplot's final contention is that the damages awarded respondents Burdette G. Risley and Violet R. Risley are excessive as a matter of law and were influenced by passion and prejudice on the part of the jury. This same contention is made by the other appellants.

Burdette Risley was awarded a verdict of \$125,000. Apparently this embraced general damages only, for his mother and guardian, Hilda Risley, was awarded a separate verdict for special damages representing medical expenses in the sum of \$1,753.53. Violet Risley was awarded a verdict of \$75,000. This last verdict apparently included special damages for medical expenses in the sum of \$1,310.95, for there was proof at the trial that medical expenses in that amount were incurred on behalf of Violet. Jay Humbird received a verdict for \$2,000, apparently general damages.

[31-36] The measure of damages in an action for personal injuries is the amount which will compensate for all the detriment proximately caused by the negligence of the defendant. Civ.Code, sec. 3333. Dam-

ages must in all cases be reasonable, Civ. Code, sec. 3359, but what is a reasonable amount is a question upon which there may legitimately be a wide difference of opinion. *Bellman v. San Francisco H. S. Dist.*, 11 Cal.2d 576, 586, 81 P.2d 894. An allowance of damages is primarily a factual matter, and it is well settled that even though the award may seem large to a reviewing court, it will not interfere unless the allowance is so grossly disproportionate to a sum reasonably warranted by the facts as to shock the sense of justice and raise a presumption that it was the result of passion and prejudice. *Kircher v. Atchison, T. & S. F. Ry. Co.*, 32 Cal.2d 176, 187, 195 P.2d 427. As stated in *Mudrick v. Market Street Ry. Co.*, 11 Cal.2d 724, 735, 81 P.2d 950, 956, 118 A.L.R. 533:

"While the law furnishes no accurate means of measuring damages in personal injury cases, the rule is well established respecting the power and duty of an appellate court in considering that subject and has been stated as follows: 'The amount of damages in such cases is committed, first, to the sound discretion of the jury, and next to the discretion of the judge of the trial court, who, in ruling upon the motion for a new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just. Upon appeal, the decision of the trial court and jury on the subject cannot be set aside unless the verdict is "so plainly and outrageously excessive as to suggest, at first blush, passion or prejudice or corruption on the part of the jury." [Citing cases].'"

[37-39] And as this court said in *Bazoli v. Nance's Sanitarium, Inc.*, 109 Cal. App.2d 232, at page 243, 240 P.2d 672, 679:

"* * * If he [the trial judge] believes the damages awarded by the jury to be excessive and the question is presented, it becomes his duty to reduce them. [Citing cases.] When the question is raised his denial of the motion for new trial is an indication that he approves the amount of the award. An appellate court has no such powers.

It cannot weigh the evidence and pass on the credibility of the witnesses as a juror does. To hold an award excessive it must be so large as to indicate passion or prejudice on the part of the jurors."

In the instant case all of the appellants filed motions for a new trial in the respective actions brought by Burdette and Violet Risley, one of the grounds upon which said motions were based being that of excessive damages. These motions were all denied without reduction of the verdicts.

The record shows that Burdette Risley received a laceration below the left jaw; that he suffered an injury to the left chest, extending over the first, second and third ribs near their junction with the breastbone, and this injury caused him to raise a bloody sputum for a period of from ten to fifteen days following the accident; that he received multiple abrasions and bruises to both arms and legs and hands; and that his right ankle, both knees, and his pelvis were fractured. The fractures appear to have healed, but at the time of trial the left knee was still somewhat weak and its recovery was retarded by Burdette's inability to do the necessary exercises, because of the injuries to the right knee. The function of the right knee is permanently impaired—the disability being estimated at about thirty percent. It appears that the crucial ligaments in the right knee are ruptured and that there is a loose fragment of bone in the kneecap. There was medical testimony showing that surgery on this knee is indicated, but that even with surgery the knee would always be unstable and that Burdette Risley will never be able to do heavy work or work that requires him to be on his feet for long periods of time. There is a possibility that traumatic arthritis will result from the injury to the right knee and perhaps even from the fracture of the right ankle. The chest injury, though healed, has left a noticeable indentation or depression over the ribs, and there are also some minor scars. There is some atrophy in the right leg. Burdette Risley was in the hospital for about three weeks, and he testified that it was not until two or three months after the accident that he had

enough strength to get up and walk around even for a short time. His left knee was in a cast for nine or ten weeks, and his right leg was also in a cast for about twelve weeks.

At the time of the accident Burdette Risley was 19 years of age. His formal education had ended with the second year of high school. For approximately four months prior to the accident he had been employed as a ratchet setter in a sawmill. Although this was seasonal work, the parties in their briefs have accepted \$3,472 as his probable annual earnings. In April, 1951, which was some nine months after the accident, Burdette went back to work at the sawmill. He was given the easiest job at the mill, but had to quit after thirteen days because he was unable to do the work. In this regard he testified that his legs hurt him and that on one occasion his right knee buckled and he fell.

Violet Risley also suffered extensive injuries. The record shows that she had a four-inch laceration extending from above the right eye back into the hairline, which required about thirty stitches to close; that she suffered miscellaneous abrasions about the face, hands and left foot; that she had a large hematoma in the muscle of the left thigh; that her chest was bruised; and that she suffered fractures of both bones in the right ankle and of the small bones of the left foot. At the time, she was in the ninth month of her pregnancy, being within a week or ten days of delivery, and she had a separation of the placenta and began to pass a bloody discharge. She went into labor at about 9:00 o'clock on the morning after the accident and delivered a dead fetus at approximately 2:00 o'clock that afternoon. Her physician, Dr. Frey, testified at the trial that Violet's progress toward recovery was steady, although delayed by anemia, by mental upset over the loss of the baby, and by the fact that she had been bedridden for six weeks because of the fractures of her left foot and right ankle. In November, 1950, some four months after the accident, when the cast was removed from her right leg she still complained of headaches and nervousness and experienced fear when reference was made to her ac-

cident. At the time of the trial she had lost 15 percent extension in the right foot, and there may be a 10 percent or so permanent limitation of extension, as well as some traumatic arthritis as a residual from the fracture. She also complained of soreness in the left foot when she remained on her feet for long periods of time. She had disfiguring scars as a result of the four-inch laceration and other abrasions on her forehead. She testified that the chest injury stayed with her for about four weeks, but apparently it has healed. She has a depression about four inches long and one inch wide in the left thigh and there is a three-inch scar over the outer side of the knee. At the time of trial there was some question whether the accident would interfere with future pregnancies. Violet was 17 years of age at the time of the accident, and both she and Burdette were in apparent good health. It appears that she was in a critical condition immediately after the accident, and was given blood plasma the first night and was under an oxygen tent for three days. She was in the hospital for three weeks. She testified that she is unable to do the heavier housework because of the injuries to her foot and ankle. She is conscious of her facial scars and they cause her considerable embarrassment.

[40-42] Appellants argue that the combined judgments in favor of Burdette and Violet, i. e., \$200,000, are entirely out of line with the injuries and resulting disability and disfigurement suffered. They cite a number of cases in which verdicts for injuries have been reduced but it would serve no useful purpose to discuss these cases as each case must be decided upon its own facts. Taking into consideration the extent of the injuries suffered by respondents as hereinbefore detailed, and applying the rules laid down by our appellate courts in numerous cases, we cannot say that the amounts awarded respondents are so large as to indicate passion or prejudice on the part of the jury. The following language of our Supreme Court in *Johnston v. Long*, 30 Cal.2d 54, at page 76, 181 P.2d 645, at page 658, is applicable: "It is not the function of a reviewing court to interfere with a jury's award of damages unless it is so

grossly disproportionate to any reasonable limit of compensation warranted by the facts that it shocks the court's sense of justice and raises a presumption that it was the result of passion and prejudice."

Appeal of Lenwell and Raddatz.

As hereinbefore stated, defendants Lenwell and Raddatz filed separate appeals and have filed separate briefs. In addition to the claim of excessive damages, and asserted error in the admission of the opinion testimony of officers Kitts and Steuber (which contentions we have already discussed in connection with the appeal of defendant Simplot), they also contend that the court erred in the giving and refusing of certain instructions, and that plaintiffs' counsel was guilty of prejudicial misconduct during the trial.

Said appellants Lenwell and Raddatz contend that the court erred in deleting a portion of the instruction offered by them on the subject of expert testimony. The instruction as given by the court was as follows:

"The rules of evidence ordinarily do not permit the opinion of a witness to be received in evidence. An exception to this rule exists in the case of expert witnesses. A person who, by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it."

The deleted portion stated, substantially, that there was a conflict in the testimony of expert witnesses concerning the extent and permanency of the plaintiffs' injuries, that the jury must resolve that conflict in favor of the expert testimony which was entitled to the greater weight, and that expert testimony could not be contradicted by the opinion of a nonexpert. Appellants point to certain conflicts in the medical testimony and state that the jury was uninstructed in the matter.

[43] There is no merit in this contention, for the court in other instructions fully instructed the jury as to the burden of proof, preponderance of evidence, and that it was their function to weigh the evidence, that they were the exclusive judges of the credibility of the witnesses, and were to resolve the conflicts in the evidence. These instructions would apply as well to the testimony of experts as to the testimony of other witnesses, and the court properly deleted the unnecessary portions of the offered instruction.

Said appellants next complain of the following instruction given at the request of respondents:

"I instruct you that the uncontradicted evidence establishes in this case that the defendants Earl Lenwell and Warren Raddatz were employees of and acting in the scope and course of such employment of the defendant William Bennett at the time and place of the happening of this accident, and I therefore instruct you that in the event that you desire to return a verdict against either Earl Lenwell, Warren Raddatz, or William Bennett, you must return such verdict against all three of said defendants. In other words, if you believe from the evidence and the instructions herein given that any one of the three is responsible, then under the law of the State of California, all must be responsible."

[44] Apparently it is appellant Raddatz who is complaining of this instruction, for the argument is that Lenwell was the sole driver of the truck and that he was Bennett's employee, not Raddatz's. It is admitted that Raddatz helped to load the truck and that the instruction might be applicable if negligent loading was a proximate cause of the accident, but it is also contended that the jury could have found, from the evidence, that the accident was caused by Lenwell's manner of driving, in which event the instruction was improper. However, said appellants are hardly in a position to urge that such instruction was error because the record shows that at the close of the trial counsel for defendants

Bennett, Raddatz and Lenwell stated in open court that he made no contention that there was any difference in the liability of these three defendants; that on the basis of this statement only three forms of verdict were prepared and submitted to the jury, none of which distinguished between the liability of Raddatz on the one hand and the liability of Bennett and Lenwell on the other; that also on the basis of this statement respondents' counsel stated to the jury, without objection, that there was no distinction between the legal positions of Lenwell, Raddatz and Bennett; and that counsel for these three defendants said, in his argument to the jury:

"If you reach the point, in reviewing the evidence, that any one of those three persons were guilty of some acts of negligence which caused that lumber to fall off the truck, then, as far as my clients are concerned, they are responsible to the plaintiffs in this action."

[45] Said appellants next complain that the court erred in giving the following instruction:

"It is a matter of common knowledge of which you may take notice that the purchasing power of the dollar has substantially decreased in recent years. If you determine that the plaintiffs, Burdette Risley, Violet Risley, and Jay Humbird are entitled to recover damages, if any, you may take this factor of reduced purchasing power into consideration in determining the amount of such damage."

A similar instruction was approved in the recent case of *Burke v. City and County of San Francisco*, 111 Cal.App.2d 314, 321, 244 P.2d 708 (hearing denied), and in *Kircher v. Atchison, Topeka & Santa Fe Railway Company*, 32 Cal.2d 176, at page 187, 195 P.2d 427, at page 434, our Supreme Court said:

"It is a matter of common knowledge, and of which judicial notice may be taken, that the purchasing power of the dollar has decreased to approximately one half what it was prior to the present inflationary spiral [citing cases], and the trier of fact should

take this factor into consideration in determining the amount of damages necessary to compensate an injured person for the loss sustained as the result of the injuries suffered."

There was no error in giving this instruction, nor would it have been error to refuse it, because it is hardly necessary to remind a jury of the diminished purchasing power of the dollar as the jurors are reminded of it almost daily when they purchase the necessities of life.

[46] Said appellants next complain of the following instruction given at the request of respondents:

"If you decide from the evidence that the plaintiffs, Burdette Risley and Violet Risley, are entitled to a verdict, in fixing the amount of damages, if any, you may consider as evidence the fact that the life expectancy of a person aged 19 years is 51.2 years and of a person aged 20 years is 50.2. However, such expectancy is merely the average for one of ordinary health and exposure to danger of people of that age. In connection with this evidence you should consider all other evidence bearing on the same issue, such as that pertaining to the occupation, health, habits, and activity of the person whose life expectancy is in question."

We are unable to agree with said appellants' contention that the giving of this instruction was error.

The record shows that counsel for respondents stated: "I would like to offer in evidence the life expectancy table of a male of the age of Burdette, which would be 50.2 years, and a female the age of Violet, 51.2 years." The court stated that it was his understanding that the court could take judicial notice of the life expectancies, whereupon counsel for appellants Lenwell and Raddatz stated that the tables that he had indicated lower life expectancies than the table offered by respondents. There was some discussion among counsel and the court suggested that counsel get together and check on the matter and give

him the benefit of their result. The record does not indicate that this was done and appellants offered no instruction on life expectancy.

[47] Appellants Raddatz and Lenwell contend that the above instruction was erroneous and prejudicial, and they refer to several mortality tables which show shorter life expectancies. Respondents reply that the courts take judicial notice of mortality tables (citing *Foerster v. Direito*, 75 Cal. App.2d 323, 333, 170 P.2d 986, and other cases), that the tables mentioned by appellants in their argument were obsolete, that the court should be allowed to exercise its discretion and make a selection of a mortality table based on modern experience, that the table used was prepared by the Statistical Bureau of the Metropolitan Life Insurance Company and was in conformity with other modern tables, that appellants were given the benefit of an extra year of age by the instruction, and that both Burdette and Violet Risley were in apparent good health prior to the accident, and their actual life expectancies were in excess of the figures used. The general rule is stated in 31 C.J.S., Evidence, § 99, pp. 698-699:

"The courts take judicial notice of the standard mortality tables and of their contents showing the natural expectancy of life at a given age of healthy persons in employments not extrahazardous. While there is some variance in the different tables, yet the courts know that an equal or even greater difference in expectation of life may arise from other causes."

Counsel for respondents stated in open court that the mortality tables he was using were the ones issued by the Metropolitan Life Insurance Company, and if appellants desired to have some other mortality table used by the court they should have submitted it to the court in the form of an instruction, or otherwise. Furthermore, the instruction contained the qualification that life expectancy as shown by mortality tables is a mere average based on a limited record of experience, that the inference only applies to one who is in aver-

age health, and that the jury must consider not only the mortality tables but all evidence bearing on the same issue.

[48] Said appellants next contend that the court, by giving separate instructions on damages as to each of the three principal plaintiffs, Jay Humbird, Burdette Risley and Violet Risley, over-emphasized the issue of damages to the prejudice of said appellants. There is no merit in this contention.

The separate actions of the three plaintiffs were consolidated for trial and in each the court instructed that physical pain and mental suffering were proper elements for the jury to consider; that the term "mental suffering" included anxiety, worry, mortification, embarrassment and humiliation; and that mental suffering occasioned by any future pain was also a proper element of damage.

Appellants quote from *Dodge v. San Diego Electric Railway Company*, 92 Cal. App.2d 759, 764, 208 P.2d 37, where it is said to be error to give an instruction that unduly over-emphasizes issues, theories or defenses either by repetition or by singling them out or making them unduly prominent although the instruction may be a legal proposition. However, as pointed out by respondents, the cases were consolidated for trial on motion of appellants and appellants themselves submitted separate instructions pertaining to different plaintiffs, so they are hardly in a position to complain of the number of instructions on the issue of damages.

Said appellants Lenwell and Raddatz next complain of the following instruction:

"You are instructed that this is not an action seeking damages for the death of Sylvia Rae Risley. If, however, you find from the evidence that some or all of the defendants are liable you may include as items of damage in the action of Violet Risley the pain, suffering and anxiety proximately caused by any injuries received by the plaintiff Violet Risley which were proximately caused by and resulting from the miscarriage in which Sylvia Rae Risley was born dead."

In their opening brief said appellants stated that this instruction was given by the court on its own motion. Respondents in their brief stated that the record did not show who offered the instruction and that therefore it must be presumed that the instruction was given at the request of appellants. In order to clarify the matter, said appellants made a motion before this court to augment the record so as to include the original of said instruction or a photostatic copy thereof. Following a hearing this court granted the motion and the scope of the augmentation was referred to the trial court with direction to take all necessary proceedings and certify to this court its conclusions in respect to the challenged instruction. Thereafter the trial judge, the Honorable Sherrill Halbert, certified to this court that he gave the above instruction on his own motion for the following reasons:

"(a) No adequate or impartial instruction on this subject was offered by any party to this action.

"(b) It was believed by the undersigned then, and it is still believed, that this instruction clearly states the law, namely, that while no damages could be allowed for the death of the child, Sylvia Rae Risley, on the other hand, the mother, Violet R. Risley, who was the plaintiff, could recover for the usual elements of damages growing out of a personal injury, which said injury in this case not only resulted in severe injury to her body, but also brought about a miscarriage as the result of which she was forced to bear a dead foetus, and go through the pain, suffering and anxiety of so doing."

Said appellants are therefore correct in stating that said instruction was given by the court on its own motion. This instruction, say Raddatz and Lenwell, was given by the court on its own initiative after rejecting all instructions offered by appellants on the same issue, and is objectionable for the reasons that it is (a) incomplete, (b) invades the province of the jury, (c) contains an improper statement of the law and (d) is contradictory. The instruction

is claimed to be incomplete in that it does not mention Burdette Risley, the husband, and also because it does not instruct the jury that damages may not be allowed for the death of the child. It is claimed that it invades the province of the jury in that it advises the jury that Violet Risley has sustained pain, suffering and anxiety, the objection apparently being that the court failed to include the words "if any," after the reference to pain, suffering and anxiety. Appellants conclude their statement of this point by saying that in effect the instruction advises the jury that Violet may recover for her suffering as a result of this death. This last is also said to be contradictory to the first part of the instruction which states that the action is not one seeking damages for the death of the unborn infant. The correct rule, say these appellants, is that Violet Risley may recover for mental anguish *attending* the miscarriage and no more. Appellants also claim that it was improper and prejudicial to refer to the fact that the baby was born dead. In reply respondents point out that the instruction covers pain, suffering and anxiety resulting from the miscarriage, and not from the death; that Burdette Risley was not mentioned because he did not suffer the miscarriage; that in being instructed that the action was not one seeking damages for the death of the baby, the jury was informed that no damages for such death should be allowed; that the instruction refers to "any injuries" received by Violet Risley as a result of the miscarriage, not to "the injuries"; and that evidence regarding the baby's death and its name was received without objection by appellants. They also point out that one of appellants' medical witnesses referred to the death of the baby, and that appellants, themselves, offered two instructions which referred to the death.

[49] We are unable to agree with the contention of appellants Lenwell and Raddatz that the giving of this instruction was error. The jury was informed that the action was not one for the death of the unborn child and it is certainly true that the evidence shows that Violet Risley suffered a miscarriage as a result of the accident,

and as stated in the case of *Bovee v. Danville*, 53 Vt. 183, cited by said appellants: "Any physical or mental suffering attending the miscarriage is a part of it and a proper subject for compensation." There is nothing in the instruction to justify the statement that the jury was told that they could include compensation for grief or injured feelings over the death of the child. Upon the record in the instant case appellants were not prejudiced by the omission of the words "if any" from the instruction. It is worthy of comment that appellant Simplot does not complain of this instruction.

Appellants Raddatz and Lenwell next complain that the court refused the following instructions offered by them:

"I instruct you that the plaintiff Violet R. Risley is not entitled to recover because of grief, sorrow or resentment on account of any injury sustained by her husband Burdette G. Risley."

"I instruct you that the plaintiff Burdette G. Risley is not entitled to recover because of grief, sorrow or resentment on account of any injury sustained by his wife Violet R. Risley, or because of any scars, blemishes or disfigurements on the face of the wife."

"I instruct you that the law does not permit you to, and you must not, award plaintiffs Burdette G. Risley and Violet R. Risley, or either of them, any sum for the shock, sorrow, mental distress and grief, or injury consequent thereto, if any, that they may have suffered by reason of the death of their child."

"I instruct you that even if you should find that the defendants, or any of them, negligently caused the death of the foetus, or unborn child then being carried by the plaintiff Violet R. Risley, then the death of the foetus or unborn child cannot be included as an element of injury to the plaintiffs Violet R. Risley or Burdette G. Risley, or either of them, and no recovery may be allowed therefor."

"I instruct you that the law does not permit you to and you must not award the plaintiffs Burdette G. Risley and Violet R. Risley, or either of them, any sum for the suffering, if any, occasioned the unborn child then being carried by the plaintiff Violet R. Risley."

[50-55] However, a reading of all the instructions given by the court shows that the jury was fully and correctly instructed upon the question of damages and the giving of these five instructions in addition to the others given was unnecessary. What the court said in *Kent v. First Trust & Savings Bank of Pasadena*, 101 Cal.App.2d 361, at page 374, 225 P.2d 625, at page 633, is applicable:

"* * * The court is not required to give every instruction requested even if considered by itself it may state a correct and pertinent principle of law. All that is required is that the jury be fully and fairly instructed on all the issues presented."

Appellants Lenwell and Raddatz next contend that the court erred in refusing to give the following instruction:

"I instruct you that the ability of the defendants, or any of them, to respond in damages, is not to be considered by you, and that no insurance company is a party to this action and that whether there is or is not insurance has no bearing whatever upon the verdict which you may render in these cases. The amount of damages which you may allow to the plaintiffs, if any, does not depend upon the ability of the defendants to pay, is not punitive in any sense, and would be the same whether the defendants or any of them did or did not carry insurance."

As to this instruction said appellants state that Bennett's public utility permit, which was read to the jury by appellant Simplot's counsel, contained a provision that no vehicle should be operated by the carrier, Bennett, unless adequately covered by public liability and property damage insurance policy. Appellants state they do not claim that the introduction of the permit, or the

reading of it into evidence, was in and of itself prejudicial error, but they contend that the requested instruction was required in order to offset the fact, now known by the jury, that Bennett carried insurance; that they were entitled to have this instruction; and that in the absence of such an instruction this court has no basis for assuming that the damages awarded were not simply an attempt by the jury to estimate the extent of the coverage under the policy.

Respondents in reply argue that Raddatz and Lenwell, through their counsel, expressly acquiesced in the introduction of this evidence; that the jury knew that no insurance company was a party to the actions, and probably already assumed that Bennett was insured; that the permit did not state that Bennett actually was insured; that the reference was to Bennett and he is the only one who could have been prejudiced by it; and that the matter of insurance was introduced by Simplot, not by respondents. Respondents ask why their rights should be jeopardized by the conduct of Simplot's counsel, and they point to the danger of permitting co-defendants to defeat a recovery through the studied employment of such practices. Appellants Raddatz and Lenwell answer that regardless of who introduced the evidence of insurance, it had no place in the jury's deliberations.

[56] While we believe that the court might well have given the requested instruction we do not believe that upon the record in the instant case the failure to give it constitutes reversible error. The jury of course knew that no insurance company was a party to the action, and as stated by this court in *Moniz v. Bettencourt*, 24 Cal. App.2d 718, 76 P.2d 535, 539, it is very generally known to every person of understanding "that common carriers operating large trucks upon the highways are so protected [by insurance]." We do not believe that the failure to give the requested instruction affected the final outcome of the case or the amount awarded.

Appellants Lenwell and Raddatz contend also that respondents' counsel was guilty of prejudicial misconduct during the trial. They cite seven instances of alleged mis-

conduct on the part of respondents' counsel in referring to the death of the baby. These are as follows:

(1) In his opening statement to the jury counsel said: "She [referring to Violet Risley] was expecting her baby any day. At the time of this injury she received such a crushing blow that the unborn baby was apparently instantly killed, and was born a still birth shortly thereafter."

(2) In his opening argument to the jury, counsel stated: "There they are married, the husband had a fine position, hard working, had a little home, and the baby was going to be there most any day."

(3) Again, counsel said during his opening argument: "Then we come to the proposition of the pain and suffering in connection with the death of the little baby."

(4) And, during the same argument, counsel said: "All he [referring to Burdette Risley] asked was to have his little home, his wife, his daughter, and his job."

(5) In his final argument to the jury counsel stated: "There is no reason why, they were injured and their baby gone, in this county they should be given a few pennies, whereas if it had happened in San Francisco county there would be a difference."

(6) And again: "You have been asked to bring in a verdict and say to the world and those interested in the defense of these actions that so far as the people of the county are concerned their pain and suffering is cheap, their disfigurement is cheap, we chisel on the loss of wages, we chisel on the proposition of disability, we chisel on the pain and suffering caused by the expulsion of this little girl who would have been here today except for that, but if you do it in Placer County it is ten cents on the dollar."

(7) And, in closing, he said: "I leave with you Violet, without her daughter, and with her scars. I leave with you Burdette, in a completely con-

fused state, without his daughter, without a job, and without the training or education to get one for which he is equipped."

These statements are, of course, taken out of context. Appellants Raddatz and Lenwell contend that these references to the death of the child were calculated to, and did, arouse the passion and prejudice of the jury to such an extent that excessive damages were awarded as a result of this aroused feeling. Respondents reply that, with one exception, there were no objections made to any of the statements in question, and that, without exception, there were no assignments of misconduct or requests that the court admonish the jury concerning the statements. The exception refers to the objection made by Mr. Chamberlain, counsel for Bennett, Raddatz and Lenwell, to the third remark set out above. The record shows that the following occurred at that time:

"Mr. Robinson: * * * Then we come to the proposition of the pain and suffering in connection with the death of the little baby. That's something that, frankly, I can't help you very much on. It just is a matter that you are going to have to use your—

"Mr. Chamberlain: If the Court please, pardon the interruption, I will have to object to any remarks of counsel for any damage caused by pain and suffering due to the death of the child, as not within the issues, not a proper element to be considered by the jury in this action. Plaintiffs have their separate action for the death of the child; not a proper amount to be considered in arriving at a verdict of either Mr. or Mrs. Risley in this action.

"Mr. Robinson: I submit the pain and suffering caused by the injuries which caused the miscarriage are a proper item of damage in this action. That is what my remark was called to.

"Mr. Chamberlain: It was 'caused by the death of the child'.

"The Court: I think it should be confined to the pain and suffering; I do think that is a proper element. The

matter of the death of the child is not the issue in this case."

[57-60] We believe that said appellants' claim of misconduct comes too late. No objections, with the one exception noted above, or assignments of misconduct having been made at the trial, and the court not having been asked to instruct the jury to disregard the challenged remarks, it is too late to raise the point on appeal. *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal.2d 330, 340, 240 P.2d 282. Misconduct of an attorney is not a ground for reversal where the other party, even though objecting to the remarks, fails to request that the jury be charged to disregard them. *Houser v. Bozwell*, 80 Cal.App.2d 702, 707, 182 P.2d 314. As the effect of misconduct can ordinarily be removed by an instruction to the jury to disregard it, it is generally essential, in order that such act be reviewed on appeal, that it shall first be called to the attention of the trial court at the time, to give the trial court an opportunity to so act in the premises, if possible, as to correct the error and avoid a mistrial. *Cope v. Davison*, 30 Cal.2d 193, 202, 180 P.2d 873, 171 A.L.R. 667. A party should not be permitted to remain quiet and take the chance of a favorable verdict, and then, if the verdict is unfavorable, raise the objection on appeal. *Aydlott v. Key System Transit Co.*, 104 Cal.App. 621, 628, 286 P. 456.

[61, 62] It is apparent from the record that the instant case was hotly contested and that all parties were represented by able and experienced counsel. It is to be expected in such a case that counsel for plaintiffs will endeavor to impress his views upon the jury by vigorous and forceful argument. Counsel in summing up a case are given wide latitude and may indulge in all fair arguments in favor of their client's case. If in their overzeal in behalf of their client's case they go outside the record and the issues and make improper and unjustified statements, the vigilance of able counsel on the other side can usually be depended upon to make the proper objection and assignment of misconduct and to request the court to properly instruct the jury and to admonish counsel. While the language

of counsel for respondents here complained of was vigorous and forceful, we do not believe that it can be held to be outside of the bounds of legitimate argument, and the fact that no objection or assignment of misconduct was made at the time by the able and experienced counsel representing the various appellants strengthens us in this belief.

[63] Because of the numerous contentions of error urged in the more than 300 pages of appellants' briefs, we have made a careful study of the entire record in the instant case. With the exception of the contention as to the insufficiency of the evidence, the claimed errors relate to admission of evidence, instructions and asserted misconduct of counsel. As hereinbefore set forth we have concluded that the evidence is sufficient to support the judgment. As to the other contentions of error we do not believe that the claimed errors are sufficient to justify a reversal of the judgment.

Section 4½ of Article VI of our state constitution reads as follows:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

The instant case was tried by able and experienced counsel and was presided over by an able trial judge who after full hearing denied appellants' motions for a new trial. Taking the record as a whole, and bearing in mind the plain and meaningful words of the constitution hereinbefore quoted, we are satisfied that even if appellants are correct in some of their contentions of error, no miscarriage of justice has resulted.

The judgments and order are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

129 Cal.App.2d 565

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Alfred SALINAS and Etha Law, Defendants,
Alfred Salinas, Appellant.

Cr. 2547.

District Court of Appeal, Third District,
California.

Dec. 15, 1954.

Rehearing Denied Dec. 30, 1954.

Prosecution for illegal possession of narcotics. From judgment of conviction of the Superior Court, Yolo County, C. C. McDonald, J., a defendant appealed. The District Court of Appeal, Peek, J., held that evidence established the corpus delicti sufficiently to allow admissions by defendant to arresting officers to be admitted into evidence, that there was no abuse of discretion in trial court's refusal to grant defendant separate trial, that the trial court did not commit error in its examination of state's witness, and that although statement of state's witness could not be condoned, evidence was so preponderately for conviction that such error did not result in a miscarriage of justice.

Judgment affirmed.

1. Poisons ⚡9

In prosecution for possession of narcotics, where defendant admitted that he owned narcotics found in possession of other defendant, that he had purchased them, that he lived in house where the officers found narcotics, and that he intended to sell them, evidence was sufficient to sustain conviction. Health and Safety Code, § 11500.

2. Poisons ⚡9

In prosecution for possession of narcotics, evidence was sufficient to establish corpus delicti when there was shown to be illegal possession of narcotics by codefendant, and it was not necessary to prove defendant's connection with the narcotics in order to establish essential elements to prove the corpus delicti. Health and Safety Code, § 11500.

3. Criminal Law ⚡406(1)

In prosecution for illegal possession of narcotics, where the elements of the cor-

pus delicti were proved by substantial evidence, it was not error to admit admissions made by defendant to arresting officers. Health and Safety Code, § 11500.

4. Criminal Law ⚡622(1)

A defendant, jointly charged with another, is not entitled to a separate trial as a matter of right, and the question of severance rests entirely in the discretion of the trial court.

5. Criminal Law ⚡622(2), 1148

In prosecution for illegal possession of narcotics, refusing to grant defendant, jointly charged with another, separate trial, was not an abuse of discretion and ruling would not be disturbed on appeal. Health and Safety Code, § 11500.

6. Criminal Law ⚡698(1)

In prosecution for illegal possession of narcotics, where defendant did not object to court's examination of state's witness, and failed to show any prejudice by this examination, such examination was not improper. Health and Safety Code, § 11500.

7. Criminal Law ⚡660

In prosecution for illegal possession of narcotics, where defendant did not object to comment by court, and failed to show any prejudice by such comment, there was no error in court's comment. Health and Safety Code, § 11500.

8. Criminal Law ⚡1186(4)

Witnesses ⚡249

In prosecution for illegal possession of narcotics, although state's witness made statements designed to convey to jury witness' acquaintance with defendant as a narcotic violator, after court warned him not to do so, making of statements was error, but such error did not result in miscarriage of justice, where evidence in case so preponderately supported conviction. Const. art. 6, § 4½; Health and Safety Code, § 11500.

9. Criminal Law ⚡1173(2)

In prosecution for illegal possession of narcotics, it was not reversible error for trial court to fail to instruct that it was necessary to establish corpus delicti by evidence independent of the purported admissions and statements of the defendant,

where corpus delicti was fully established independent of any admission by defendant. Health and Safety Code, § 11500.

10. Criminal Law — 1168(2)

In prosecution for illegal possession of narcotics, where state's witness, who had previously testified, discussed the case with another state's witness, who had not yet been called, but where defendants did not move for mistrial because of such conversation, and such conversation did not relate to case at trial, no prejudicial injury resulted from such conversation.

George I. Lewis, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and Frederick G. Girard, Deputies Atty. Gen., for respondent.

PEEK, Justice.

This is an appeal by defendant, Alfred Salinas, from a judgment of conviction of a violation of section 11500 of the Health and Safety Code, and from the order denying his motion for a new trial.

The record discloses that the defendant was apprehended while driving an automobile in the City of Sacramento and was then taken to a house in Broderick, Yolo County. While one inspector remained with the defendant in the car, two other officers entered the front door of the residence. The key by which they gained admittance was attached to a key ring on which was the ignition key to the car operated by the defendant. Inside the residence they found the defendant, Etha Law, who acknowledged that she rented a room to defendant Salinas. During their search of the premises one of the inspectors noticed an object which contained white powder protruding from the brassiere being worn by Law. He also noticed a brown capsule on the floor near her feet. Upon inquiry concerning the nature of the contents of the two containers, she stated she had received the white powder from a doctor in Sacramento; that it was originally codeine tablets, but that she had ground the same into powder form to make it easier to swallow since she could not swallow tablets.

She stated she did not know how the brown container got on the floor. Salinas was then brought into the house. During the time he remained in the car with the inspectors, defendant informed them that the car belonged to a Mr. Law who had been unable to keep up the payments; that he, the defendant, was presently making the payments, and was to keep possession until Mr. Law could repay him. Defendant further told the officers that he lived at the residence only occasionally. He also stated that defendant Law had nothing to do with the matter; that the narcotics were his; that she knew nothing about it and that he had obtained the same earlier that morning from a Mexican; that he had paid nothing therefor, but was to pay at a later date when he had disposed of it. He further stated to the officers that the brown substance was heroin and that the white substance was a powder used for cutting heroin. Subsequently he made similar statements while being interrogated at the office of the State Bureau of Narcotics in Sacramento. The inspectors testified to finding letters addressed to defendant in a dresser drawer in the house and also a quantity of men's clothing. One officer further testified that when they left the house for the Sacramento office, defendant took some of the clothing with him and told the officers that the clothes were his. A chemist testifying on behalf of the People stated that the white powder was cocaine and that the brown capsule contained heroin.

The defendant Law, while testifying in her own behalf, denied generally the testimony given by the officers. In particular she testified that while the officers were searching the room she noticed the two containers on the floor; that she had never seen them before; that she picked them up and was about to return to where she was sitting when one of the officers noticed the same in her hand, came over, and took them from her. She also testified that she rented a room to one Gabino Salinas, 87 years of age; that the telephone was listed under his name; that he paid her \$100 a month for room and board; that the clothes found there were his; and that the defendant Salinas did not live at that address.

She denied having made any statements to the officers and also denied hearing any statements made by Salinas to them. A friend of hers testified that she knew Gabino Salinas and that he lived at that address. Defendant Salinas did not testify.

From our examination of the record it appears wholly unnecessary to discuss in detail each of the 14 separate contentions made by defendant since many are but restatements of similar contentions, and some are mere observations on various aspects of the case.

[1] As usual the first contention is that the evidence is insufficient. It is undisputed that narcotics were found in the house and on the person of the defendant Law; Salinas admitted to the officers that the narcotics were his—that he had purchased them from a Mexican and that Law was innocent; admission to the house was gained by using a key then in the possession of defendant; letters addressed to him were found in the house; he had clothing there; although it was admitted to officers by both defendants that Salinas did live there, the defendant Law, when testifying in her own behalf, denied most of the evidence introduced by the State. Such evidence was amply sufficient. *People v. Bigelow*, 104 Cal.App.2d 380, 231 P.2d 881.

[2, 3] Appellant's contention to the contrary, there can be no question but that the evidence established the corpus delicti when there was shown to be illegal possession of a prohibited narcotic. It is not necessary to prove a defendant's connection with the narcotic in order to establish the essential elements to prove the corpus delicti. *People v. Cuellar*, 110 Cal.App.2d 273, 276, 242 P.2d 694; *People v. Chan Chaun*, 41 Cal. App.2d 586, 589, 107 P.2d 455. Having proved the elements by substantial evidence, it cannot be said that the admissions made by the defendant were improperly admitted.

[4, 5] Appellant next contends that the court erred in denying his motion for a separate trial. A defendant, jointly charged with another "is not entitled to a separate trial as a matter of right, and the question of severance rests entirely in the dis-

cretion of the trial court.'" *People v. Burton*, 91 Cal.App.2d 695, 715, 205 P.2d 1065, 1077; *People v. King*, 30 Cal.App.2d 185, 85 P.2d 928. In the absence of any showing that the trial court abused its discretion in this regard, its ruling will not be disturbed on appeal.

[6, 7] It is next urged that the trial court committed error in its examination of a witness for the prosecution. We find nothing improper in the attacked action of the court. Counsel for defendant has failed to show any prejudice other than his bald statement that such was the case. This is also true of his further objection to a comment of the court which is equally without merit. Furthermore, in neither instance did counsel object to the remarks or assign the same as being prejudicial.

[8] It is next contended that the court should have granted defendant's motion for a mistrial because of the repeated voluntary statements of a highly prejudicial nature made by a witness for the State after he was warned by the court not to do so. The statements in question obviously were designed to convey to the jury the witness' acquaintance with the defendant as a narcotics violator. Such conduct cannot be condoned. The comments were not made through ignorance of court procedure. By virtue of his long experience in law enforcement, the witness was at least as well aware of this particular rule of evidence as was counsel. If the evidence in this case did not so preponderantly support the conviction, the comments so attacked might well warrant a reversal of the judgment. However, in view of the provisions of section 4½ of Article VI of the Constitution, we cannot say that such error resulted in a "miscarriage of justice."

[9] Defendant's next contention is that the court failed in not giving, of its own motion, an instruction advising the jury that it was necessary to establish the corpus delicti by evidence independent of the purported admissions and statements of the defendant. While ordinarily a court should so instruct, a failure to do so is not reversible error where, as here, the corpus delicti was fully established independent of any

admission on the part of defendant. *People v. Clark*, 117 Cal.App.2d 134, 141, 255 P.2d 79.

[10] Defendant next contends that prosecution witnesses, who had previously testified, discussed the case with other prosecution witnesses who had not yet been called, and therefore the court should have granted a mistrial. An examination of the record shows that at no stage of the proceeding did counsel for defendant mention to the court that a mistrial should be granted because of the alleged improper conversations. Secondly, the record shows that these conversations did not relate to the case at trial, but were on matters wholly unrelated to the same. Obviously, therefore, it cannot be said that prejudicial injury resulted therefrom.

Appellant's final contention is that the court erred in admitting certain rebuttal testimony concerning a second automobile. We find no merit whatsoever in such contention.

The judgment and order are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



130 Cal.App.2d 47

Charles BITTICK, a minor, by Jane Cox, his
Guardian Ad Litem, Plaintiff and
Respondent,

v.

Joseph R. BROWN, R. T. Dealy, Morris
Plan of California, a corporation,
Defendants and Appellants.

Civ. 20277.

District Court of Appeal, Second District,
Division 3, California.
Dec. 30, 1954.

Action for personal injuries resulting from intersection collision between southbound automobile and eastbound automobile. The Superior Court, Los Angeles

County, Thurmond Clarke, J., entered judgment for driver of southbound automobile and other driver appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained finding that eastbound driver was negligent in operation of his automobile.

Judgment affirmed.

1. Appeal and Error ⇨989

In reviewing evidence, it is not a function of reviewing court to consider relative weight of conflicting evidence, but its function is to determine legal sufficiency of evidence to support findings.

2. Appeal and Error ⇨989

In reviewing evidence, reviewing court's power is limited to determination whether substantial evidence supports findings.

3. Automobiles ⇨244(11)

In action for personal injuries sustained by driver of southbound automobile in intersection collision between southbound and eastbound automobiles whose drivers claimed to have entered intersection with green light, evidence sustained finding that eastbound driver was negligent in operation of his automobile.

4. Damages ⇨132(1)

Award of \$1,500 damages to automobile driver who as result of collision had headaches, had to have 15 stitches taken in ear and had inch long scars on chin and hand and scar on ear was not excessive.

Thomas G. Neusom, Los Angeles, for appellants.

Charles E. Taintor, Scott Weller, Los Angeles, and Joseph L. Hebbert, Burbank, for respondent.

PARKER WOOD, Justice.

Action for damages for personal injuries allegedly resulting from an automobile collision. In a nonjury trial, judgment was for plaintiff for \$1,500. Defendant appeals from the judgment.

Appellant contends that the evidence was insufficient to support the judgment.

Plaintiff was not present at the trial, but his case was presented by his deposition. Plaintiff, 18 years of age, testified that he was driving a Ford automobile south on Normandie Avenue in Los Angeles, about 9 p. m., when the weather was clear. As he drove toward the intersection of Normandie Avenue and West Adams Boulevard at the rate of approximately 25 miles an hour, and when he was about 200 feet from the intersection, the signal light at the intersection (for traffic on Normandie) changed from red to green. As he approached the intersection he slowed down to 20 miles an hour, he looked both ways before he went into the intersection—looked to his left and saw two cars that were stopped along the safety zone on Adams, and then he looked to his right and did not see any cars approaching from the right on Adams. Then, while the light was still green, he proceeded “through [into]” the intersection and looked to his right and saw a car coming toward him, which car was about 50 feet away and was traveling between 40 and 60 miles an hour. That car hit the right quarter panel of plaintiff’s car. Then plaintiff’s car spun around twice in a clockwise motion, went upon the sidewalk at the southeast corner of the intersection, crashed into the side of a building, and came to rest partly upon the sidewalk and partly inside the building.

Plaintiff also testified that after his car came to rest his head was sore and bleeding, and he had a lot of pain. He was taken to the General Hospital where his ear was sewed with fifteen stitches. He stayed at the hospital three days, and thereafter he returned to the hospital four times for treatments. As a result of the accident he has an inch-long scar on his chin, an inch-long scar on his head, and a scar on his ear. Since the accident he has had headaches which have continued to the time his deposition was taken.

Mr. Burns, called as a witness by defendant, testified that on the night of the accident he was selling papers at the northwest corner of said intersection. He did not see defendant’s car go into the intersection. When plaintiff was about “half-way down Normandie” the traffic light

started to change, and when plaintiff approached the intersection the signal was red, he passed the red signal, and he proceeded on through and the collision occurred.

Defendant testified that on the night of the accident he was driving a Cadillac automobile easterly on West Adams in the inside lane (for eastbound traffic). When he was about 100 yards from Normandie the traffic signals at the intersection were red (for traffic on West Adams), and he was traveling about 35 miles an hour. When he was about 100 feet from Normandie the signals turned green, and he was still traveling about 35 miles an hour and he proceeded on the highway. He saw plaintiff’s automobile, and he put his brakes on and tried to avoid plaintiff. Plaintiff’s automobile struck the left front of defendant’s automobile, and turned defendant’s automobile around.

The court found that defendant operated his automobile in such a negligent manner that it collided with plaintiff’s automobile; and that as a direct and proximate result of the negligent conduct of defendant, as aforesaid, plaintiff suffered bodily injuries to his damage in the amount of \$1,500.

Appellant’s attorney says: “Manifestly there is a conflict in the evidence, but the preponderance of the evidence of negligence was presented by the Appellant refuting any negligence on his part and affirmatively establishing negligence on the part of the Respondent.” He also says that plaintiff had the burden of proving damages and he “did not by a preponderance of the evidence establish injury beyond uncertainty and conjecture.”

[1-4] In reviewing evidence on appeal, it is not a function of the reviewing court to consider the relative weight of conflicting evidence but its function is to determine the legal sufficiency of the evidence to support the findings, see cases cited in 6 West’s Cal.Digest, Appeal and Error, p. 616, ¶989d.; and the reviewing court’s power is limited to a determination whether substantial evidence supports the findings. See cases cited in 6 West’s Cal.Digest, Appeal and Error, pp. 611, 612, 613, ¶989c. The

questions of negligence and damage were questions of fact for the determination of the trial court. It is clear that there was a substantial conflict in the evidence on the question of negligence, and that there was no evidence in conflict with plaintiff's evidence regarding the injuries suffered by him. The trial court resolved such conflict regarding negligence in favor of plaintiff, and it awarded damages based upon the uncontradicted evidence regarding plaintiff's injuries. The evidence amply supports the findings. The appeal is frivolous.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



129 Cal.App.2d 775

Stephen LOMBARDI, Plaintiff and
Appellant,
v.

Loretta TRANCHINA, as Executrix of the
Will of Candida Lombardi, Deceased,
Defendant and Respondent.

No. 16159.

District Court of Appeal, First District,
Division 1, California.
Dec. 27, 1954.

Son brought action against executrix of will of his deceased mother on a claim for money, which son had expended in paying off balance of indebtedness of father and mother. The Superior Court of the State of California, in and for the County of San Mateo, Gregory P. Maushart, J., entered judgment adverse to son, and son appealed. The District Court of Appeal, Fred B. Wood, J., held that implied obligation of mother to repay son was an obligation which became immediately due and payable, and that two year statute of limitations began running at once.

Judgment affirmed.

1. Limitation of Actions ⇨143(1)

Statement of mother that she would pay son when she was able to do so for money previously expended by son in paying off indebtedness of father and mother was not sufficient to toll statute of limitations or start it running anew with respect to son's claim against estate of mother, since acknowledgment or promise by mother was not contained in some writing, signed by the party to be charged thereby, as required by statute. Code Civ.Proc. § 339, subd. 1; § 360.

2. Limitation of Actions ⇨56(1)

Where son paid balance of indebtedness owing by father and mother, mother's implied obligation to repay son was an obligation which became immediately due and payable, and two-year limitation statute began running at once. Code Civ.Proc. § 339, subd. 1.

Ferrari & Ferrari, San Francisco, for appellant.

James L. Minnis, Jr., San Francisco, Cosgriff, Carr, McClellan & Ingersoll, Burlingame, for respondent.

FRED B. WOOD, Justice.

In this action against the executrix of the will of Candida Lombardi upon a claim for \$2,800, the trial court found that "although the plaintiff did advance the sum of \$2,800 to his father, Sebastian Lombardi, to pay off an obligation upon which his mother, Candida Lombardi, was jointly liable, the said decedent Candida Lombardi never agreed to repay said loan out of her own funds and property and plaintiff's right to recover or any obligation he may have had against his mother is now barred by the statute of limitations," specifying sections 339(1) and 360 of the Code of Civil Procedure. The evidence supports these findings, contrary to plaintiff-appellant's contentions.

Two parcels of land in San Joaquin County, known to the parties as the Tracy ranch, stood in the name of Sebastian Lombardi as sole owner. In 1933 he borrowed \$5,700, secured by deeds of trust on

these two parcels. His wife Candida signed the notes with him and joined in the execution of the deeds of trust.

By September, 1937, the unpaid balance of this debt amounted to \$2,800. Plaintiff went with his father to the office of the obligee, paid the amount due, and received and retained in his own possession the cancelled notes and the deeds of reconveyance. Candida was not present upon that occasion and there is no evidence that she was at the time aware of this transaction. This supports the finding that she made no express promise to repay plaintiff. At most it would support (defendant concedes it does support) an implied promise, an obligation imposed by law, to repay. Subsequent events bear out this view of the situation.

From the time plaintiff made this \$2,800 advance until about April, 1941, checks for gas royalties accruing from time to time in respect to the Tracy ranch, were delivered or mailed to plaintiff. Until March 21, 1939, plaintiff cashed these checks and kept the proceeds, amounting to \$982.69, which he treats as a credit in part payment of his \$2,800 claim. Sebastian died early in 1941. In April, 1941, Candida, executrix of Sebastian's will, caused the mailing of the gas checks to plaintiff to be discontinued. Upon that occasion, Candida told her attorney that plaintiff had been paid long ago; hearsay evidence, but it went in without objection. The fact that plaintiff did not cash the gas checks which he received after March, 1939, lends support to Candida's statement. In 1947, as the result of a title search incident to a proposed sale of the Tracy ranch, Candida's attorney discovered the lack of a reconveyance of record. Accordingly, he obtained deeds of reconveyance and had them recorded. He had no knowledge that similar deeds had been previously issued nor is there evidence that Candida knew of the deeds first issued or that plaintiff had them. Later, Candida sold the ranch. Defendant testified, without objection that her mother Candida told her there was nothing due Steve. Neither in Sebastian's will nor in Candida's was there any reference to this claim. Also, plaintiff did not present this claim during the probate of his father's estate. Indeed,

during that probate proceeding he bought 15 shares of bank stock at \$100 per share, paying the executrix, Candida, cash in full without any offset or credit against the claim here involved. Neither Candida's attorney nor her executrix was aware of plaintiff's claim until asserted by him after Candida's death. She died in November, 1951.

[1] Thus far there is no evidence of an express promise by Candida to repay; some evidence that plaintiff has been fully repaid, and no evidence of any fact that would toll the statute of limitations. Plaintiff attaches some significance to testimony of his son, Stephen, and his brother, August. The son said that in 1948 or 1949 he heard Candida tell plaintiff "not to worry about the money that was due my father, as soon as she had a few debts straightened out, she would straighten it out with him." The brother testified concerning a conversation between plaintiff and Candida a year or so before the latter's death: "Well, Steve claimed that he had the money coming. I don't know the exact amount, but my mother said that she would pay him when she was able to." That was not sufficient to toll the statute or to start it running anew, because the "acknowledgment or promise" was not "contained in some writing, signed by the party to be charged thereby." Code Civ.Proc., § 360. Plaintiff would construe these conversations as evidence of a promise made in the beginning (1937) "to pay when able." But the trier of the facts did not so view this testimony. Nor was he required to do so, especially in the absence of evidence that Candida at the time of plaintiff's payment made any promise of any kind in respect to its repayment.

[2] The obligation to repay which the law imposed upon Candida under the circumstances described was one which became immediately due and payable. (See cases collected in 16 Cal.Jur. 523, Limitation of Actions, § 122.)

That started the two-year statute running in September, 1937, this being an obligation "not founded upon an instrument of writing." Code Civ.Proc., § 339, subd. 1.

It is unnecessary to consider additional grounds urged by defendant in support of the judgment, which for the reasons indicated, must be affirmed.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.



129 Cal.App.2d 778

Stephen LOMBARDI and August Lombardi,
Plaintiffs and Appellants,

v.

Loretta TRANCHINA, Individually and as
Executrix of the Will of Candida Lombardi,
Deceased, Rose Tranchina and Evelyn McCracken, Defendants and Respondents.

No. 16182.

District Court of Appeal, First District,
Division 1, California.

Dec. 27, 1954.

Sons brought action against executrix of will of deceased mother and others to establish a constructive trust in realty, which sons had conveyed to the mother. The Superior Court of the State of California in and for the County of San Mateo, Edmund Scott, J., entered judgment adverse to sons, and they appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence was insufficient to establish a fiduciary relationship between sons and mother, as a basis for a constructive trust in favor of sons.

Judgment affirmed.

1. Evidence ⇨594

Trier of fact is not required to accept as true the testimony of a witness, even though it is uncontradicted.

2. Appeal and Error ⇨1012(1)

When trial court has declared a deed to be just what it purports to be, an appellant cannot expect a reversal unless evi-

dence is almost overwhelmingly the other way.

3. Appeal and Error ⇨1011(1)

In a case involving question whether deed is what it purports to be, determination of trial court in favor of either party on conflicting or contradictory evidence is not open to review on appeal.

4. Evidence ⇨265(18)

Testimony concerning oral declarations allegedly made by a decedent against interest, unless corroborated by satisfactory evidence, is the weakest of testimony that can be produced.

5. Trusts ⇨110

In action by sons against executrix of will of deceased mother and others, evidence was insufficient to establish a fiduciary relationship between sons and mother, as basis for a constructive trust in favor of sons in realty conveyed by them to her.

Ferrari & Ferrari, San Francisco, for appellant.

James L. Minnis, Jr., San Francisco, Cosgriff, Carr, McClellan & Ingersoll, Burlingame, for respondent.

FRED B. WOOD, Justice.

Question: Does the evidence support the finding that Candida Lombardi (mother of the plaintiffs) owned the real property in suit at the time of her death and that neither Candida nor the defendants (the executrix of her will and the devisees of the property) at any time held the property in trust for the plaintiffs?

Plaintiffs Stephen and August Lombardi conveyed this property to Candida in August, 1943. In support of their claim that Candida, in consideration of the transfer, orally agreed to hold it in trust for them, Stephen testified: The property was purchased in 1924 with money he and his brother August had saved, but was taken in the name of the mother because August was not yet of age and could not borrow money; that his father, Sebastian, paid off the purchase money loan with rentals received from the property; by 1933 the parents

were in financial difficulties owing to the depression, so, the property belonging to him and his brother, he took it up with them, telling them he wanted it because "it belonged to us," and the parents conveyed it by deed to him and his brother, and "it stayed in our name for about 10 years." After the father's death (in January, 1941) the mother told the boys she wanted the property back in her name. It dragged along for quite a while and then she started putting "pressure" on them. Stephen said to her, "the property belongs to us" and she replied, "well, turn it over to me, and then when the proper time comes, I will see that you get what you have coming." She was going to use the income as long as she had the property and then she was going to turn the property back to the boys later on. And so they deeded it to her. Stephen's is the only testimony to this conversation, for there was no third person present and Candida is no longer living. After they deeded the property to Candida, Stephen saw her from time to time but had no further discussions in regard to the agreement he testified to. They never discussed it again. He frankly conceded that from the acquisition of the property in 1924 Sebastian managed the property, collecting the rents, paying taxes and making improvements, until his death in 1941, and that thereafter until her death in 1951 Candida exercised like sole dominion over it.

Plaintiffs claim that this testimony of Stephen's is uncontradicted, can not be disregarded, and, therefore, requires a reversal of the judgment. We do not so view it.

[1-4] It is apparent that the trial judge, whose function it was to evaluate the testimony, disbelieved Stephen's account of the transaction. As trier of the fact, he was not required to accept as true the testimony of a witness even if it were uncontradicted. *Jordan v. O'Connor*, 99 Cal.App.2d 632, 641, 222 P.2d 322; *Gammill v. Nunes*, 104 Cal.App.2d 185, 189, 231 P.2d 86; *Spaulding v. Jones*, 117 Cal.App.2d 541, 548, 256 P.2d 637. When a trial court has declared a deed "** * * to be just what it purports to be, an appellant * * **"

*can not expect a reversal unless the evidence is almost overwhelmingly the other way * * *.*" *Spaulding v. Jones*, supra, 117 Cal.App.2d 541, 545, 256 P.2d 637, 640. In such a case the determination of the trial court "in favor of either party upon conflicting or contradictory evidence is not open to review on appeal." *Beeler v. American Trust Co.*, 24 Cal.2d 1, 7, 147 P.2d 583, 587. We must remember also that "[t]estimony concerning oral declarations alleged to have been made by a decedent against interest, unless corroborated by satisfactory evidence, is the weakest of testimony that can be produced." *Gammill v. Nunes*, supra, 104 Cal.App.2d 185, 189, 231 P.2d 86, 88.

Evidence tending to show the creation of a trust is not as clear and convincing as it appears to the plaintiffs.

The youthfulness of the plaintiffs in 1924 (Stephen was just 21 and August not yet 21) is a circumstance suggestive of doubt whether they had accumulated funds sufficient to be the real purchasers of the property. Another explanation than August's minority is potentially available as the reason for taking the property in Candida's sole name. A bank loan of \$1,300, secured by mortgage, was taken at the time of purchase. It happened that Sebastian was a director of the lending bank and the bank had a policy of not lending to its officers. Then, in 1928, Candida effected another loan of \$3,000 from the same bank, using the proceeds to retire the remainder of the first loan and pay off another loan, depositing the balance (\$1,475) in Sebastian's checking account at the bank. That is consonant with the idea that Sebastian and Candida, not the boys, were the purchasers, taking title in Candida's name the more conveniently to obtain a purchase money loan.

When Candida and Sebastian conveyed to the boys it may have been for their own protection, not for the purpose of vesting legal title in the real owners. The cashier of their bank testified that in 1933 and 1934 Sebastian was having a hard time getting his obligations together and was being pressed; he was land poor; his personal property and some of his land was encum-

hered. Some of this was hearsay testimony but plaintiffs interposed no objection to it.

These circumstances, coupled with the continuous exercise of dominion by Sebastian and Candida, tend to cast doubt upon the claim that this property belonged to the boys from the beginning.

Stephen's testimony was not entirely free from inconsistencies. Asked upon direct examination if his mother told him (in 1943) why she needed the property, Stephen said: She had been receiving the rent and she was going to use the income as long as she had the property, was going to use the income for the purpose of having it for living expenses. Later, upon cross-examination, asked what reason Candida had for wanting this property in her name if she thought it belonged to Stephen and August, Stephen answered: "That I can't say. She had the income from the property right along. Q. She didn't give any reason to you at all? A. No, she didn't."

There is evidence of a controversy between the boys on the one hand and their mother and sisters on the other during the probate of the father's estate. See opinion by Mr. Justice Bray of this court in *In re Estate of Lombardi*, 128 Cal.App.2d 606, 276 P.2d 67, tried at the same time and upon the same record as the instant case. Yet, when asked "did you ever have any disagreement with your mother with regard to the handling of the properties for her, or any other subject?" Stephen answered "No sir. I am 50 years old. I have never had a word with my mother." Then the following ensued: "The Court: Not even when these properties that belonged to you were put in the estate of your father? The Witness:

I never had no words with her, no. I just told her that it didn't belong in the estate. It belonged to us. The Court: What did she say? The Witness: I never had no harsh words with her. The Court: What did she say when you told her it didn't belong to the estate? The Witness: She let it go that way and we relinquished our 12th interest. She turned over the 40 acres voluntarily herself. We didn't ask for it."

[5] The parties have discussed at some length the question whether the evidence demonstrates the existence of a fiduciary relationship between the plaintiff and Candida, as a basis for a constructive trust in favor of plaintiffs in the property conveyed to her in 1943. Our reading of the record convinces us that there is evidence to support an implied finding that there was no such relationship at the time in question. However, we do not hold that such a relationship is a prerequisite to the creation of such a trust. In *Steinberger v. Steinberger*, 60 Cal.App.2d 116, 119-121, 140 P.2d 31, this court, in an opinion by Presiding Justice Peters, reviewed the California authorities and concluded that in this state "a constructive trust arises and will be enforced to compel restitution upon violation of the oral promise" to reconvey, regardless of the existence of a confidential relationship. 60 Cal.App.2d at page 120, 140 P.2d at page 33. See also *Orella v. Johnson*, 38 Cal.2d 693, 697-698, 242 P.2d 5.* Here the evidence supports the finding that Candida made no express promise to reconvey.

The portion of the judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

* *Mazzera v. Wolf*, 30 Cal.2d 531, 183 P.2d 649, cited by defendant, is not applicable. It involved an oral agreement to join in the purchase of land but was not a case in which the purchase price

was paid by one person, in whole or in part, and the title was taken in the name of another. The defendant, who took title, paid the entire purchase price; plaintiff paid none of it.

129 Cal.App.2d 743

Jean LYNE, Plaintiff and Appellant.

v.

Donald Bowton BONNER, Robert James Bonner, Elizabeth Jane Bonner Edmunds, Defendants and Respondents.

Civ. 20521.

District Court of Appeal, Second District,
Division 2, California.

Dec. 23, 1954.

Action to compel three of four cotenants to sell interest in land in accordance with broker's agreement. The Superior Court, Los Angeles County, James G. Whyte, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that brokerage agreement which provided for sale of tract of real estate at a stated price but which was signed by only three of the four cotenants was not an authorization to procure a purchaser for a three-fourths undivided interest in the real estate at a proportionately reduced price.

Judgment affirmed.

1. Specific Performance ⇨114(2)

Complaint to compel vendors, who had executed contract with brokers, to sell real estate, was fatally defective for failure to allege that the brokerage agreement, which contained provision for extension of time, had in fact been so extended as to be effective at date of plaintiff's offer.

2. Brokers ⇨94

Brokerage agreement which provided for sale of tract of real estate at a stated price but which was signed by only three of the four cotenants was not an authoriza-

tion to procure a purchaser for a three-fourths undivided interest in the real estate at a proportionately reduced price. Civ.Code, § 1624, subd. 5.

3. Brokers ⇨94

In absence of a power in writing signed by the owners, brokers had no authority to execute a contract for sale of land as attorneys in fact.

4. Brokers ⇨92

Power to bind owner of real estate to a contract, executed by a broker on behalf of owner, must be so clear, distinct and certain as to leave no room for doubting that such is its purpose. Civ.Code, § 1624, subd. 4.

William R. Walsh, Los Angeles, for appellant.

Hampton Hutton, Los Angeles, for respondents.

MOORE, Presiding Justice.

Appeal from a judgment of dismissal after general demurrer to the complaint had been sustained and plaintiff had declined to amend.

The complaint alleged that on September 8, 1953, defendants as tenants in common owned an undivided three-fourths interest in 800 acres of land in Los Angeles County; that defendants then contracted in writing with Messrs. Austin and Ream, real-estate brokers, to sell within 90 days their interests in such land for \$76,000 net on terms stated in the contract and appearing in the margin hereof¹; that on Octo-

1. "Exclusive Agency Agreement

"In consideration of the mutual promises herein contained, we, the undersigned owners, hereinafter designated the Sellers, do hereby jointly and severally grant to E. R. Austin and F. Wesley Ream, real estate brokers, the exclusive right to sell all that property hereinafter described for a period of Ninety (90) days from date hereof for the sum of \$76,000.00 net to Sellers (Seventy-Six Thousand

Dollars) exclusive of commission, payable one quarter thereof, to-wit: Nineteen Thousand Dollars (\$19,000.00) to be paid on close of escrow to be opened at the Title Insurance and Trust Company, 433 South Spring Street, Los Angeles 13, California. The balance to be secured by a Note and Trust Deed payable thereafter in three (3) equal annual installments of Nineteen Thousand Dollars (\$19,000.00) each. The entire balance

ber 22, 1953, plaintiff executed a writing with Mr. Ream, one of such brokers, whereby plaintiff agreed to buy the three-fourths interest of defendants in the 800 acres and paid the sum of \$500; that on October 27, 1953, she opened an escrow with a title company, deposited \$500 and agreed to deposit in cash \$13,750 and her promissory note for \$42,750 payable to defendants, to be secured by a trust deed on the realty described in the contract of September 8, 1953; that defendants have at all times since October 27, 1953, refused to deposit their deeds in the escrow or otherwise convey their interests in the land; that on November 12, 1953, plaintiff tendered to defendants the sum of 13,750 and offered to deposit in the escrow her promissory note in the sum of \$42,750 payable to defendants and to execute a trust deed on the same 800 acres, securing such note and to do all things required of her by "said agreement of sale"; that she has performed all the conditions of such agreement required of plaintiff and has been and is ready, willing and able to fulfill the agree-

ment and to cause the balance of the purchase money to be paid; that the 800 acres is located in the city of Los Angeles and is described in the complaint.

[1] A second count follows which emphasizes that while the contract of September 8 allowed the brokers 90 days to make a sale, it alleges that the contract permitted the sellers or the brokers to extend the time for an additional thirty days; *but the pleading does not allege an agreement of extension.* The absence of such an allegation is fatal. *Waterman v. Banks*, 144 U.S. 394, 402, 12 S.Ct. 646, 36 L.Ed. 479. She complains that by her offer of January 1, 1954, by opening an escrow on January 4 with \$500, by agreeing to deposit \$18,500 and to give a promissory note for \$57,000, she met the terms of the "agreement" and bound the seller. The 90-day period expired December 7, 1953. An agreement for sale on January 1 was 24 days late unless the option for extension of 30 days had been exercised. Mr. Ream's writing on January 1 does not prove an ex-

of the purchase price to be paid on or before three (3) years after close of escrow.

"After the first payment of Nineteen Thousand Dollars (\$19,000.00) has been paid to Sellers through said escrow, Sellers agree to release to Buyers, at Buyers' option, any portion or part of the property affected herein, said portion or part to be designated by Buyers and said land so released to be free of the security of the balance of the purchase price, provided access to the unreleased portions of said property is maintained by roads, easements or reasonable reservations, and Buyers agree to pay to Sellers and Sellers agree to accept One Thousand Dollars (\$1,000.00) per acre for any land so released. Said payments of \$1,000.00 per acre paid for said released land to apply on the total purchase price of the property affected herein until the full purchase price of \$76,000.00 has been paid to Sellers.

"Interest on all unpaid balances due Sellers on the purchase price shall be at the rate of six per cent (6%).

"Evidence of title to be in the form of a policy of title insurance issued by the Title Insurance and Trust Company and to

be furnished and paid for by Sellers, and Sellers agree to pay Sellers' escrow fees.

"The description of the property affected herein is as follows:

"All those lands lying partly in Sections 20-30-31 and 32, Township 2 North, Range 13 West, consisting of approximately Eight Hundred (800) Acres more or less and known as the Bonner Ranch or Bon-Air Hills. Correct legal description to be furnished in escrow.

"Either party hereto (sellers or brokers) may extend the time provided herein for a period of THIRTY (30) days after the time set forth in this agreement.

"Witness Our Hands This 8th day of September 1953

"/s/ Donald Bowton Bonner

"/s/ Robert James Bonner

"/s/ Elizabeth Jane Bonner
Edmunds

"Mary Evelyn Lewis
Sellers

"[Wesley Ream's acknowledgment that the signatures are true]

"/s/ E. R. Austin (J. W.)

"/s/ F. Wesley Ream"

[Exhibit A]

tension of time was even discussed between broker and seller.

[2-4] Moreover, there is no provision in the "agreement" to sell an undivided three-fourths of the 800 acres. That idea may have sprung to appellant's reasoning from the fact that the fourth owner of the 800 acres did not sign the "agreement." It was prepared for all four owners to sign. It was never signed by Mary Evelyn Lewis, one of the four. The complaint makes no attempt to plead the nonsigning owner. By no system of legal logic can it be concluded that an authorization to procure a purchaser of land for \$76,000 can be construed to mean that three fourths of the land may be sold for \$57,000. The "agreement" was not executed and could not become obligatory upon any of the owners. Therefore, the complaint fails to allege a cause of action. *Anthony Macaroni Co. v. Nunziato*, 5 Cal.App.2d 588, 590, 43 P. 2d 315; Civ.Code, sec. 1624(4). The agency agreement merely authorized the brokers to produce a purchaser with \$76,000. A sale for a lesser sum was without authority. Civ.Code, sec. 1624(5). The brokers had no authority to execute a contract for sale of the land as attorneys in fact for the sellers. Such a power must be in writing signed by the owners. *Stemler v. Bass*, 153 Cal. 791, 795, 96 P. 809; Civ. Code, sec. 1624(4). The power to bind an owner to a contract, executed by a broker on behalf of the owner, must be so "clear, distinct and certain, in its meaning to that end as to leave no room for doubting that such is its purpose." *Church v. Collins*, 18 Cal.App. 745, 748, 124 P. 552, 553; see *Salter v. Ives*, 171 Cal. 790, 792, 155 P. 84.

Plaintiff's argument that the case of *Duffy v. Hobson*, 40 Cal. 240, is outmoded by reason of economic changes since 1870 is interesting and informative. But the law announced then is unchanged. It is fortified by section 1624(4), *supra*, which requires an agency for the conveyance of real property to be created by a writing over the signature of the owner.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

BOARD OF EDUCATION OF CITY OF LOS ANGELES, Plaintiff and Respondent,

v.

Frances Robman EISENBERG, Defendant and Appellant.

Civ. 20190.

District Court of Appeal, Second District,
Division 2, California.

Dec. 23, 1954.

Hearing Denied Feb. 16, 1955.

Action by city Board of Education against school teacher to determine whether cause for dismissal of such teacher existed after she had, when appearing before state Un-American Activities Committee, invoked her constitutional privilege against self-incrimination in refusing to state whether she was a member of the Communist Party of a certain county. The Superior Court, Los Angeles County, J. R. B. Warne, J., entered judgment adverse to school teacher, and school teacher appealed. The District Court of Appeal, Moore, P. J., held that public school teacher did not have constitutional right to her position after invoking her constitutional privilege of refusing to answer, under oath before state Un-American Activities Committee, question asking her whether she was a member of the Communist Party of a certain county.

Judgment affirmed.

1. Schools and School Districts \Rightarrow 141(5)

In action by city Board of Education against school teacher to determine whether cause for dismissal of such teacher existed after she had, when appearing before state Un-American Activities Committee, invoked her constitutional privilege against self-incrimination in refusing to state whether she was a member of the Communist Party of certain county, teacher's offered testimony concerning her beliefs on matter of invoking such privilege was irrelevant and properly excluded. Education Code, §§ 8275, 13521.

2. Schools and School Districts \Rightarrow 55

Statute, which merely required loyalty oath as condition precedent to public employment, occupied field of legislation on

subject of loyalty oaths for public employees but did not make School Board's rule, which required school employee subpoenaed by an Un-American Activities Committee to appear before such committee to answer, under oath, questions relative to membership in the Communist Party, an unauthorized assumption of legislative power. Government Code, §§ 3100-3109; Education Code, § 12600 et seq.; St.1953, p. 3343, § 4.

3. Schools and School Districts ⇨127

School Board's rule that person who is knowingly a member of Communist Party should not be employed by any school district, with certain exception, and that any school employee had duty, when subpoenaed by an Un-American Activities Committee, to appear before such committee and answer specifically under oath questions propounded relative to membership in the Communist Party was not unreasonable nor did it conflict with school teacher's constitutional guaranties. Education Code, §§ 8275, 13521.

4. Schools and School Districts ⇨141(4)

It was not necessary to show that school teacher knew of activities or purposes of Communist Party before she could be discharged for refusal to answer question, before state Un-American Activities Committee, pertaining to membership in the Communist Party.

5. Officers ⇨18

A statute may not require a public employee to know, at his peril, whether all organizations of which he is a member and which are not named in statute, advocate forceful overthrow of Government by unlawful means. Education Code, §§ 8275, 13521.

6. Schools and School Districts ⇨141(4)

Where school teacher refused, while under oath, before state Fact-Finding Committee on Un-American Activities, to answer question whether she was a member of the Communist Party of a certain county, school teacher was not entitled to judicial guidance on question of relevancy of such question, but acted at her peril when she refused to answer. Education Code, §§ 8275, 13521.

7. Schools and School Districts ⇨141(4)

Senate resolution empowering Fact-Finding Committee on Un-American Activities to make its investigation did not, on ground that it was too vague, invade federal constitutional rights of school teacher who refused, while before Committee and under oath, to answer question asking whether she was a member of the Communist Party of a certain county.

8. Statutes ⇨47

Statutes must be clear and unambiguous.

9. Schools and School Districts ⇨141(4)

If a school teacher will not cooperate by informing state Fact-Finding Committee on Un-American Activities whether he is a member of the Communist Party, such teacher violates rule of his school board requiring him to answer such question and may be dismissed from the school service. Education Code, §§ 8275, 13521.

10. States ⇨34

Senate resolution, which empowered senate committee to investigate facts relating to activities of groups which have as their object the overthrow of state or federal governments by force or other unlawful means was authorized by constitutional provision that committees may be appointed to make recommendations as to any subject within scope of legislative regulation or control. Const. art. 4, § 37.

11. Constitutional Law ⇨90

Legislative power to gather facts of most intense public concern is not diminished by unchallenged right of individuals to speak their minds within lawful limits, and, when speech or propaganda clearly presents an immediate danger to national security, protection of constitutional provision pertaining to free speech ceases.

12. Schools and School Districts ⇨141(4)

Public school teacher did not have constitutional right to her position after invoking her constitutional privilege of refusing to answer, under oath before state Un-American Activities Committee, question asking her whether she was a member of the Communist Party of a certain county. Education Code, §§ 8275, 13521.

William B. Esterman, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Gerald G. Kelly, Asst. County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, Clarence H. Langstaff, Deputy County Counsel, and James W. Briggs, Deputy County Counsel, Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether a teacher in the public schools has a constitutional right to her position after invoking her concededly constitutional privilege of refusing to answer the question: "Are you a member of the Communist Party of Los Angeles County?"—no other misconduct having been charged against her.

Appellant, Frances Robman Eisenberg, entered the public school system in 1933 as a substitute teacher. By 1944 she had advanced to the status of California Lifetime Teacher. On October 28, 1952, appellant appeared before the California Senate Fact-Finding Committee on Un-American Activities. While under oath, she refused to answer the quoted question. On November 20, 1952, basing his action on such refusal, the superintendent of the Los Angeles City School Districts formally charged her with unprofessional conduct and violation of the Board of Education Rule requiring her to tell a senatorial committee whether she belonged to the Communist Party.

The legislature has enacted statutes designed to prohibit the infiltration of Communists into the ranks of employees in public service and to prevent the spread of

the practices and doctrines of Communism. By statute in 1951, the lawmakers forbade the teaching of Communism "with intent to indoctrinate any pupil." Education Code, sec. 8275. In 1952, the Los Angeles Board of Education made a study of the subject and published its findings that "there are active disciplined communist organizations presently functioning" in the Los Angeles School, High School and Junior College Districts; that there is a clear and present danger that the members of such organizations will engage in concerted effort to hamper, restrict, impede or nullify the efforts of the Los Angeles Board of Education to enforce section 8275, *supra*.¹

Thereupon, the Board adopted the Rule, section 2 of which provides that no person who is knowingly a member of the Communist Party shall hereafter be employed by, or retained in the employment of, any school district, except as provided in section 3. Section 5 made it the duty of any employee of any school governed by the Los Angeles Board of Education who is subpoenaed by an Un-American Activities Committee of either the American Congress or of the California Legislature to appear before such committee to answer specifically under oath questions propounded by the committee relative to "membership in the Communist Party."

The same section makes guilty of insubordination and subject to dismissal, any employee who refuses to answer under oath *any question* propounded by any such committee or subcommittee. Also, section 7

4. Education Code, sec. 8275.

"No teacher giving instruction in any school, or on any property belonging to any agencies included in the Public School System, shall advocate or teach communism with the intent to indoctrinate any pupil with, or inculcate a preference in the mind of any pupil for communism.

"The Legislature in prohibiting the advocacy or teaching of communism with the intent to indoctrinate any pupil with or inculcate a preference in the mind of any pupil for, such doctrine does not intend to prevent the teaching of the facts of the above subject but intends to

prevent the advocacy of, and inculcation and indoctrination into communism as is hereinafter defined, for the purpose of undermining the patriotism for, and the belief in, the Government of the United States and of this State in the minds of the pupils in the Public School System.

"For the purposes of this section, communism is a political theory that the presently existing form of government of the United States or of this State should be changed, by force, violence, or other unconstitutional means, to a totalitarian dictatorship which is based on the principles of communism as expounded by Marx, Lenin and Stalin."

makes the violator of the rule guilty of unprofessional conduct.

By virtue of the Board's service upon appellant of its findings and the Rule, she knew their contents on October 22, 1952; knew that her refusal to answer, before a legislative committee, questions on any topic specified in section 5 required dismissal from the Los Angeles High School District, and knew that employees of the District were required to appear before such committee to answer whether they were members of the Communist Party.

When she refused to answer whether she was a member of the Communist Party of Los Angeles County, the superintendent of schools forthwith charged her with unprofessional conduct and violation of the Board's Rule. Pursuant to appellant's demand for a hearing thereon, the Board filed a complaint in the superior court alleging that cause existed for the dismissal of appellant from the Los Angeles school system. The trial court found the charge to be true within the meaning of section 13521 of the Education Code which authorizes the dismissal of a permanent employee for violating section 8275.

On appeal she contends that the judgment is unjust and assigns certain rulings and conclusions as unjustified, certain laws as violative of her constitutional guaranties.

Appellant assigns as prejudicial the court's exclusion of her testimony: that she believed it was her duty to invoke and protect the provisions of the Education Code and of the state and federal constitutions and that she did only that while before the legislative committee; that she believed the committee had no power to inquire into her beliefs, her communications or associations, and that the procedures of the committee were unconstitutional; that she believed her answering the question would be to participate in wrongdoing and that it was her duty not to cooperate in such acts of the School Board; that if she had acted otherwise, she would have rendered herself a corrupt, indecent person, unfit to teach school.

[1] Such testimony was irrelevant to the issues of the truth or falsity of the

charge against her. The court's duty was plain: to ascertain whether the charge of appellant's refusal to answer was true. Her beliefs had nothing to do with it. Having found that the committee convened, that appellant appeared, that the question was asked, and that she refused to answer, the court had not far to seek to conclude that her intransigence constituted sufficient grounds for her dismissal. The Rule of the Board made it imperative that her guilt be adjudged. The truth of the charge did not depend in the slightest degree upon her beliefs. *Christal v. Police Commission*, 33 Cal.App.2d 564, 568, 92 P.2d 416; *Oil Workers International Union CIO v. Superior Court*, 103 Cal.App.2d 512, 534, 230 P.2d 71; *Cope v. Davison*, 30 Cal.2d 193, 200, 80 P.2d 873, 171 A.L.R. 667. The duty of the court to order her dismissal was according to the truth of the charge. Her only way to avoid a dismissal was to answer the question. The artificial argument that her conduct was not involved is of no avail. She was on trial for her conduct, to wit, not answering a question relating to the public good. No exceptions were provided for in the rule violated.

The Rule is Valid

[2] Appellant proposes that the Rule of the Board is unconstitutional as an unauthorized assumption of legislative power and violates her right of due process. She contends that the Levering Act, Government Code, secs. 3100-3109, had prescribed an oath which she had signed two years previously; that such act occupies the field of legislation on the subject of loyalty oaths and prescribes the only one which may be required of a county employee. Such argument has already been answered by this court in *Board of Education of City of Los Angeles v. Wilkinson*, 125 Cal.App. 2d 100, 270 P.2d 82. It involved the same Board of Education and the same Rule. Mr. Justice Drapeau points out that the Levering Act does not prohibit school boards from requiring their employees to be loyal to the state and to the nation; that it does not relieve such boards from inquiring into the fitness of teachers or from prescribing reasonable rules for our pro-

tection against traitors; that the citizens of America are entitled to know whether any public employee is a Communist. See *Fraser v. Regents of University of California*, 39 Cal.2d 717, 718, 249 P.2d 283; *Christal v. Police Commission*, supra. In the *Christal* case, the officers accused insisted that they were not obliged to answer questions that would tend to incriminate them. But because they refused to answer did not make them white as snow. Their refusal disqualified them as police officers and was cause for their dismissal. Paraphrasing Justice Holmes,² they had a constitutional right to talk politics, but no constitutional right to be policemen.

Not only did the Levering Act have nothing to do with the conduct of teachers who appear before investigating committees, but it merely requires a loyalty oath as a condition precedent to public employment and occupies the field of legislation on the subject of loyalty oaths for public employees. *Bowen v. County of Los Angeles*, 39 Cal. 2d 714, 715, 249 P.2d 285. Moreover, only two years after the adoption of the Levering Act, the Dilworth Act, Education Code, § 12600 et seq.,³ was created solely because the Levering Act had nothing to do with teachers and communism.

Now, the giving of a loyalty oath to teachers is not, in the slightest degree, relevant to the issues in the case at bar. A public school teacher's refusal to answer before a legislative committee whether she is a member of the Communist Party is the only question involved in this action. Neither the Board nor the Legislature itself deemed a compliance with the Levering Act sufficient protection for the public. A teacher must answer directly that she is or

is not a member. Past pledges or oaths of loyalty are not sufficient for the School Board which has jurisdiction over a vast empire of wealth, pupils and teachers. Its responsibility impels it to require every teacher to stand and be counted. Unless it knows the extent of reliance to be placed in a teacher, its attempt to preserve American ideals will go for naught and treason might run rampant.

[3] One year after the School Board had adopted its rule, the Legislature enacted the Dilworth Act, which in turn approved of the right of the Board to make rules on the subject of keeping Communists out of the public schools and validated any rule, regulation or order previously enacted by school boards. It is consonant with law and with pertinent statutes and is therefore invaluable to the government of the Los Angeles City School Districts. *Tucker v. San Francisco Unified School District*, 111 Cal.App.2d 875, 882, 245 P.2d 597. In view of the findings that there is a present, imminent danger that communist organizations in the District will engage in concerted undertaking to hamper the efforts of the Board to comply with section 8275 of the Education Code and in view of appellant's obligation to inform the Board whether she is a member of a Communist organization whose tenets she was forbidden to impart to her students, it cannot with reason be said that the adoption of its rule on September 22, 1952, was unreasonable or that it conflicts with appellant's constitutional guaranties.

[4, 5] Appellant contends that the Constitution requires a showing that she knew of the activities or purposes of the Com-

2. *McAuliffe v. Mayor, Etc., of City of New Bedford*, 155 Mass. 216, 29 N.E. 517.

3. Dilworth Act, section 4.

"The purpose of this act is to declare a state policy and provide a uniform procedure applicable to all school districts whereby members of school district governing boards shall suspend and dismiss or refuse to employ persons who are knowingly members of the Communist Party and shall suspend and dismiss employees who fail or refuse to answer the pertinent questions specified in this act.

Nothing in this act is intended or shall be construed to limit or restrict the rule-making power of governing boards of school districts. Any rule, regulation or order heretofore adopted on this subject by any such governing board is hereby validated and declared to be fully and completely effective to the extent it is consistent with this act and any such rule, regulations or order shall only be superseded by this act to the extent inconsistent with this act." Stats.1953, ch. 1632, p. 3343.

munist Party before she may be discharged for a refusal to answer the question, citing *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216. The cited case is not authority for such contention. It does not require a public employee to have knowledge of the activities or purposes of an organization to which he belongs if it has been prescribed by name. It holds merely that a statute may not require a public employee to know at his peril whether all the organizations of which he is a member and are not named in the statute, advocate the forceful overthrow of the Government by unlawful means. The case requires not knowledge on the part of the teacher that her organization advocates the violent overthrow of the Government, but knowledge that it is proscribed to public employees as a condition of continued employment.

From the court's review of the authorities cited in *Wieman v. Updegraff*, it is there made clear that the decision was confined to the holding that a statute is fatally defective when it requires an employee to state whether he belongs to unnamed proscribed organizations, when the employee is not allowed, for lack of knowledge, to say that his organization was in the proscribed class. In the case at bar, the ques-

tion was whether appellant was a member of an organization which is proscribed in the Board's Rule. She knew the Rule's contents. The incidents of due process had been meticulously observed, notwithstanding former holdings that due process of law does not require that a teacher must have had knowledge of the activities or purposes of the Communist Party. *Wieman v. Updegraff*, supra; *Galvan v. Press*, 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. —.

The Board's Rule presents none of the difficulties encountered by the courts in the *Wieman* case. It was skillfully prepared with a view to an observance of the constitutional guaranties of the employees of the Los Angeles School Districts. It prevents a member of the Communist Party from obtaining or retaining employment in the Los Angeles City School Districts; requires an employee to indicate under oath whether he is or has been a member of the Communist Party; requires the employee subpoenaed by a legislative committee or the Board of Education to answer five questions relating to his loyalty and duties. Section 3 allowed an employee thirty days from the date of the adoption (September 22, 1952) to resign in good faith from the Communist Party, and retain his position with the Board. Sections 5 and 6⁴ of the Rule

4. "Los Angeles City School Districts. Superintendent's Bulletin No. 1. Rules and orders of the Board of Education Relating to (a) Membership in the Communist Party and (b) the Obligation to answer Questions Concerning Duties and Loyalty. * * *

"Section 5. It shall be the duty of any employee of any school district governed by the Los Angeles City Board of Education who may be subpoenaed by a United States Congressional Un-American Activities Committee or any other committee or subcommittee of the United States Congress or the California Legislature or of either House of either thereof to appear before said committee or subcommittee and specifically to answer under oath questions propounded by the committee or subcommittee relating to:

"a. Present personal advocacy by the employee of the forceful overthrow of the government of the United States or of any state or political subdivision.

"b. Present membership in any organization now advocating the forceful

overthrow of the government of the United States or of any state or political subdivision.

"c. Past membership in any organization which during the time of the employee's membership advocated the overthrow of the government of the United States or of any state or political subdivision.

"d. Questions calling for answers pertaining to the employee's school district duties based upon the personal knowledge of the employee of persons, places, and conversations, exclusive of conversations privileged under Section 1881, Code of Civil Procedure.

"e. Questions as to membership in the Communist Party.

"Any employee who fails or refuses to answer under oath any such questions propounded by any such committee or subcommittee shall be guilty of insubordination and guilty of violating this rule and shall be dismissed from his employment in the manner provided by law."

Section 6 is substantially the same as

give the five questions which must be answered when asked by a legislative committee, or Board of Education member or the superintendent of schools. Failure or refusal to answer any such question requires dismissal.

No Prior Determination of
Relevancy Required

Appellant is obsessed with the notion that before the School Board could act upon the complaint and discharge her, she was entitled to have the superior court determine that the question propounded to her was relevant. Relevant to what? That question, itself, was the sum total of all that was before the Legislative Committee. The rule was a simple statement that "it shall be the duty of any employee * * * who may be subpoenaed by * * * a California Legislative Un-American Activities Committee * * * to appear * * * and specifically to answer * * *

e. Questions as to membership in the Communist Party." Of course, it placed appellant in an unfortunate situation in that she must answer or be "guilty of violating this rule," of the Board, an act of insubordination. The procedure of the Board in discharging appellant was not the final scene. She was entitled to a trial before the court and there they tried anew the very issue determined by the Board. If the question had been irrelevant, the court below had the opportunity so to determine before approving of her dismissal. In the *Wilkinson* case, supra [125 Cal.App.2d 100, 270 P.2d 86], the court said: "This is not a contempt proceeding * * * the duty of the court began and ended with a determination that defendant's conduct did or did not constitute grounds for dismissal." If a teacher may be dismissed for refusal to accept teaching assignments, Board of Education of City of Los Angeles v. Swan, 41 Cal.2d 546, 551, 261 P.2d 261, there is equally as good reason for her dismissal when she has refused

to answer whether she is a member of the Communist Party. The existence of that party which the Board had found to be "a clear and present danger," engaged in concerted effort "to nullify the efforts of the Los Angeles City Board of Education to comply with and enforce Section 8275 of the Education Code" is a real danger to the District.

[6] Not only do the facts herein recited argue that appellant was not entitled to judicial guidance on the question of relevancy, but highly respectable authority holds that a witness acts at his peril when he refuses to answer. *Sinclair v. United States*, 279 U.S. 263, 274, 49 S.Ct. 268, 73 L.Ed. 692; see also *Morford v. United States*, 339 U.S. 258, 70 S.Ct. 586, 94 L.Ed. 815.

Senate Enabling Act Not
Unconstitutional

[7-9] Appellant vainly seeks to undermine Senate Resolution 127 by contending that it is too vague. She says the resolution makes no suggestion as to the identity of the persons who are to be denied protection under the Bill of Rights; that the resolution has no limitations and that it covers every area of work in California; that "a legislative body may not impose restrictions that are unnecessary or unreasonable." The rights of appellant under the federal constitution are not invaded by Senate Resolution 127. Appellant has not made a speech or published a sentence. Her mistake, so far as free speech is concerned, is her refusal to say "yes" or "no." The resolution has no vague and ambiguous terms. But if it had, it is only a resolution not a statute. All of appellant's argument on this score and all the authorities she cites pertain to the enactment of statutes. It is true that laws made by a legislature must be clear and unambiguous. The legislature having determined, as did the Los Angeles Board of Education, that the in-

section 5, but it requires any employee of the Board to answer under oath questions propounded by a member of the Board of Education or by the Superintendent relating to the topics included in a, b, c, d and e, and makes any employee who fails or refuses to answer un-

der oath any such questions propounded by a member of the Board of Education or the Superintendent of Schools guilty of insubordination and guilty of violating this rule "and shall be dismissed from his employment in the manner provided by law."

filtration of communism is detrimental to the general welfare, it did the next logical thing by sending out, as its emissaries, committees to ascertain the extent of the detriment caused and likely to be caused by advocates or prowlers for communism. There is nothing un-American in such action. It is done to protect the United States and every political subdivision thereof. No attempt is made to bridle free speech. The resolution means no more than "stand up and be counted." It makes no interdiction against any person's saying whatever he desires to say. It is designed to give the legislature a knowledge of social conditions prevailing in California whereby to make laws intelligently. If a teacher will not cooperate by informing the committee whether he is a party member of the Communists, he violates a definite rule of his school board and is entitled to nothing but dismissal from the service.

[10] The adoption of Senate Resolution 127⁵ is authorized by section 37 of Article IV of the Constitution whereby a committee so appointed may make recommendations "as to any subject within the scope of legislative regulation or control." The power of the legislature to appoint such committees and their power to investigate un-American activities has been exercised repeatedly. *Barsky v. U. S.*, 83 U.S.App. D.C. 127, 167 F.2d 241, 245; *Id.*, 334 U.S. 843, 68 S.Ct. 1511, 92 L.Ed. 1767; *United States v. Josephson*, 2 Cir., 65 F.2d 82,

90; *Josephson v. United States*, 333 U.S. 838, 68 S.Ct. 609, 92 L.Ed. 1122. On the question of definiteness of terms employed in the resolution, the language of the resolution involved in the *Barsky* case [83 U.S. App.D.C. 127, 167 F.2d 246] was held to be definite enough: "'subversive and un-American propaganda that * * * attacks the principle of the form of government as guaranteed by our Constitution'"; it conveys a clear meaning and that is all that is required.

[11] The claim that the Resolution 127 authorizes prior censorship of ideas is defeated by the very existence of the First Amendment to the Constitution. "The power of Congress to gather facts of the most intense public concern, such as these, is not diminished by the unchallenged right of individuals to speak their minds within lawful limits. When speech or propaganda, or whatever it may at the moment be called, clearly presents an immediate danger to national security, the protection of the First Amendment ceases." *United States v. Josephson*, supra [165 F.2d 91].

[12] Because of plaintiff's violation of a lawful rule of her employer, the Los Angeles Board of Education, it was authorized to dismiss her from public service.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

5. Senate Resolution No. 127 empowered the Senate Committee, *inter alia*: "to investigate, ascertain, study and analyze all facts relating directly or indirectly * * * to the activities of groups and organizations which have as their objectives, or as part of their objectives, the overthrow of the State of California or of the United States by force, violence

or other unlawful means; to all organizations known or suspected to be dominated or controlled by a power seeking to impose a foreign political theory upon the government and people of the United States; to all persons who belong to or are affiliated with such groups or organizations. * * *

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43 Cal.2d 726

ESTATE of Jacob RESLER, Deceased.

Fay Lieberman RESLER et al., Appellants,
v.

Lenore ROOS et al., Respondents.

S. F. 18686, 18768.

Supreme Court of California.

In Bank.

Dec. 31, 1954.

Rehearing Denied Jan. 26, 1955.

Proceeding in probate of testate estate.

The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., made findings of fact, conclusions of law, and order on final account and executors' request for instruction and entered decree of settlement of final account, supplemental account, and final distribution, and testator's widow appealed. The District Court of Appeal, 269 P.2d 105, reversed. On appeal the Supreme Court, Edmonds, J., held that paragraph of will providing that there should be set aside to testator's wife property, other than that specifically devised or bequeathed, "equal to one half of the community estate" of testator and his wife was ambiguous as to whether testator intended to bequeath to wife one half of community estate or property which would compensate her for any depletion of her share, and therefore testimony of attorney, who drafted will, to show that testator intended to dispose of all community property should have been admitted since proof of such intention would determine amount of bequest.

Appeal from findings of fact, conclusions of law and order dismissed and decree of settlement of final account, supplemental account and final distribution reversed with directions.

278 P.2d—1

1. Wills ⚡440

Sole objective in interpretation of will is to ascertain intention of testator as disclosed by language he has used. Probate Code, § 105.

2. Evidence ⚡60, 65

In construction of a will, it will be presumed that testator knew as a matter of law that he had no power to dispose of his wife's interest in community property, that he could only dispose of one-half of community property without his wife's consent and, unless contrary appears from terms of will, that he did not intend to devise or bequeath that interest in community property over which he did not have power to dispose. Probate Code, § 105.

3. Evidence ⚡89

Fact that testator undertook to dispose of a ring and his interest in a business would not dispel presumption that he did not intend to devise or bequeath that interest in community property over which he did not have power to dispose when there was nothing in will to negate his likely belief that ring and interest in business were his separate property.

4. Wills ⚡439

It is testator's intention, and not ground upon which that intention rests, that must control in interpretation of his will.

5. Wills ⚡577

Paragraph in will, which provided that there should be set aside to wife property, other than that specifically devised and bequeathed, "equal in value to one-half" of the community estate, demonstrated an intent by testator to exercise control over more than his share of community property by a substitution of property sufficient

in amount to bring widow's portion to one-half community estate and dispelled presumption that testator meant to deal with that property only over which he had power of testamentary disposition.

6. Wills \S 440, 441, 487(3, 6)

When an uncertainty arises upon face of a will, as to application of any of its provisions, testator's intention is to be ascertained from words of will, taking into view circumstances under which it was made, excluding oral declarations of testator as to his intention excepting those oral instructions of testator to a scrivener when offered to resolve an ambiguity in a will concerning amount of a bequest. Probate Code, \S 105.

7. Wills \S 487(6)

Paragraph of will providing that there should be set aside to testator's wife property, other than that specifically devised or bequeathed, "equal to one-half of the community estate" of testator and his wife was ambiguous as to whether testator intended to bequeath one-half of community estate or property which would compensate her for any depletion of her share, and therefore testimony of attorney, who drafted will, to show that testator intended to dispose of all community property should have been admitted, since proof of such intention would determine amount of bequest. Probate Code, \S 105.

8. Wills \S 558(1)

Under paragraph of will providing that there should be set aside to wife, property, other than that specifically devised and bequeathed, equal in value to one-half of community estate and devising in addition thereto such, if any, additional property as with wife's share of community estate would give her property of value equal to one-half of that property which at date of testator's death stood in name of testator, or testator and his wife, property held by testator in joint tenancy with a sister did not stand in the name of testator, or testator and his wife, and was not includible in computing any bequest pursuant to that paragraph.

9. Wills \S 767

Where testator transferred his interest in a business in exchange for a note subsequent to execution of will in which he bequeathed his interest in business to a sister, sale divested testator of his interest in business and in absence of a showing of a contrary intent sister was not entitled to proceeds of note in lieu of testator's interest in the business.

10. Husband and Wife \S 273(4)

If a widow repudiates a will and elects to take under the statutes of succession, amount of her family allowance is a proper part of administration expenses chargeable to the community property. Probate Code, \S 201.

11. Husband and Wife \S 273(4), 274(3)

A family allowance is a charge against the community property and that allowance and amount of husband's debts must be deducted from value of community assets before determination as to community property available for distribution may be made. Probate Code, \S 201, 750.

12. Executors and Administrators \S 185

A widow may waive her right to a family allowance by conduct or by an agreement to that effect.

13. Executors and Administrators \S 185

Where widow agreed to waive her right to further family allowance after a period of one year, court did not err in limiting family allowance to the period agreed upon.

14. Executors and Administrators \S 510(2)

Findings of fact, conclusions of law, and order directing executors to prepare and file with the court a supplemental statement bringing accounts up to date of filing and to submit a form of decree of final settlement of executors' accounts and of distribution were not appealable.

15. Appeal and Error \S 77(1)

Order directing executors to prepare and file with court a supplemental statement bringing accounts up to date of filing and to submit to court for approval and signing a form of decree of final settlement

of accounts and of distribution was interlocutory and was not appealable.

Jefferson E. Peyser and Guernsey Carson, San Francisco, for appellants.

Sullivan, Roche, Johnson & Farraher and James Farraher, San Francisco, for respondents.

EDMONDS, Presiding Justice.

Jacob Resler died testate in 1949 leaving only post-1927 community property of himself and his widow, Fay Lieberman Resler. The widow's appeal from a decree of final distribution which also settles the executors' final account requires a construction of the will in connection with questions regarding the distribution of the property and payment of certain charges against the estate. Also in issue is the approval of an allowance to the widow for maintenance pending settlement of the estate.

The controversy principally concerns paragraph "Fourth" of the will, which reads as follows: "There shall first be set aside to my beloved wife, property (other than that which I have specifically hereinafter devised and bequeathed) equal in value to one-half (1/2) of the community estate of myself and my said wife. In addition thereto, I hereby devise and bequeath to my said wife * * * such, if any, additional property as with her said share of our community estate shall give to her property of value equal to one-half (1/2) of that property which at the date of my death stands in the name of myself or of myself and my said wife (excluding therefrom any property held in the names of my wife and myself as joint tenants with right of survivorship).

"The further provisions of this my Last Will and Testament relate to that portion of my estate remaining after there has been set aside the property to be distributed and devised and bequeathed to my wife in accordance with the foregoing provisions of this paragraph."

In paragraph "Fifth", Resler left an automobile, household furniture and personal effects to Fay. Paragraphs "Sixth" through "Ninth" contain specific legacies or bequests to various collateral relatives.¹ In paragraph "Eleventh", the testator directed: "If at the time of my death I am the owner of an interest in that certain business * * * operating under the fictitious name of 'Swift Ltd.', I give and bequeath all of my said interest therein to my sister, Lenore Roos." He bequeathed the residue of his estate in equal shares to three sisters, Mollie Resler Rogers, Lenore Roos, and Gertrude Resler, and a brother, Abraham Resler.

Paragraph "Third" provides that all estate and inheritance taxes "applicable to or payable on account of all gifts, devises and bequests" are to be held "chargeable to and payable out of my residuary estate and not chargeable to and payable by or collectible from the persons to whom or for whose benefit such gifts, devises and bequests are made."

Resler was survived by his widow and all of the collateral relatives named in the will, except a sister whose legacy lapsed. He left no lineal descendants. His will was admitted to probate, and letters testamentary were issued to Fay, his sister Lenore Roos, and Camil Roos his brother-in-law, all of them serving as co-executors. Upon application by Fay the court ordered payment to her of \$2,000 per month as family allowance "beginning as of the 13th day of July, 1949, and continuing until further order of the Court."

In November, 1950, the executors filed their first and final account and report, together with a petition for distribution and for instructions as to the rights of the claimants under the will. All of the beneficiaries, except Fay filed objections to the account on the ground that the amount of the family allowance claimed for her was excessive. The widow filed an answer to the objections and a supplemental petition for instructions.

1. To Yetta Resler, his step-mother, \$5,000; to Frances Resler Rosenfeld, a sister, \$2,000; to Stanley Resler, a neph-

ew, \$1,000; to Phyllis Rose Baruch, a niece, his diamond ring; to Abraham Resler, a brother, his wristwatch.

At the hearing on the objections, Fay sought to introduce extrinsic evidence as to the testator's intention in making the will. This evidence was rejected. Thereafter, she made a formal offer of proof consisting of the testimony of the attorney who prepared the will that Resler told him he wished to dispose by the will of all of his property, including the one-half of the community property belonging to his wife, and that the will was prepared with the purpose of giving effect to the testator's wishes.

The objections were sustained by a minute order which fixed the amount of the widow's allowance and attorneys' fees, gave instructions regarding the distribution of the estate and the payment of charges, and directed the preparation of a formal written order. On September 19, 1951, the trial judge signed a document, which was filed with the clerk and recorded, and which included findings of fact, conclusions of law and an order directing the executors to prepare and file with the court "(1) a supplemental statement bringing said accounts up to the date of its filing, and (2) submit to this Court for approval and signing a form of decree of final settlement of said accounts and of distribution, which said decree shall be in accordance with the foregoing Findings of Fact and Conclusions of Law." On August 7, 1952, a formal decree of "Settlement of Final Account, Supplemental Account and Final Distribution" was entered.

The findings state that the whole of the estate is the community property of Resler and his widow. The "Albany property," real estate which at the time of Resler's death was owned by him and his sister Gertrude Resler as joint tenants, was found to be worth \$40,000. That property, said the court, "was not on the date of Decedent's death held in the name either of himself or of himself and his wife * * * within the purview of paragraph 'Fourth' of the Will * * * and * * * cannot be considered by this Court in determining the value of the property to be distributed to" the widow.

According to another finding, Resler exchanged his interest in Swift, Ltd., for a

promisory note from Camil Roos, upon which \$32,254.58 as principal and \$5,053.39 as interest remained unpaid. The residuary legatees have filed their written consent to a distribution of the note to Lenore Roos, the finding continues, because of their expressed belief that such distribution would follow the decedent's intention as expressed in paragraph "Eleventh" of the will. It was concluded that the distribution of the note could be made "without affecting the distribution to said Fay Lieberman Resler of her share of the estate." In lieu of her interest in the note, the court directed that she receive in cash an amount equal to one-half of the unpaid principal.

Also stated as findings of fact are these determinations: Article "Third" of the will provides that the residuary estate is liable for payment of the estate and inheritance taxes applicable only to the gifts, devises and bequests mentioned in paragraphs "Fifth" through "Ninth". "There is no gift or devise or bequest made to * * * [Fay] in Article 'Fourth' of the said Will," but under that paragraph she "is entitled to receive half of that part of the estate remaining after payment of the expenses of administration, the debts of the decedent, the family allowance to * * * [her], and the federal estate taxes, if any, assessed against the estate." Also, "from a reading of the Will," Resler did not intend to devise or bequeath all of the community property of himself and his wife but his testamentary purpose was to dispose of only the one-half of it owned by him.

With regard to the family allowance to Fay, the court found that, under a contract made between her, Lenore Roos and Camil Roos, in exchange for their waiver of objections to an allowance of \$2,000 per month, she agreed to claim it for only one year. As she had received about \$30,000 prior to the accounting, she was directed to reimburse the estate for the excess.

Fay has noticed appeals "from the whole and each and every part of the Findings of Fact, Conclusions of Law and Order * * * dated September 19, 1951" [S.F. No. 18686]; and from the decree dated August 7, 1951 [S.F. No. 18768].

Basically, her position is that her husband attempted to dispose of all of the community property, as well as his separate property, and that paragraph "Fourth" of the will is a bequest to her of a share of the estate equal to one-half of the gross value of all property standing in the name of the decedent at his death, including the Albany property, without deduction for taxes and expenses of administration. The will should be so construed as a matter of law, she argues, but if there is uncertainty in its terms the trial judge erroneously excluded extrinsic evidence to establish their meaning.

Even under the trial judge's construction of the will, she contends, the distribution of the estate and the payment of charges were decreed erroneously. According to that construction, the argument continues, by section 201 of the Probate Code she is entitled to one-half of the community property. The court could not dispose of her interest in the Roos note and other specific items of personal property. Furthermore, she argues, it was error to charge her share of the community estate with a portion of the costs of administration, including her family allowance, as well as estate and inheritance taxes. Her final contention is that the trial judge abused his discretion in limiting the amount of family allowance to \$24,000.

[1,2] The sole objective in the interpretation of a will is to ascertain the intention of the testator as disclosed by the language he has used. In re Estate of Brunet, 34 Cal.2d 105, 107, 207 P.2d 567, 11 A.L.R.2d 1382; In re Estate of Lawrence, 17 Cal.2d 1, 6, 108 P.2d 893; Probate Code, § 105. "In the construction of the will, it will be presumed the deceased knew as a matter of law that he had no power to dispose of his wife's interest in the community property; it will also be presumed that he knew he could only dispose of one-half of the community without his wife's consent; and further it will be presumed he knew, unless the contrary appears from the terms of the will, that he did not intend to devise or bequeath that interest in the community property over which he did not have power to dispose." In re Estate of

Klingenberg, 94 Cal.App.2d 240, 243, 210 P.2d 514, 516; In re Estate of Vogt, 154 Cal. 508, 511, 98 P. 265; In re Estate of Moore, 62 Cal.App. 265, 271, 216 P. 981. "While courts will presume that a testator meant to deal with that property only over which he had power of testamentary disposition, this presumption cannot prevail against the unequivocal intention expressed in the will. That intention, when it can be deduced from the instrument, governs its construction." In re Smith, 108 Cal. 115, 119, 40 P. 1037, 1038.

[3,4] Fay contends that in the present case the presumptions have been dispelled. One argument is that "since the testator here in fact undertook to dispose of the ring and his interest in Swift's, he thereby expressed his intention to control all of the property owned by him and his wife in the Will." That conclusion, however, does not necessarily follow. The testator may have believed that those items were his separate property or, if community property, that the widow would consent to the bequests or accept other property in lieu of them. "It is the testator's *intention*, and not the ground upon which that intention rests, that must control in the interpretation of his will. A mistaken belief on the part of a testator that he has the unrestricted power to dispose of the property absolutely is immaterial." In re Estate of Moore, 62 Cal. App. 265, 274, 216 P. 981, 985. There is nothing in the will which negates his likely belief that the ring and the interest in Swift's were his separate property.

Another argument is based upon the provision of paragraph "Fourth" that "[t]here shall first be set aside to my beloved wife * * * property (other than that which I have specifically hereinafter devised and bequeathed) equal in value to one-half (1/2) of the community estate of myself and my said wife." As Fay reads this provision, by the use of the phrase "equal in value to one-half" of the community estate, her husband demonstrated an intention to give to her property in lieu of the items in which she could claim an interest pursuant to section 201 of the Probate Code.

[5] The respondents argue that this phrase shows only a recognition of Fay's

share of the community property and the purpose of the testator to dispose only of his own share of it. But something more than that must have been intended. The testator does not state that Fay's share is to be set aside, but what is set aside is property "equal in value" to one-half the community estate. In other words, there is a substitution of property sufficient in amount to bring the widow's portion to one-half the community estate. By that attempted substitution, the testator demonstrated an intent to exercise control over more than his share of the community property, and the contrary presumption is dispelled.

Although it is clear that the testator attempted to dispose of more than one-half of the community property, the disputed phrase of his will does not, as a matter of law, express an intention that the widow should receive her entire share of it as a bequest. Such a construction would require the words "set aside" to be defined as meaning "bequeath." That use would be somewhat inconsistent with the terminology in all 10 of the other clauses in which specific bequests or legacies appear, where the dispositive word used is "bequeath." The only other place in which the words "set aside" are used is in the last sentence of paragraph "Fourth", which reads: "The further provisions * * * relate to that portion of my estate remaining after there has been set aside the property to be distributed and devised and bequeathed to my wife in accordance with the foregoing provisions of this paragraph." The paragraph mentions property, in addition to "her said share of our community estate", which the testator said "I hereby devise and bequeath to my said wife." From its context in the latter use, the words "set aside" appear to have been intended more as a term of recognition than as a bequest.

[6] Although the construction of paragraph "Fourth" urged by Fay is tenable, the one urged by the respondents is equally plausible. It may well be that the testator sought to bequeath to Fay property in lieu of her community interest in specific items of property intended by him to be distributed to other relatives. The will is uncertain in that regard. The general rule is that when "an uncertainty arises upon the

face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding" the oral declarations of the testator as to his intentions. Probate Code § 105. An exception to the exclusion of oral declarations of the testator is his instructions to a scrivener when offered to resolve an ambiguity in a will concerning the amount of a bequest. *In re Estate of Dominici*, 151 Cal. 181, 186, 90 P. 448; *In re Estate of Donnellan*, 164 Cal. 14, 17, 127 P. 166.

[7] The uncertainty apparent in paragraph "Fourth" is not in whether Resler sought to make a gift, for under either of the only tenable interpretations of the disputed phrase, he intended to bequeath some property to her. Instead, the question presented is whether his intention was to bequeath to her one-half of the community estate or property which would compensate her for any depletion of her share. It is, therefore, an ambiguity as to the amount of the bequest and falls directly within the exception to the rule against the admission of oral declarations of the testator to show his intention. Fay attempted to introduce the testimony of the attorney who drafted the will to show that Resler intended to dispose of all of the community property. As proof of such intention would determine the amount of the bequest under paragraph "Fourth", the evidence should have been admitted.

[8] Fay next contends that the trial court erred in its treatment of the Albany property. The second sentence of the "Fourth" paragraph clearly is a bequest to Fay. It reads: "In addition thereto, [the disputed community property] I hereby devise and bequeath to my said wife * * * such, if any, additional property as with her said share of our community estate shall give to her property of value equal to one-half (1/2) of that property which at the date of my death stands in the name of myself or of myself and my said wife (excluding therefrom any property held in the names of my wife and myself as joint tenants with right of survivorship)." As the remainder of the property is stipulated to belong to the community,

the Albany real estate is the only property that could have been bequeathed under this provision. Fay does not contend that she is entitled to any interest in that land but only that she is entitled to a sum equal in value to one-half of its value payable from the remainder of Resler's estate. However, the Albany property was held in joint tenancy with a sister. It did not stand in the name of "myself or of myself and my said wife", and cannot, therefore, be included in computing any bequest under this paragraph.

[9] Fay correctly maintains that the Roos note should not be distributed to Lenore. Apparently the trial judge was acting under paragraph "Eleventh" of the will in which the testator bequeathed to Lenore any interest he might have at his death in "Swift, Ltd." But after the will was made, the testator transferred his interest in the business to Camil Roos in exchange for the latter's note. That sale divested the testator of his interest in the business, and, in absence of a showing of a contrary intent, it may not be assumed that he intended to bequeath the proceeds of it in lieu of his interest. Cf. *In re Estate of Babb*, 200 Cal. 252, 256-259, 252 P. 1039; *In re Estate of McLaughlin*, 97 Cal.App. 481, 484, 275 P. 874.

The widow next contends that the trial court erred in charging her share of the community estate with a portion of the costs of administration and the federal estate taxes. The determination as to the property liable for these amounts must await the decision as to whether she takes under section 201 of the Probate Code or by a bequest under paragraph "Fourth" of the will. If, upon retrial paragraph "Fourth" is held to bequeath property equal to one-half of the value of the community property, that bequest should be entirely free from any such charges, to the extent that the residuary estate is sufficient to pay them. Probate Code section 750. If it be determined that a major part of her community share passes to her under the provisions of section 201 of the Probate Code, it is improper to charge against that amount any portion of the federal estate taxes.

In Re Estate of Coffee, 19 Cal.2d 248, 120 P.2d 661, when considering the right to take community property under section 201 of the Probate Code, this court said: "It is clear * * * that the portion of the community property which belongs to the wife is the one-half which remains after the payment of the husband's debts and the expenses of administration apportioned between the community and separate property in accordance with the value thereof, and this is true even when the husband's share of the community, together with his separate property, is ample to pay those debts and expenses." 19 Cal.2d at pages 252-253, 120 P.2d at page 664. This rule was said to rest upon the principle that "section 202 of the Probate Code * * * 'subjects all community property passing from the control of the husband, by his death or otherwise, to administration, to his debts, and to certain other charges. This is a provision more or less typical of the law in all community property states and should be construed as correlative to the principle that during the husband's life the community property is subject to his debts. Both are apparently corollaries to his right of management and control.'" 19 Cal.2d at page 252, 120 P.2d at page 664.

In the *Coffee* case, the wife had successfully claimed in the trial court that her share of the community property was exempt from all debts and expenses. There was no apportionment of them by the trial court, and it was not indicated whether federal estate taxes and the amount of the family allowance, if any, were included among them. Nor did the trial court determine whether the property was acquired before or after 1927.

In *Re Estate of Atwell*, 85 Cal.App.2d 454, 193 P.2d 519, the problem was whether in an estate in which the community property was acquired before 1927 the federal estate taxes should be deducted from the gross value of the community property, one-half of the remainder being distributed to the wife. It was concluded that federal estate taxes are chargeable against the entire probate estate and a proper deduction from all of the community property.

Subsequently, in *Re Estate of Cushing*, 113 Cal.App.2d 319, 248 P.2d 482, both pre-1927 and post-1927 community properties were involved. The court followed the *Atwell* decision in the disposition of the pre-1927 community property. But with regard to community property acquired after that time, the court concluded that federal estate taxes are not properly a charge or cost for the administration of the estate; instead, "an examination of the statute [1948] makes it reasonably clear that the federal estate tax is chargeable against, and is a lien upon, only the gross estate and not upon the probate estate." 113 Cal. App.2d at page 328, 248 P.2d at page 487. This conclusion was based upon the reasoning that "the proration statute [Prob. Code, §§ 970-977; Stats.1943, ch. 894] definitely expresses a policy that the federal estate tax is intended * * * to be levied * * * in accordance with the benefit that a person interested receives from the estate—such benefit is * * * limited to the taxable gross estate, and does not extend to the entire probate estate." 113 Cal.App.2d at page 333, 248 P.2d at page 490. It was concluded that to subject the wife's share of the post-1927 community property to charges for federal estate taxes was erroneous.

The respondents urge that the *Cushing* case be disapproved. This argument, however, is based only upon the ground that insufficient consideration was given to the question in the *Cushing* case, and that there is no proper basis for distinguishing it from the *Atwell* decision. The conclusion reached in the *Cushing* case was a proper one. It appears to be the general legislative intent to charge the amount of taxes payable for succession to a decedent's property to the person to whom it is distributed.

[10] Contrary to the widow's next contention, if she takes under Probate Code section 201, the amount of her family allowance is a proper part of administration expenses chargeable to the community property. She relies upon a statement from *In re Estate of King*, 19 Cal.2d 354, 121 P.2d 716, as indicating that the widow's community interest may not be subjected to payment of any part of such an allowance: "A contrary construction of the

statute might result in charging the obligation of an estate to pay family allowance to a widow against her own community interest in the property. That construction is opposed to the policy of the law with respect to family allowances." 19 Cal.2d at page 365, 121 P.2d at page 723.

[11] This argument misconceives the basis for the rule which makes the family allowance a charge against the community property. The charge is a debt payable from the community estate. In *re Estate of Coffee*, supra, 19 Cal.2d at page 252, 120 P.2d at page 664. That allowance and the amount of the husband's debts must be deducted from the value of the community assets before the determination as to the community property available for distribution may be made.

The *King* case is not inconsistent with this conclusion. There the widow renounced her right to inherit under her husband's will and elected to share in his estate under the laws of succession. It was argued that following the renunciation, his one-half of the community property was "undisposed of by will" and, under section 750 of the Probate Code should be charged with all of the expenses of administration before resort to other property. The court held that the charge should not be borne alone by either the wife's share, the husband's share, or by the community property as distinguished from the separate property. Instead, it was concluded that the trial court correctly determined that the family allowance should be charged against the devisees and legatees "in the proportions that they respectively share in the properties, both community and separate, upon final distribution." 19 Cal.2d at page 362, 121 P.2d at pages 721, 724. The contention that the husband's share of the community property was "undisposed of by will" within the meaning of section 750 was rejected.

[12,13] Fay next contends that the court erred in limiting the family allowance to \$24,000. It is settled, however, that the widow may waive her right to a family allowance by conduct or by an agreement to that effect. In *re Estate of Brooks*, 28 Cal.2d 748, 750, 171 P.2d 724. There was ample testimony to support the finding that Fay agreed to waive her right to further

family allowance after a period of one year. The testimony to the contrary created only a conflict in the evidence.

[14, 15] The appeal in S.F. 18686 purports to be from the findings of fact and conclusions of law and order of September 19, 1951. No appeal lies from such determinations, *In re Estate of Thompsen*, 61 Cal.App.2d 188, 142 P.2d 337; and the order of September 19th, directing the preparation of a formal written order is clearly interlocutory. Cf. *In re Estate of Phillips*, 202 Cal. 490, 499, 261 P. 709.

The purported appeal in S.F. 18686 is dismissed; the decree in S.F. 18768 is reversed with directions to proceed in accordance with this decision. Each party shall bear his own costs.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice (concurring).

I concur in the judgment of reversal. However, I believe the decision of the court is contrary to *In re Estate of King*, 19 Cal.2d 354, 121 P.2d 716, holding that the community property may not be charged with a family allowance and the King case should be overruled.

Rehearing denied; CARTER, J., dissenting.



43 Cal.2d 740

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Joseph WHITE, Defendant and Appellant.
Cr. 5613.

Supreme Court of California.
In Bank.

Dec. 31, 1954.

Rehearing Denied Jan. 26, 1955.

Defendant was convicted of rape and the infamous crime against nature. The Superior Court of San Bernardino County, Martin J. Coughlin, J., entered judgment on verdict and entered an order denying motion for new trial, and defendant ap-

pealed. The Supreme Court, Carter, J., held that Superior Court did not commit prejudicial error in refusing to dismiss entire jury panel because of error in making up jury list.

Judgment and order affirmed.

Prior opinion, 269 P.2d 19.

1. Witnesses ⇨274(2)

In prosecution for rape and for infamous crime against nature, court properly permitted prosecution to ask defendant's character witness whether witness had heard that reports had been given to police department that defendant carried on homosexual activities in certain park, where question was based on information gained from oral reports and written arrest reports received from certain officer of police department, parole officer of California Youth Authority, and representative of the district attorney's office. Penal Code, § 286.

2. Criminal Law ⇨706

In prosecution for rape and infamous crime against nature, court did not err in ruling that district attorney acted in good faith in asking defendant's character witness whether witness had heard that reports had been given to police department that defendant carried on homosexual activities in certain park, where district attorney testified that he had researched the law concerning propriety of such question and had conferred with other members of his office about legal point involved and that consensus of opinion was that the question was a proper one.

3. Criminal Law ⇨824(5)

In prosecution for rape and infamous crime against nature, wherein character witness of defendant made a negative reply to question whether witness had heard that reports had been given to police department that defendant carried on homosexual activities in certain park, court did not commit prejudicial error in failing to give, of its own motion, instruction that question concerning alleged reports to police department were not proof of facts therein contained and were not to be considered as evidence. Penal Code, § 286.

4. Criminal Law Ⓒ698(1)**Witnesses** Ⓒ390

A confession, not shown to have been freely and voluntarily made, cannot be used for purpose of impeachment, but when no objection has been made in the trial court as to involuntariness and no evidence is presented to show involuntariness of confession, it is not error to admit confession for purpose of impeachment.

5. Witnesses Ⓒ389

In prosecution for rape and infamous crime against nature, wherein defendant on cross-examination denied making any statements amounting to a confession, parole officer for the California Youth Authority was properly permitted to testify that defendant had made that confession, which defendant had denied on cross-examination, in absence of any objection by defendant that alleged confession was involuntary. Penal Code, § 286.

6. Criminal Law Ⓒ1172(2)

Instruction in language of statute dealing with the presumption of innocence in a criminal prosecution and providing in addition that if, when considering all evidence, jury is satisfied to moral certainty and beyond reasonable doubt that defendant is guilty, then presumption of innocence no longer prevails and jury shall find defendant guilty, was not prejudicially erroneous. Penal Code, § 1096.

7. Criminal Law Ⓒ784(7)

Instruction that jury is not permitted, on circumstantial evidence alone, to find defendant guilty of any crime charged against him unless the proved circumstances not only are consistent with hypothesis that defendant is guilty of the crime, but are irreconcilable with "any rational" conclusion was not erroneous because of omission of the word "other" before the word "rational".

8. Criminal Law Ⓒ674

Where questions are asked which are improper, court acts within scope of its duty in refusing to allow questions to be answered, even though no objection be made

9. Witnesses Ⓒ280

In prosecution for rape and infamous crime against nature, court properly limited defendant's cross-examination of prosecutrix as to why, on day of alleged attack, she had punched her time card out at 4:37 p. m. and did not leave her place of employment until 5:35 p. m., where question was purely argumentative. Penal Code, § 286.

10. Criminal Law Ⓒ1159(6)

A reviewing court will not uphold a judgment or verdict based on evidence, which is inherently improbable, but it is not sufficient for reversal that certain circumstances disclosed by testimony are merely unusual.

11. Criminal Law Ⓒ1159(4)

To warrant the rejection by reviewing court of statements given by witness, who has been believed by trial court, there must exist either a physical impossibility that the statements are true or their falsity must be apparent without resorting to inferences or deductions.

12. Criminal Law Ⓒ260(11), 1159(3)

Conflicts and even testimony, which is subject to justifiable suspicion, do not justify reversal of judgment of conviction, since it is the exclusive province of the trial judge or jury to determine credibility of witness and truth or falsity of facts on which a determination depends.

13. Criminal Law Ⓒ1159(4)

In prosecution for rape and infamous crime against nature, testimony that assailant of prosecutrix helped her pick up contents of her purse after alleged attack, that he kissed her, and that she went to work the next day did not render her testimony inherently improbable. Penal Code, § 286.

14. Jury Ⓒ33(1)

"Trial by jury," considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community, but it is not necessary that every jury must contain representatives of all economic, social, religious, racial, political, and geographical groups of the

community, but means that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of those groups.

See publication Words and Phrases, for other judicial constructions and definitions of "Trial by Jury".

15. Jury ☞33(1)

System of jury selection primarily from membership rosters of certain private clubs and organizations will normally tend to result in systematic inclusion of large proportion of business and professional people and definite exclusion of certain classes such as ordinary working people and therefore is improper

16. Jury ☞33(1)

Any systematic attempt to exclude to wage earners in system of jury selection is improper.

17. Jury ☞33(1)

It was improper for the jury commissioner, in compiling jury list, to rely almost entirely on membership roster of private clubs and organizations such as Lions club, Rotary club, women's clubs and Chamber of Commerce.

18. Criminal Law ☞1166½(5)

In prosecution for rape and infamous crime against nature, trial court did not commit prejudicial error in refusing to dismiss entire jury panel because of error in making of jury list.

19. Jury ☞33(1)

Generally, errors and irregularities in making up a jury list will not invalidate list when person objecting is not a member of group discriminated against.

20. Criminal Law ☞1166½(5)

A defendant cannot complain of error in making of jury list if he was tried by an impartial jury.

William B. Esterman and William B. Murrish, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

CARTER, Justice.

Joseph White was charged in Count I of an information with assault with intent to commit rape upon Velma Gonzales on November 17, 1952. In Counts II and III he was charged with rape and a violation of section 286¹ of the Penal Code committed upon Agapita Gallegas, both offenses alleged to have been committed on October 27, 1952. He pleaded not guilty as to each count and moved to challenge the jury panel upon the ground that there had been a systematic exclusion of Negroes, working people, men, and young persons. The motion was denied. Upon defendant's motion for a severance, the court ordered separate trials of the charges relating to each victim. Counts II and III were tried first and the jury found defendant guilty on both counts. He was sentenced to the state prison for the term prescribed by law as to each offense, the sentences to run concurrently. Count I was then dismissed. Defendant has appealed from an order denying his motion for a new trial and from the judgment.

There was evidence presented at the trial to the effect that shortly after Mrs. Gallegas had left her place of employment in downtown San Bernardino, in the early evening of October 27, 1952, she was accosted and forced into an empty lot where her assailant raped her and committed a violation of Penal Code section 286. On November 18, 1952, defendant was arrested and taken to the police station where he was identified by Mrs. Gallegas as her assailant. Mr. Parker, a parole officer for the California Youth Authority, testified that during an interview defendant made a statement admitting the commission of the crimes charged. There was also testimony to the effect that defendant had confessed to Deputy District Attorney Hartley in the presence of a shorthand reporter, Roy

1. "Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is

punishable by imprisonment in the state prison not less than one nor more than ten years." Pen.Code, § 286.

Cain, who testified concerning the contents of the statement taken down by him. Defendant made no argument concerning the voluntary character of these confessions but merely denied having made them.

[1-3] Defendant contends that the district attorney committed prejudicial misconduct in the cross examination of Maria Lawson, one of the character witnesses for the defense. After the witness had testified on direct examination as to defendant's good reputation in the community for chastity, virtue and morality, she was asked on cross examination: "Had you heard that reports had been given to the San Bernardino Police Department that Joe White carried on homosexual activities in Meadowbrook Park?" Defendant objected and moved to strike the question on the ground that it had been asked in bad faith and without factual basis. The objection was overruled but the court reserved a ruling on the motion to strike and the witness answered in the affirmative. From her answer it was evident that she did not understand the question and after the meaning of "homosexual" was explained to her, she stated that she had not heard such reports. A hearing was had (outside the presence of the jury) on the issue of the prosecutor's good faith in asking the question. At the hearing the prosecutor testified that his question was based upon information concerning defendant's homosexual activities gained from oral reports and written arrest reports received from Officer Avery of the San Bernardino Police Department, Mr. Parker of the California Youth Authority and Mr. Hartley of the district attorney's office. He also testified that he had researched the law on the propriety of such a question and had conferred with other members of his office about the legal point involved and that the consensus of opinion was that the question was a proper one. In view of this the trial court's finding that the question was asked in good faith and its refusal to strike the question are not without support. In this connection it is

also contended that the court erred in failing to give, of its own motion, an instruction to the effect that questions concerning such reports are not proof of the facts therein contained and are not to be considered as evidence. Not only was such instruction not asked for, *People v. Stevens*, 5 Cal.2d 92, 100, 53 P.2d 133, but a negative answer was given by the witness. Under the circumstances defendant would appear to have suffered no prejudice.

[4,5] It is further contended by defendant that certain testimony of Mr. Parker relating to a confession was improperly admitted. After defendant on cross examination had denied making any statements amounting to a confession, Mr. Parker was called as a rebuttal witness. He testified that during their conversation the defendant had made the confession which he had denied on cross examination. Defendant contends that it was error to admit Parker's testimony without preliminary proof that the confession was free and voluntary. Defendant did not object to the admission of the testimony at the trial on that ground and apparently no testimony was introduced at the trial indicating that the confession had been obtained by improper threats or promises. It is true that a confession not shown to have been freely and voluntarily made cannot be used for the purpose of impeachment, *People v. Rodriguez*, 58 Cal.App. 2d 415, 419-420, 136 P.2d 626; however, when no objection has been made in the trial court as to involuntariness and no evidence is presented to show the involuntariness of the confession, it is not error to admit it for the purpose of impeachment, *People v. Byrd*, 42 Cal.2d 200, 210, 266 P.2d 505.

[6] It is next contended by defendant that the court erred in instructing the jury (1) on the presumption of innocence; (2) on circumstantial evidence; and (3) "in unexplained reference to Counts II and III." With respect to the presumption of innocence the court gave an instruction in the language of section 1096² of the

2. "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reason-

able doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is

Penal Code and then added the following: "If, when considering all the evidence, the jury are satisfied to a moral certainty and beyond a reasonable doubt that the defendant is guilty, then the presumption of innocence no longer prevails and you should find the defendant guilty." Defendant argues that these added words suggested a distinction between the objective evidence and the presumption of innocence and that it therefore deprived him of his right to have all of the evidence, including the presumption, considered until a verdict was reached. The instruction, as given, merely told the jury that if after considering all the evidence (and this would include the presumption of innocence) they were satisfied that defendant was guilty beyond a reasonable doubt they should find him guilty since the presumption of innocence would then no longer apply. While not identical, the instruction is similar to the one upheld in *People v. Arlington*, 131 Cal. 231, 63 P. 347, and there would appear to be no prejudicial error.

[7] In regard to circumstantial evidence the court instructed, in part, as follows: "You are not permitted on circumstantial evidence alone, to find defendant guilty of any crime charged against him unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with *any rational* conclusion." (Emphasis added.) Defendant argues that the omission of the word "other" before the word "rational" rendered the instruction ambiguous and meaningless, with the effect of depriving the defendant of his right to a jury trial. It is difficult to see how such an omission could have misled the jury. Moreover, the People's case rested chiefly on direct evidence and was merely corroborated by some circumstantial evidence. The references to Counts II and III, of

which defendant complains, were made by the court in instructing the jury as to the form of the verdicts. The court merely instructed the jury that if they found certain elements to be present they were to find defendant guilty as "charged in count II of the Information." The reference to Count III was similar. Defendant argues that this reference to Counts II and III could not have failed to arouse the curiosity of the jury as to the existence and nature of another unmentioned count. It is difficult to see how any substantial prejudice could have resulted from a mere passing reference of this nature. Indeed, if any curiosity was aroused the jury could well have thought that Count I had been dismissed for lack of evidence or that the defendant had already been acquitted of it.

[8,9] Defendant also contends that the trial court erred in limiting one phase of the cross examination of the prosecutrix. There is little merit in this contention. The incident complained of arose after the prosecuting witness had explained how, on the day of the alleged attack, she had happened to punch her time card out at 4:37 p.m. and yet not leave her place of employment until 5:35 p.m. Thereafter counsel for defendant insisted upon returning to the matter with an argumentative line of questioning. It is well established that where questions are asked which are improper, the court acts within the scope of its duty in refusing to allow them to be answered, even though no objection be made. *People v. Parry*, 105 Cal.App.2d 319, 322, 232 P.2d 899; *People v. Yuen*, 32 Cal.App.2d 151, 160, 89 P.2d 438, 90 P.2d 291; *People v. Bartley*, 12 Cal.App. 773, 777-778, 108 P. 868. Where, as here, the questioning is purely argumentative it is properly excluded. *People v. Harlan*, 133 Cal. 16, 65 P. 9; *Kimball v. McKee*, 149 Cal. 435, 86 P. 1089; *People v. Ramey*,

only to place upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of

the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.'" Pen.Code, § 1096.

70 Cal.App. 92, 232 P. 724; *Newsom v. Smiley*, 57 Cal.App.2d 627, 135 P.2d 24; *People v. Horowitz*, 70 Cal.App.2d 675, 161 P.2d 833.

[10-13] Defendant further contends that the testimony of the complaining witness was inherently improbable in that she and her assailant would have reacted differently had she actually been raped. It is argued that certain testimony, such as that her assailant helped her pick up the contents of her purse, that he kissed her, that she went to work the next day, etc., is unbelievable when considered with other factors. It is true that an appellate court will not uphold a judgment or verdict based upon evidence which is inherently improbable; however it is not sufficient that the circumstances disclosed by the testimony are merely unusual. *Kidroski v. Anderson*, 39 Cal.App.2d 602, 605, 103 P.2d 1000. As stated by this court in *People v. Huston*, 21 Cal.2d 690, 693, 134 P.2d 758, 759, "To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. *Back v. Farnsworth*, 25 Cal.App.2d 212, 219, 77 P.2d 295; *Lufkin v. Patten-Blinn Lumber Co.*, 15 Cal.App.2d 259, 262, 59 P.2d 414; *Agoure v. Spinks Realty Co.*, 5 Cal.App.2d 444, 451, 42 P.2d 660; *Hughes v. Quackenbush*, 1 Cal.App.2d 349, 354, 355, 37 P.2d 99; *Powell v. Powell*, 40 Cal.App. 155, 158, 159, 180 P. 346. Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. *Hicks v. Ocean Shore Railroad, Inc.*, 18 Cal.2d 773, 781, 117 P.2d 850." In the case at bar there is nothing which would indicate that the testimony of the prosecutrix was so inherently improbable that it could not have been accepted by the jury.

Defendant's principal contention is that the trial court committed prejudicial error in denying his motion to dismiss the entire

jury panel and that as a result he was denied his constitutional right to a trial by an impartial jury. In support of this position defendant alleges that the method used in selecting the jury panel resulted in the systematic exclusion of certain classes, such as hourly workers, of which defendant was a member, and the systematic inclusion of limited classes of persons who did not represent a cross section of the community. It appears that the panel, from which the jury for defendant's trial was selected, consisted of 525 people, all of whom came from a number of townships in and around the city of San Bernardino. A sampling taken of part of this panel indicated that approximately 53.32% were housewives, 14.80% were business men and women, 10% were retired businessmen, 17.34% were salaried workers, 1.27% were hourly workers, 4% were retired workers and 3.57% were ranchers. Of the spouses of 178 of the members of the panel, 30 were hourly-rated workers, 85 were salaried workers, 15 were ranchers and 48 were businessmen. On an age basis approximately 22.7% of the panel were under 35 years of age, 35.4% were in the 36 to 45 age group, 16.8% were in the 46 to 55 age group and the remainder were over 55 years of age.

In explaining the method by which jury panels were selected, the jury commissioner testified that each year questionnaires were sent to persons whose names appeared on the membership lists of organizations such as the Rotary, Kiwanis, Lions, Exchange Club, 20-30 Club, Chamber of Commerce, and on the membership lists of women's clubs. Questionnaires were also given to persons who volunteered and to those who were recommended by other citizens. Former jurors were frequently placed on the panel if they so requested. The jury commissioner also testified that an attempt was made to get as many businessmen on the panel as possible, because such people had in the past been excused frequently, and the attorneys of the county were anxious to have such persons serve; that the sources from which the names of those to whom questionnaires were sent included persons of Mexican and Negro

origin as well as hourly wage earners; and that no attempt was made to exclude persons on the basis of race or because they were of the laboring class.

[14] It is well recognized that "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. *Smith v. Texas*, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84; *Glasser v. United States*, 315 U.S. 60, 85, 62 S.Ct. 457, 471, 86 L.Ed. 680. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society." *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220, 66 S.Ct. 984, 985, 90 L.Ed. 1181; see, also, 31 Am.Jur. 1953 Supp., Jury, § 83. Where no particular source is required by law, jury lists have been compiled in various ways and from numerous general sources such as from city directories, *State v. Lawrence*, 124 La. 378, 50 So. 406, from the register of voters, *People v. Hess*, 104 Cal.App.2d 642, 234 P.2d 65; *People v. Dessauere*, 193 Misc. 381, 68 N.Y.S.2d 108, affirmed in 273 App.Div. 984, 79 N.Y.S.2d 516, and from telephone directories, *State v. Dorsey*, 207 La. 928, 22 So.2d 273; *United States v. Local 36 of International Fishermen & Allied Workers, D.C.*, 70 F.Supp. 782. The principal requirement is that there should be no systematic and intentional exclusion of any group or groups of citizens from the prospective jury lists. 31 Am.Jur. 617-620, Jury, §§ 83-88; 1 A.L.R.2d 1291-1398.

It has been stated that any " * * * intentional, planned, and deliberate exclusion of or discrimination against members of a particular political or economic group, religious faith, race, or sex, by officers in

charge of the selection and summoning of jurors, is in contravention of the constitutional right to jury trial and of the 'due process' and 'equal protection of the laws' clauses of the Fourteenth Amendment of the Federal Constitution, at least as against an accused on trial or litigant belonging to the class or race discriminated against." 31 Am.Jur. 617. Just what does and what does not constitute a systematic and intentional exclusion of certain groups has never been too well defined but it is well established that merely because names are compiled in part from special types of directories such as *Who's Who*, *The Blue Book*, *Social Register* or club lists does not in itself condemn the list as a whole or the manner of its compilation. *United States v. Local 36 of International Fishermen & Allied Workers*, supra, 70 F.Supp. 782; *United States v. Dennis*, 2 Cir., 183 F.2d 201. This is true since in general the clerk or jury commissioner is " * * * free to go to any source for persons to call." *United States v. Local 36 of International Fishermen & Allied Workers*, supra. The principal question is whether the list as a whole is improperly weighted so as to prevent having a good cross section of the community for prospective jurors. *United States v. Local 36 of International Fishermen & Allied Workers*, supra; *United States v. Dennis*, supra; *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680.

The general tendency of the courts has been to permit the compilation of jury lists from membership rosters of private clubs and organizations so long as such sources are used with other general lists such as city directories, voting lists, or telephone directories, *United States v. Local 36 of International Fishermen & Allied Workers*, supra; *United States v. Dennis*, supra; but when all jurors or a predominant part of them are selected from private membership lists the basic concept of a jury panel representative of the community is lost. As stated in *Glasser v. United States*, supra, 315 U.S. 60, 86, 62 S.Ct. 457, 472, " * * * the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community', and not the organ of any

special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties.

"The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations from training or otherwise acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class, but, in addition, it is also openly partisan. If such practices are to be countenanced, the hard won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions."

[15,16] The system of jury selection primarily from the membership rosters of certain private clubs and organizations would normally tend to result in a systematic inclusion of a large proportion of business and professional people and a definite exclusion of certain classes such as ordinary working people. Any systematic attempt to exclude wage earners cannot under our democratic system be permitted. As stated in *Thiel v. Southern Pacific Co.*, supra, 328 U.S. 217, 222-224, 66 S.Ct. 984, 987, a case

which originated in the federal district court in San Francisco, the " * * * exclusion of all those who earn a daily wage cannot be justified by federal or state law. Certainly nothing in the federal statutes warrants such an exclusion. And the California statutes are equally devoid of justification for the practice. Under California law a daily wage earner may be fully competent as a juror. A juror, to be competent, need only be a citizen of the United States over the age of 21, a resident of the state and county for one year preceding selection, possessed of his natural faculties and of ordinary intelligence and not decrepit, and possessed of sufficient knowledge of the English language. California Code of Civil Procedure, § 198. Cf. § 199. Nor is a daily wage earner listed among those exempt from jury service. § 200. And under the state law, 'A juror shall not be excused by a court for slight or trivial causes, or for hardship, or for inconvenience to said juror's business, but only when material injury or destruction to said juror's property or of property entrusted to said juror is threatened * * *' § 201.

"Moreover, the general principles underlying proper jury selection clearly outlaw the exclusion practiced in this instance. Jury competence is not limited to those who earn their livelihood on other than a daily basis. One who is paid \$3 a day may be as fully competent as one who is paid \$30 a week or \$300 a month. In other words, the pay period of a particular individual is completely irrelevant to his eligibility and capacity to serve as a juror. Wage earners, including those who are paid by the day, constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status. We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do."

It is true that our United States Supreme Court has upheld the selection of so-called "blue ribbon" juries, *Fay v. New York*, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043, but such has no application here. In the case of *Fay v. New York*, *supra*, the defendant did not object to the selection of the general jury panel of some 60,000 persons but only to the selection of the "blue ribbon" panel of about 3,000 which was sifted from the general panel. Under the New York procedure the general panel was selected from all segments of the population and from this a special "blue ribbon" panel for the trial of difficult and complicated cases was selected on the basis of qualifications. The selection of jurors under this system favored those of superior qualifications for the special panel but it did not discriminate against any social, political or economic group nor against any religious faith or race.

[17] In the case at bar persons were not excluded from the jury list merely because they were hourly wage earners or members of a minority group but the system which was used would normally tend to exclude a large portion of such persons. The jury commissioner testified that an attempt was made to get as many business people on the panel as possible. To accomplish such a purpose the commissioner, in compiling the jury list, relied almost entirely on the membership rosters of private clubs and organizations such as the Lions, Rotary, women's clubs and the Chamber of Commerce. Such a system would of necessity result in a jury list composed of business people and those of the more fortunate economic strata but at the same time large segments of the population such as hourly wage earners and those of less fortunate economic circumstances would be excluded. Those persons who would be denied the opportunity for jury service under this system would not be excluded because of any lack of ability, intelligence or qualifications but merely because they did not belong to the social and economic strata of the community which comprises the membership of certain private clubs and organizations. A system which tends to permit this form of wholesale exclusion of a large segment of our

citizens from jury duty would normally prevent the selection of juries from a cross-section of the community. Such a system is highly discriminatory and should not be condoned.

[18-20] The precise question presented for this court's determination, by the case at bar, is whether or not the trial court committed prejudicial error in refusing to dismiss the entire jury panel. We are of the opinion that under the facts here presented it did not. It is generally recognized that as a general rule, errors and irregularities in making up a jury list will not invalidate the list when the person objecting is not a member of the group discriminated against. *People v. Parman*, 14 Cal.2d 17, 19, 92 P.2d 387. As stated in *People v. Hess*, 104 Cal. App.2d 642, 234 P.2d 65, 83, "A defendant cannot complain if he is tried by an impartial jury and can demand nothing more."

Even though the jury panel in question may have been selected in an improper manner it cannot be said that its actual composition resulted in any substantial prejudice to the defendant by reason of the exclusion of members of the group to which defendant belonged. The panel to which the defendant objected consisted of 525 persons. A sampling taken of part of this panel indicated that 209 were housewives, 14 were ranchers, 97 were active or retired business men and women and 91 were active or retired working people. Defendant's principal objection seems to be that of the 73 individuals employed as workers only 5 were hourly workers; however, as previously pointed out, of the spouses of 178 of the panel members, 30 were hourly-rated workers, 85 were salaried workers, 15 were ranchers and 48 were business men. It would thus appear that working people or the spouses of such persons were represented on the panel. "Moreover, it is no denial of any constitutional right, even if there were no persons on the jury panel belonging to the 'groups or classes of persons to which the defendants belong.' Their right is to an 'impartial' jury. It is the right to reject jurors and not to select them. *Hayes v. Missouri*, 1887, 120 U.S. 68, 7 S.Ct. 350, 30 L.Ed. 578; *Spies v. Illinois*, 1887,

123 U.S. 131, 8 S.Ct. 22, 31 L.Ed. 80; *Brown v. New Jersey*, 1899, 175 U.S. 172, 20 S.Ct. 77, 44 L.Ed. 119; *Howard v. Kentucky*, 1906, 200 U.S. 164, 26 S.Ct. 189, 50 L.Ed. 421. To hold with the defendants in this connection would be to hold that as a matter of law an implied bias existed in the minds of persons of all other groups than a defendant regardless of an actual state of mind * * *." *United States v. Local 36 of International Fishermen & Allied Workers*, supra, 70 F.Supp. 782, 797.

The American system requires an impartial jury drawn from a cross section of the entire community and recognition must be given to the fact that eligible jurors are to be found in every stratum of society. In selecting a truly representative jury panel, the membership lists of various clubs and organizations may properly be used, but they should not be relied on as the principal source of prospective jurors nor should they be used to the complete exclusion of other general sources more likely to represent a cross section of the population, such as telephone directories, voting lists, and city directories. Any system or method of jury selection which fails to adhere to these democratic fundamentals, which is not designed to encompass a cross section of the community or which seeks to favor limited social or economic classes, is not in keeping with the American tradition and will not be condoned by this court.

In view of our previous discussion of the matter, defendant's application to produce additional evidence, concerning the lack of good faith of the district attorney in his cross examination of character witness Maria Lawson, could serve no useful purpose and is hereby denied.

From our examination of the record in this case, we find no error prejudicial to the rights of the defendant or which would justify a reversal of the judgment.

The judgment and the order denying the motion for a new trial are, therefore, affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Howard J. BENNER, Defendant and
Appellant.
Cr. 2527.

District Court of Appeal,
Third District,
California.
Jan. 3, 1955.

Rehearing Denied Jan. 18, 1955.

Hearing Denied Feb. 2, 1955.

Defendant was convicted of violating statute penalizing the making of fraudulent claims against public funds. The Superior Court, Del Norte County, Carl Christensen, Jr., J., entered judgment, and defendant appealed. The District Court of Appeal, Peek, J., held that evidence, which revealed that probation officer, while acting under valid Juvenile Court order, had conveyed court ward from county to another place as directed, had filed claim correct in amount for miles traveled and costs incurred for food and lodging, and had returned to county, was not sufficient to establish the making of a fraudulent claim against public funds even if officer did not return to the county on day that he said he did.

Judgment reversed.

1. False Pretenses §37

In prosecution for making of fraudulent claim against public funds, indictment, which charged that probation officer, who had filed claim against estate for transporting ward of Juvenile Court of certain county, had claimed to have returned to county on September 16 but, in fact, had continued onto New Mexico, but which did not charge that probation officer had not delivered ward as required or that officer had not ultimately returned to the county, and which did not charge that amount of claim was erroneous, was not sufficient to charge commission of a public offense. Pen.Code, § 72.

2. False Pretenses §49(4)

Evidence, which revealed that probation officer, while acting under valid Juvenile Court order, had conveyed court ward from county to another place as di-

rected, had filed claim correct in amount for miles traveled and costs incurred for food and lodging, and had returned to county, was not sufficient to establish the making of fraudulent claim against public funds even if officer did not return to the county on day that he said he did. Pen. Code, § 72.

Blaine McGowan, Eureka, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

PEEK, Justice.

By an indictment defendant was charged with two separate violations of section 72 of the Penal Code. In Count I he was accused of wilfully making a fraudulent claim for his expenses in transporting one Robert Sellers, a ward of the juvenile court of Del Norte County, from Crescent City to the Preston School of Industry at Ione. Count II charged a similar violation of the same section involving a claim for expenses incurred in conveying one Alvery Miner, a ward of said court, to the same institution. Although the record does not show what disposition was made thereof, it does show that defendant moved to set aside the indictment, and also demurred to the same. A trial was had before a jury which found the defendant not guilty of the crime charged in Count I but guilty of the crime charged in Count II. Defendant's motion for a new trial was denied, and thereafter his application for probation was granted. He now appeals from the judgment entered pursuant to the verdict of the jury, and from the order denying his motion for a new trial.

During all of the times mentioned herein, defendant was the probation officer of Del Norte County. In that capacity he was called upon to drive to Roswell, New Mexico, and there to take into custody one Robert Sellers, a juvenile who had violated his parole. By the terms of the court order defendant was ordered to deliver Sellers to the Preston School. Also, by said order, defendant's expenses were to be paid by

Sellers' parents, the sum agreed upon between them and defendant being \$300, and a check in that amount was given to him. In addition, however, defendant filed a claim in the sum of \$75.09 with the State for the expenses incurred by him in transporting Sellers from Crescent City to Ione. It is this claim which formed the basis of the first count of the indictment, and on which he was found to be not guilty.

At approximately the same time a second juvenile, Alvery Miner, who was then in Del Norte County, had been committed by the same court to the Preston School. For his necessary expenses in transporting Miner from Crescent City to the institution, defendant also filed a claim with the State in an identical amount, \$75.09. This claim formed the basis of the second count of the indictment on which he was found guilty and which in substance charged as follows:

"* * * Said claim was false, and fraudulent as said Howard J. Benner well knew, in that the said Howard J. Benner claimed that he had conveyed the said Alvery Miner from said Del Norte County to said Preston School of Industry on or about the 15th day of September 1951, and that he, the said Howard J. Benner, returned on September 16, 1951 to the County of Del Norte after the delivery of said Alvery Miner to said Preston School of Industry, when in truth and in fact said Howard J. Benner did not return from said Preston School of Industry to said County of Del Norte on the 16th day of September 1951, and did proceed from said Preston School of Industry to Roswell, New Mexico."

It is to be noted that the claim was charged to be false in that Benner claimed that he conveyed Miner from Del Norte County to Preston School on or about September 15th and that he returned to Del Norte County on September 16th after such delivery, when in truth and in fact he did not return on the 16th but proceeded directly from the Preston School to New Mexico.

Penal Code section 72 provides that:

"Every person who, with intent to defraud, presents for allowance or for payment to any state board or officer, or to any county, town, city, district, ward or village board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or writing, is guilty of a felony."

[1] The very evident purpose of said section is to prevent and penalize the making of fraudulent claims against public funds. *People v. Richards*, 86 Cal.App. 86, 260 P. 582. However here the falsity of defendant's act as alleged in the indictment is that he claimed to have returned to Del Norte on September 16th when in truth and in fact he did not return on that date but continued on to New Mexico. The indictment does not charge that the amount of the claim was in error. Neither does it charge that the defendant did not deliver Miner to the school; nor is it charged, and obviously it could not be, that he did not ultimately return to Del Norte County. Such allegations certainly could not sustain a charge of presenting a false or fraudulent claim to the State. Whether he returned to Del Norte County on the 16th or on some other date would be wholly immaterial if he did in fact ultimately return; hence the conclusion is inescapable that the indictment does not charge the commission of a public offense.

[2] Even if the indictment were not subject to such an attack, the evidence before us would be likewise wholly insufficient to sustain the conviction of the defendant as to Count II. The record shows without contradiction that, acting under a valid order of the juvenile court, defendant conveyed a ward of that court from Del Norte County to Ione. The claim which he filed for his necessary expenses was, according to the claims officer of the State, correct in amount for the miles traveled and the costs incurred for food and lodging. Again, even assuming his testimony in explanation of his activities to be false, that is that he did return to Del Norte County on September 16th, the fact remains that he did return, however circuitous his route may have been, and he was validly entitled to

reimbursement for the return portion of his trip from Ione to Del Norte County.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.



130 Cal.App.2d 128

PEOPLE of the State of California,

Plaintiff and Respondent,

v.

Dolly Arlene GILBERT, Defendant and Appellant.

Cr. 886.

District Court of Appeal, Fourth District, California.

Jan. 5, 1955.

Defendant was convicted of issuing seven checks without sufficient funds to meet them and with intent to defraud. The Superior Court of Fresno County, Milo Popovich, J., rendered judgment on the jury's verdict, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that the trial judge's remarks out of the jury's hearing that defendant's counsel's question on cross-examination of a store detective as to whether he was so incensed about the matter because he was "stood up" by defendant was degrading and embarrassing to the witness and must be retracted and stricken from the record, unless counsel satisfied the judge that the question was asked in good faith, were not substantially prejudicial to defendant as improperly restricting cross-examination and preventing impeachment of the witness.

Judgment affirmed.

Criminal Law ⇐ 1166½(12)

In prosecution of woman for issuing checks without sufficient funds, trial judge's remarks out of jury's hearing that defendant counsel's question on cross-examination of store detective as to whether he was so incensed about the matter because he was "stood up" by defendant was degrading and embarrassing to witness and must be

retracted and stricken from record, unless counsel satisfied judge that question was asked in good faith, were not substantially prejudicial to defendant as improperly restricting cross-examination and preventing impeachment of witness.

Hal Johnson, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged in separate counts with issuing, on December 6, 1952, seven checks without sufficient funds to meet them and with intent to defraud. She was also charged with two prior convictions of forgery. She admitted the prior convictions and pleaded not guilty as to each count. A jury found her guilty as charged in each count. She has appealed from the judgment, and from an order denying her motion for a new trial.

It was admitted at the trial that the appellant signed these checks and issued them in exchange for cash, or for cash and merchandise, and that there were no funds in the bank to meet them. The only issue at the trial was as to whether or not there was an intent to defraud. The evidence was sufficient to support the implied finding in that connection, and no contention is made to the contrary. Appellant's sole contention is that she was prevented from having a fair trial because the court improperly restricted her counsel's cross-examination of a certain witness, and thus thwarted his attempt to impeach that witness.

On the question of intent, evidence was received with respect to other check transactions. In connection with one of these it appeared that on February 14, 1953, the appellant tendered a check in payment for some merchandise at Roos Bros. store in San Francisco. The credit manager questioned the check, and the appellant was interviewed at some length by the store detective and an inspector from the San Francisco police department. During a part of this conversation the appellant made a serious charge against the credit manager of this store. The store detective and the

police inspector desired to go into that charge and, since another witness would not be available until after store hours, the appellant agreed to meet them at a restaurant across the street at 5:30 that day, so that they could go into the matter further. The detective and the inspector went to this restaurant at 5:30, but the appellant did not appear. During the trial, this store detective testified with respect to what had occurred on this occasion in San Francisco, including the matter of the charge then made by the appellant. After appellant's counsel had conducted a cross-examination of this store detective, which takes up 23 pages of the transcript, appellant's counsel asked the detective "Now isn't it a fact that during this hour and a half conversation, it finally terminated and you told Mrs. Gilbert to go ahead and go about her business and to meet you for a drink about three blocks away from Roos Brothers' store later that evening?" The detective answered "No". The witness was then asked: "And the reason you were so incensed about this whole matter is the fact you got stood up?", to which the witness replied "No".

The court then adjourned, and after the jury left the court room the trial judge reprimanded the appellant's counsel for using the words "stood up", saying that this was degrading and embarrassing to the witness and would not be allowed unless the accusation was made in good faith. He then stated that unless counsel could satisfy him that the question was asked in good faith counsel would have to retract the statement, apologize to the witness and have it stricken from the record; that he would give counsel an opportunity to be heard; and that unless the matter was corrected he would have to take measures to correct the situation. Counsel replied stating that the witness understood what was meant, and that he expected to clear the matter up on his case in chief. The court then said that the responsibility was upon counsel's shoulders, and that he would take the matter up at the conclusion of that day's session, outside the presence of the jury. It is argued that throughout the remainder of the trial appellant's counsel did not feel

free to cross-examine this witness for fear of being found in contempt of court, that this seriously impaired his attempt to ascertain the truth from this witness, and that he was thus prevented from impeaching the witness.

When court reconvened counsel for appellant continued his cross-examination of this witness, asking six more questions, but saying nothing about this particular matter. Later in the trial the appellant testified that at the conclusion of the conversation in the Roos Bros. store in San Francisco the store detective and the police inspector asked her to meet them for a drink later that evening at a night club three blocks away, and asked her to bring another woman with her. The store detective and the police inspector were called to the stand in rebuttal, and both denied any such arrangement. The store detective was cross-examined by appellant's counsel, during which eight questions were asked concerning appellant's charge that the proposed meeting was to be one for social purposes. The police inspector was also cross-examined with respect to whether this appointment had been made for social or for business purposes.

There was nothing in the testimony of this witness indicating that he was unusually "incensed about this whole matter", and no evidence that he had been "stood up", and the last of these questions was improper at that time at least. While the court's remarks, out of hearing of the jury, may have been unnecessarily severe they were not such as to put any restraint upon any proper cross-examination, or to prevent any impeachment of that witness. The foundation for an attempted impeachment had already been laid through the preceding question and answer. Further cross-examination of this witness was had and, after the appellant had testified, this witness and the inspector were again cross-examined without objection or limitation, including a number of questions about this particular matter. The contentions of each side as to the purpose of the proposed meeting for 5:30 on that day were fully brought out and the matter could have been, and doubtless was, argued to the jury. It does not

appear that anything in this connection substantially prejudiced the rights of the appellant, or could have affected the result.

The judgment and order are affirmed

GRIFFIN and MUSSELL, JJ., concur.



129 Cal.App.2d 682

Theodore STEINBERG, Plaintiff and Respondent,

v.

Max M. GOLDSTEIN, Defendant and Appellant,

James E. Arden, Receiver, Respondent.
Civ. 4691.

District Court of Appeal, Fourth District,
California.

Dec. 20, 1954.

Hearing Denied Feb. 16, 1955.

Action for dissolution of partnership, for an accounting, and for damages. From order of Superior Court, Fresno County, George M. DeWolf, J., approving final report and account of receiver and amending instructions given to receiver in a previous order, the defendant appealed. The District Court of Appeal, Mussel, J., held that where judge, who appointed receiver, entered order containing instructions as to duties of receiver and conduct of business and affairs of partnership, but action was tried before another judge, who entered interlocutory judgment decreeing dissolution of partnership, judge who appointed receiver, had power thereafter to enter an order amending instructions previously given when order merely controlled procedure by which partnership property was made subject to payment of partnership debts and was in aid of exercise of powers of trial judge.

Order affirmed.

See, also, 122 Cal.App.2d 516, 265 P.2d 153.

1. Partnership Ⓒ344

A personal judgment cannot be entered against a partner in a suit for accounting and settlement until all partnership assets have been converted into money, the debt paid and a final balance ascertained.

2. Receivers Ⓒ110

A receiver is an agent and officer of the court and property in his hands is under the control and continuous supervision of the court.

3. Receivers Ⓒ110

Receiver merely holds custody of property involved in litigation, in behalf of a court for the real owners thereof, and court may direct delivery to receiver of specific property which is involved in litigation.

4. Receivers Ⓒ110

Extent of property embraced by a receivership is a question that court which appointed receiver, has power and jurisdiction to determine.

5. Judges Ⓒ32

Where judge, who appointed receiver in action for dissolution of a partnership, entered order containing instructions as to duties of receiver, but action was tried before another judge, who entered interlocutory judgment decreeing dissolution of partnership, judge, who appointed receiver, had power thereafter to enter an order amending instructions previously given to permit receiver to pay partnership debts and make final report.

6. Receivers Ⓒ16

Appointment of a receiver before judgment is ancillary to and in aid of the action and its purpose is to preserve the property pending litigation so that relief awarded by judgment, if any, may be effected.



John D. Chinello and James M. Thuesen, Fresno, for appellant.

Stammer, McKnight & Barnum and L. Nelson Hayhurst Fresno, for plaintiff and respondent.

MUSSELL, Justice.

This appeal is from parts of an order entitled "Order Approving Report and Account of Receiver and Amendment and Supplement thereto, Ordering Defendant to Deliver Property and Pay Money to Receiver, and Instructing Receiver." This order was signed by Judge DeWolf on June 29, 1953, and modified a previous order signed by him in the same action on June 30, 1950.

It is contended by appellant (1) That the order of June 29, 1953, should be reversed for the reason that it was arbitrarily invalid and violative of the order of June 30, 1950; and (2) That the order of June 29, 1953, should be reversed for the reason that Judge DeWolf exceeded his jurisdiction and attempted to deprive Judge Kellas, before whom the case was tried, of his functions and powers as trial judge. Both of these contentions are untenable for the reasons hereinafter stated.

On April 4, 1950, Judge DeWolf appointed a receiver in this action. The appointment was made ex parte and was later confirmed by court order. The receiver, on April 29, 1950, filed a petition for instructions and after a hearing thereon, Judge DeWolf, on May 25, 1950, filed his order containing extensive instructions as to the duties of the receiver and the conduct of the business and affairs of the partnership. On June 21, 1950, appellant filed a motion for an order modifying the order of May 25th on the ground of changed conditions. On June 28, 1950, this motion was heard by Judge DeWolf and a modification of the instructions to the receiver was ordered prepared and submitted to the court before June 30, 1950. Judge DeWolf then, on June 30, 1950, issued an order of instructions modifying the order of May 25, 1950, in many particulars. On October 13th and 16th Judge DeWolf, as presiding judge, ordered the case assigned for trial in department six of said superior court and on October 16, 1950, the trial was commenced in department six of said court, Judge Edward L. Kellas presiding, and was conducted before him for several days. Following this trial Judge Kellas took the matter un-

der advisement and on November 30, 1950, entered his interlocutory judgment decreeing a dissolution of the partnership, appointing one Brenton B. Bradford as referee, and ordering plaintiff and defendant to produce before said referee all of their books and records relating to all partnership transactions. The referee was empowered to take evidence and examine witnesses and the court reserved jurisdiction to make further findings of fact and conclusions of law.

On January 28, 1953, James E. Arden, the receiver appointed by Judge DeWolf, filed his final report and account and petition for discharge. On March 12, 1953, appellant filed written objections to this final report and on May 7, 1953, the receiver filed an amendment and supplement to his final report and asked for further instruction. Appellant, on May 27, 1953, filed written objections to the final report and amendment thereto and on June 1, 1953, Arden filed his motion for an order amending the order of June 30, 1950, made by Judge DeWolf, by striking from paragraphs 9 and 10 thereof the underlined words in the following:

"9. The said Receiver is hereby authorized to permit the defendant to use the equipment and medical instruments which are on hand at both the Visalia and Fresno offices, and the said defendant shall pay unto the said partnership such reasonable rental for the use of any of the same which are determined to be partnership property from and after June 11, 1950, *as may be fixed and determined by the trial court at the trial of the above entitled action.*"

"10. The Receiver is also authorized to turn over unto the said defendant the medicines, supplies, glasses and expendable and saleable items as may be on hand at the Fresno and Visalia offices as of June 11, 1950, and the said defendant shall pay unto the said partnership, the reasonable value of such of the same as may be determined to be partnership property, *all as may be fixed and determined by the trial court at the trial of the above entitled action.*"

This motion was made upon the ground that it was necessary in order to permit the court to make such orders as might be necessary to permit the payment of the partnership debts, the winding up of the partnership affairs and the termination of the receivership. The motion was heard and granted by Judge DeWolf, who then filed findings of fact and conclusions of law and on June 29, 1953, signed the order from which this appeal is taken approving the report and account of the receiver and amendment and supplement thereto ordering defendant to deliver the property and pay money to the receiver and instructing the receiver.

Appellant argues that under paragraph 9 of the order of June 30, 1950, he was permitted to use certain personal property subject to the agreement that he would pay "unto the said partnership such reasonable rental for the use of any of the same which are determined to be partnership property from and after June 11, 1950, *as may be fixed and determined by the trial court at the trial of the above entitled action*"; and under paragraph 10 of the order of June 30, 1950, he received certain personal property subject to the agreement that he would pay "unto the said partnership, the reasonable value of such of the same as may be determined to be partnership property, *all may be fixed and determined by the trial court at the trial of the above entitled action*;" that Judge DeWolf by his order of June 29, 1953, struck out the above italicized provisions of the order of June 30, 1950, and then proceeded to declare said personal property to be partnership property and fixed reasonable values and reasonable rentals for use, thereby arbitrarily and retrospectively changing the agreement under which appellant had received and used said property and thereby invaded the functions and powers of Judge Kellas as trial judge in the action.

[1] The general rule is that a personal judgment cannot be entered against a partner in a suit for accounting and settlement until all the partnership assets have been converted into money, the debts paid and a final balance ascertained. *Hooper v. Barranti*, 81 Cal.App.2d 570, 578, 184 P.2d 688; *Olmo v. Olmo*, 56 Cal.App.2d 590, 594, 133

P.2d 866; *Clark v. Hewitt*, 136 Cal. 77, 68 P. 303. In the instant case there were partnership debts unpaid and the order of June 29, 1953, provided for the reduction of partnership assets to cash in order that the debts might be paid. A final judgment was not entered by Judge Kellas who tried the case and none could be entered until the assets of the partnership were reduced to cash and the debts paid.

[2-4] The receiver who was appointed by Judge DeWolf is an agent and officer of the court and the property in his hands is under the control and continuous supervision of the court. *Lesser & Son v. Seymour*, 35 Cal.2d 494, 499, 218 P.2d 536. The court also held in the *Lesser & Son* case, *supra*, that the main function of the court is to manage or dispose of the estate in the best manner possible and for the best interests of the parties concerned; that to effectually perform that duty necessarily requires some flexibility and continuity of jurisdiction in giving instructions as to the manner in which the property should be sold to meet exigencies as they may arise. A receiver merely holds the custody of the property involved in the litigation, in behalf of the court for the real owners thereof, and the court may direct the delivery to the receiver of specific property which is involved in litigation. *Irer v. Gawn*, 99 Cal.App. 17, 31, 277 P. 1053. The extent of the property embraced by a receivership is a question the court appointing the receiver has the power and jurisdiction to determine, and it may therefore determine whether any particular property is or is not involved in the action and in the receivership proceeding. (45 Am.Jur., sec. 143, p. 121.) In *Lesser & Son v. Seymour*, *supra*, 35 Cal.2d 499, 218 P.2d 539, the court said:

"We are satisfied that a court in an equity proceeding has the power to change the manner of sale of property in its custody by a receiver appointed by it from that previously prescribed by it in the order directing the sale, and in that connection may make the sale itself although the prior order called for it to be made by the receiver. In effect, the directions in the order of sale with regard to the manner in

which it should be made, are merely instructions to the receiver—his procedural directions. They do not go to the substantive rights of the parties."

[5, 6] In the instant case Judge DeWolf appointed the receiver herein and had power to modify his orders in procedural matters not interfering with the trial of the action on the merits. The changes made in the order of June 30, 1950, were to permit the receiver to pay the debts of the partnership and make a final report concluding his receivership so that Judge Kellas, who tried the case, could render his final judgment after the referee appointed by the interlocutory decree had taken and stated an account of the partnership dealings. Judge DeWolf has made no determination of any rights as between the parties or as to the disposition of the property and has not entered a final judgment on the merits. The appointment of a receiver before judgment is ancillary to and in aid of the action. Its purpose is to preserve the property pending the litigation so that the relief awarded by the judgment, if any, may be effective. *Murray v. Superior Court*, 129 Cal. 628, 632, 62 P. 191; 22 Cal.Jur. 433.

Appellant argues that Judge DeWolf exceeded his jurisdiction and attempted to deprive Judge Kellas of his functions as a trial judge. Citing such cases as *DeMund v. Superior Court*, 213 Cal. 502, 504-506, 2 P.2d 985; *Guardianship of Sullivan*, 143 Cal. 462, 467, 77 P. 153; *McAllen v. Souza*, 24 Cal.App.2d 247, 250, 74 P.2d 853; *City of Long Beach v. Wright*, 134 Cal.App. 366, 370, 25 P.2d 541; *In re Williams*, 52 Cal.App. 566, 569, 199 P. 347. These cases hold that a party litigant is entitled to a decision upon the facts of his case from the judge who hears the evidence, where the matter is tried without a jury. However, in the instant case the amendment of the instructions previously given to the receiver by Judge DeWolf was not a trial of the case on its merits and merely controlled the procedure by which the property was made subject to the payment of partnership debts in order that the trial judge could determine the rights of the parties and render judgment upon the merits. In *Williams v. Superior Court*, 14 Cal.2d 656, 663, 96

P.2d 334, it is held that if one department of a court exercises authority in a matter which might properly be held in another, the action constitutes at most an irregularity and does not affect the jurisdiction; that jurisdiction is vested by the Constitution in the court and not in any particular judge or department thereof; that whether sitting separately or together, the judges hold but one and the same court; that where a proceeding has been duly assigned for hearing and determination to one department of the superior court by the presiding judge of said court in conformity with the rules thereof, and the proceeding so assigned has not been finally disposed of therein or legally removed therefrom, it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been so assigned. Here, the action of Judge DeWolf did not interfere with the exercise of the powers of Judge Kellas but was in aid thereof and appellant was not prejudiced thereby.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.



130 Cal.App.2d 54

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Rudolph MARTINEZ, Defendant and
Appellant.
Cr. 5255.

District Court of Appeal, Second District,
Division 3, California.

Dec. 30, 1954.

As Modified on Denial of Rehearing
Jan. 10, 1955.

Hearing Denied Jan. 26, 1955.

Prosecution for possession of narcotics. From judgment of conviction in Superior Court, Los Angeles County, Ralph

K. Pierson, J., and from order denying motion for new trial, defendant appealed. The District Court of Appeal, Shinn, P. J., held that conviction resulting from use of evidence obtained when police officers, after defendant put package containing narcotic in mouth, choked and wrestled defendant to ground until he gave up package, was in violation of due process.

Judgment reversed with direction to dismiss cause.

Appeal from order denying motion for new trial dismissed.

Constitutional Law §266

Narcotic possession conviction obtained by use of evidence procured when police officer, after defendant put package containing narcotic in mouth, choked and wrestled defendant to ground until he gave up package was violation of due process. U.S.C.A.Const. Amend. 14; Const. art. 1, § 13.

Eugene V. McPherson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Dep. Atty. Gen., for respondent.

SHINN, Presiding Justice.

The appeal in this case presents the question whether a conviction of possession of a narcotic may stand where the accused put the package into his mouth, was choked and wrestled to the ground by the arresting officers until he gave up the package, which was used in evidence to prove the offense. We answer that, in our opinion, such a conviction should not be affirmed.

Rudolph Martinez, the appellant, was charged with a violation of the Health and Safety Code, § 11500 (illegal possession of narcotics), and was convicted, having waived a trial by jury. He appeals from the judgment and from an order denying a motion for new trial. He contends on appeal that the court erred in the admission of certain evidence, viz., a small package of heroin, in that the evidence was obtained in violation of the due process clause of the Fourteenth Amendment of the United States Constitution and the California Constitution, Article I, Section 13,

through the use of force applied to his person.

Defendant was in his car, apparently stopped or parked, on November 23, 1953, at about 9:00 p. m., on Griffin Avenue in Los Angeles, when police officers approached as he was about to get out, and identified themselves as officers through the closed window of the car. According to the testimony of Officer Aguirre, defendant immediately placed a white package in his mouth and began chewing it, whereupon the officers entered the vehicle and Officer Lucarelli placed a choke hold on defendant and ordered him to "spit out what he had put into his mouth." A struggle ensued in which Officer Aguirre joined. He testified "we fell to the ground with him and on the ground next to the curb I observed him spit out a small package which I recovered." Thus, while the officers had him on the ground, Martinez spat out the package. The only reasonable inference is that from the time Lucarelli placed a choke hold on Martinez it was not released until the package was given up and that it was the force that was being applied which caused him to surrender it. Aguirre testified that the choke hold was kept on defendant by Lucarelli for a minute or two, "maybe less," and that all that was recovered was what was taken from defendant's mouth. All the testimony of the event was given by Officer Aguirre; defendant did not testify.

Following our reluctant affirmance of a judgment of conviction of possession of a narcotic in *People v. Rochin*, 101 Cal.App. 2d 140, 225 P.2d 1, 913, and denial of a hearing by the Supreme Court, our judgment was reversed by the Supreme Court of the United States, 342 U.S. 165, 72 S.Ct. 205, 209, 96 L.Ed. 183. In the *Rochin* case the officers had choked Rochin in order to extract capsules from his mouth. Being unsuccessful, they took him to an emergency hospital where he was strapped down and given an emetic which caused him to disgorge the capsules. The contents were used to prove the offense charged. The court held that the conviction violated the due process clause of the Fourteenth Amendment. The views of the court pertain

to the facts of that case were expressed as follows: "Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation. * * It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach."

The facts of the present case differ from those of the *Rochin* case only with respect to the variety of methods that were used on Rochin, who was either more durable than Martinez or was not choked as hard. The question, however, is not how hard an officer may choke a suspect to obtain evidence but whether he may choke him at all. It is clear that the substance was choked out of Martinez. The fact that the officers and Martinez were thrown to the ground indicates the extent of the force that was deemed necessary and that sufficient force was used to accomplish that purpose. The People say that the officers used only the force that was reasonably necessary to make an arrest. This statement ignores the evidence. Three officers were present; only one of them testified. There was no word of testimony that Martinez was placed under arrest or told he was being arrested or that he was resisting arrest. Officer Aguirre testified that Officer Lucarelli placed a choke hold on Martinez and that "we fell to the ground with him." The package fell into the street next to the curb. All this took place for the sole purpose of retrieving the package from defendant's

mouth. The State says it could have been inferred that defendant spat out the package "of his own volition." The same might be said of the surrender of a wallet at the point of a gun but the statement would be unconvincing. Other statements in the State's brief are that the officers "made an attempt to effect an arrest," "the recovery of the contraband was not done in a manner shocking to the conscience or smacking of brutality" and "they did not strike him nor did they take any action other than to effect a lawful arrest." It is said further that the case "is in no wise comparable to the Rochin case" and that it was the breaking into Rochin's room and making use of a stomach pump which the Supreme Court characterized as "brutal conduct offending a sense of justice and depriving a defendant of due process." But the court said: "Rochin seized the capsules and put them in his mouth. A struggle ensued, in the course of which the three officers 'jumped upon him' and attempted to extract the capsules. The force they applied proved unavailing against Rochin's resistance." It is true that the court said of all the conduct "so here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society." The State would have us believe that this quoted language of the court was not related to the struggle with Rochin in which three officers choked him, jumped upon him and used force to recover the capsules. Clearly, the State's argument on this point is one of necessity in attempting to distinguish the Rochin case; but while the State goes to extreme limits to justify the conduct of the officers in choking Martinez and throwing him to the ground the State's brief read as a whole very properly concedes that if choking Martinez and throwing him to the ground was brutal conduct such as "shocks the conscience," the defendant's right to due process of law was violated. In order to evade the holding in the Rochin case, the State merely argues that there was no "conduct that shocks the conscience," no "brutal

conduct," "nothing to discredit law" or to offend "a sense of justice." Although these are relative terms and our own views are diametrically opposed to those stated in the State's brief, we accept as our guide what we believe to be the enlightened thinking of all people who believe in the dignity of the individual and that justice in its larger sense is synonymous with fair play. And aside from the very few who entertain the callous belief that the conviction of an offender is of more importance to society than the lawfulness of the means by which it is accomplished, we are confident that the conduct of the officers in question here would meet with universal condemnation.

The State says the case of *People v. Dawson*, 127 Cal.App.2d 375, 273 P.2d 938, 939, is "directly in point." It is not in point. In that case the officer "merely put his arm around defendant's neck to hold him." Defendant spat out the substances when told to do so. And the court said there was "a total absence of any showing of brutal or shocking force used against defendant." Finally the State says: "The Rochin case should not operate as a blue print for the hiding and destruction of incriminating evidence; to hold the reasoning of that case applicable to the dissimilar factual situation herein would accomplish this result." We hold the reasoning of the Rochin case to be applicable to the facts of the present case. And in so applying it we say of that decision that it is one that should serve as a warning to all those who are tempted to use brutal force for the extraction of evidence from the person of an accused and to all those who have a choice between upholding and condemning the use of such force. A conviction obtained by the use of evidence so obtained is in violation of due process.

The judgment is reversed and the superior court is directed to dismiss the cause. The appeal from the order denying motion for new trial is dismissed.

VALLÉE, J., concurs.

WOOD, J., concurs in the judgment.

Hearing denied; EDMONDS, J., dissenting.

129 Cal.App.2d 827

William E. BRAYE and Phyllis D. Braye,
 husband and wife, Plaintiffs,
 v.

Roy A. JONES and Margaret E. Jones, husband and wife, Horace Hills, Pacific Title Insurance Company, a corporation, Griffith Henshaw, Ocean Shore Railroad Company, a corporation, Lewis R. Schroyer, Rockaway Quarry, Inc., a corporation, Defendants,

Roy A. Jones and Margaret Jones, husband and wife, Defendants, Cross-Complainants and Appellants,

Mary Louise Hills, Executrix of the Estate of Horace Hills, Deceased, and Griffith Henshaw, Defendants, Cross-Defendants and Respondents.

Ero SACCONI and Beatrice Saccone, husband and wife, Plaintiffs,
 v.

Roy A. JONES and Margaret E. Jones, husband and wife, Horace Hills, Pacific Title Insurance Company, a corporation, Griffith Henshaw, Ocean Shore Railroad Company, a corporation, Lewis R. Schroyer, Rockaway Quarry, Inc., a corporation, Defendants,

Roy A. Jones and Margaret Jones, husband and wife, Defendants, Cross-Complainants and Appellants,

Mary Louise Hills, Executrix of the Estate of Horace Hills, Deceased, and Griffith Henshaw, Defendants, Cross-Defendants and Respondents.

Civ. 16059, 16060.

District Court of Appeal, First District,
 Division 2, California.

Dec. 29, 1954.

Hearing Denied Feb. 24, 1955.

Actions by purchasers of lots for damages resulting from foreclosure of prior trust deed. Vendor's cross-complaint against mortgagee alleged refusal of mortgagee to release lots in question as agreed in original trust deed. Mortgagee's special defense of res judicata to mortgagor's cross-complaint was tried separately. The Superior Court, County of San Mateo, Murray Draper, J., entered judgment upholding mortgagee's defense of res judicata and mortgagor appealed. The District Court of Appeal, Nourse, P. J., held that

issue raised by cross-complaint was same as one of issues decided in prior litigation between mortgagor and mortgagee in which judgment adverse to mortgagor had become final, and, consequently, prior judgment was res judicata.

Judgments affirmed.

1. Judgment ⇐714(1)

Where two successive causes of action are different but arise out of same subject matter or transactions, questions of law and fact actually litigated and decided in prior action are conclusive between parties in subsequent action. Code Civ.Proc. § 1963, subd. 18.

2. Judgment ⇐588

When a judgment is based on more than one ground, judgment is conclusive as to all supporting grounds although one alone would have been sufficient to support judgment.

3. Judgment ⇐717

Where no order was entered striking issue as to whether mortgagor's default justified mortgagee's refusal to execute partial release, and issue was not withdrawn by parties, fact that court in prior litigation between mortgagor and mortgagee had excluded evidence pertaining to that issue did not eliminate issue from case, and court's unappealed decision and findings pertaining to it were res judicata as to same issue raised by mortgagor's cross-complaint against mortgagee in actions by subsequent purchasers of part of encumbered property for damages resulting from trust deed foreclosure sale. Code Civ. Proc. §§ 597, 1963, subd. 18.

4. Judgment ⇐720

For question to have been litigated it is not always necessary that witnesses have been heard with respect to it.

5. Judgment ⇐576(1)

Matters decided in a judgment which has become final are equally res judicata whether decided correctly or erroneously.

Holloway Jones, Jack M. Howard, San Francisco, for appellants.

Royal E. Handlos, San Francisco, for respondents Griffith Henshaw and Mary

Louise Hills, Executrix of the last will of Horace Hills, deceased.

NOURSE, Presiding Justice.

Braye and Saccone, who both had bought lots of real property from appellants, brought separate damage actions against them after a deed of trust signed by appellants in favor of respondent Henshaw had been foreclosed and the sale had included the lots the plaintiffs had purchased. In both actions appellants filed a cross-complaint against the respondents in which they alleged among other things that respondent Henshaw in an agreement of December 19, 1947, had undertaken to effect upon payment of \$100 a partial reconveyance from the lien of said deed of trust of the property sold, which undertaking had been orally reaffirmed from time to time; that appellants had tendered the \$100 but that respondent had refused to release said property so that the property had been sold, as the result of which appellants suffered special damages as claimed by the plaintiffs in the original actions and general damages. Respondent Henshaw's answers to the cross-complaints denied that he had agreed to continue to release lots in the tract after default in the payments secured by the deed of trust and among other things alleged such default, recording of a notice of breach and a trustee's sale. As a special defense Henshaw alleged that a judgment in a prior action, *Jones v. Henshaw*, entered on December 29, 1950, was res judicata of all the issues raised by appellants' cross-complaints. This special defense was tried separately under section 597 Code of Civil Procedure and upheld by the court. The sole question presented by cross-complainants' appeals, consolidated by order of this court, is whether the judgment of December 29, 1950, which became final when an appeal taken from it by plaintiff was dismissed for lack of prosecution, was correctly considered res judicata as to the issues of the cross-actions here involved.

A detailed consideration of the issues in the prior action is required. The first amended complaint in said action, the transcripts of which are in evidence, consists of two counts. The first count alleged in substance that the Joneses in October, 1946,

bought from the Henshaws a tract of land for \$28,000, payable in installments and secured by deed of trust; that the trustees under said deed of trust had a notice of default recorded and a notice of sale published. That such was done without right because defendants Henshaw had promised to clear the title of all exceptions or credit plaintiffs with \$2,500, which had not been done; that the tract had not been properly surveyed and mapped as promised, entitling plaintiffs to a credit of \$876 and that because of the failure to clear exceptions additional credits in the amount of \$4,316.02 were due; that therefore instead of the \$18,716.67 claimed as due by defendants only \$11,023.69 was due which sum had been tendered to the defendants, but which they had refused to accept. The second count states that in an agreement attached to the complaint defendants agreed to release from the lien of said deed of trust such lots as plaintiffs might request against payment of a sum according to a schedule contained in the agreement; that plaintiffs requested the release of certain lots requiring according to schedule a payment of \$1,000; that the money entitling plaintiffs to reconveyance had been deposited with defendants; that defendants refused to reconvey; that if defendants should be unable to reconvey, plaintiffs, who had contracted to resell, would be damaged in the amount of \$2,000. The prayer was in substance for an injunction pendente lite against foreclosure, which was granted, a determination of the validity of the deed of trust as lien on any part of the tract, a determination of the correct amounts due under the deed of trust, for specific performance of the agreement to reconvey and in case of failure to reconvey damages in the amount of \$2,000.

The answer contains denials and allegations with respect to the first cause of action which need not be stated and with respect to the second cause of action it admitted that the letter regarding release of lots attached to the complaint had been signed and been sent to the Division of Real Estate to facilitate the sale of the property, that since October 13, 1948, until October 10, 1949, when the secured note became due, no amounts had been received

for release of lots, that the release requested on February 22, 1950, had been refused because the whole amount of the note was due and plaintiffs were in default in the payment of taxes and assessments in violation of the deed.

The court found among other things that under the trust deed \$16,091.67 was due, that plaintiffs had violated their duties under the trust deed with respect to real estate taxes and assessments, and as to the second cause of action that plaintiffs on February 22, 1950, had demanded a release of the lots involved, that defendants refused the reconveyance because the entire amount of principal was then due and plaintiffs were in default in the payment of principal and interest and of installments of taxes and assessments, and that other than hereinabove found the allegations of the second count were not true. The conclusions of law stated: (1) The amounts due to defendant Henshaw. (2) That the plaintiffs recover nothing as against defendants. (3) That the temporary injunction is dissolved.

[1,2] It is undisputed that the tract of land purchased by appellants from Henshaw, the trust deed, the letter as to partial reconveyance and the default involved in the present case and in the prior case are the same and that the lots purchased by the plaintiffs Braye and Saccone were not included in the lots to which the second count of the prior action related. This is therefore a situation in which the causes of action are different but arise out of the same subject matter or transactions. In such cases questions of law and of fact actually litigated and determined in the prior action are conclusive between the parties in a subsequent action. Restatement, Judgments § 68c, § 70b; *Todhunter v. Smith*, 219 Cal. 690, 695, 28 P.2d 916. The stated pleadings, findings and decision indicate that the question whether Henshaw had promised to release also when appellants would be in default and when the whole amount of the note would be due was an issue in both cases and was the ground or at least one of the grounds on which the decision that plaintiffs in the first action take nothing was based. There is a presumption that all matters in issue were sub-

mitted and decided, § 1963, subd. 18, Code of Civil Procedure, and when the judgment is based on more than one ground the judgment is conclusive as to all supporting grounds, although one alone would have been sufficient to support it. Restatement, Judgments, § 68n; compare *Williams v. Southern Pac. Co.*, 54 Cal.App. 571, 579, 202 P. 356.

[3,4] Appellants do not seriously dispute any of the above propositions but contend mainly that by certain rulings and statements of the trial court the second cause of action had been eliminated as an issue in the prior action and that therefore the findings and decision as to said second cause of action were immaterial and not res adjudicata in any sense. We do not agree. The matter referred to by appellants is that when plaintiffs in the first action were offering proof of their resale of lots and the damage caused by the failure to release them, the court, after some evidence had been received, ruled that it would sustain objections to further offers of similar evidence stating that the issue before the court was how much was due under the deed of trust and that even if plaintiffs might have an action for damages for breach of the duty to reconvey, such would not reduce the amount secured by the deed of trust. Asked whether this ruling precluded interrogation under the second cause of action the court said that he did not wish to pass on it as he was not immediately familiar with it but that if it related only to the matters stated by plaintiffs' attorney that would be so. There was no order striking the second cause of action nor any stipulation that said second cause of action was withdrawn. To the contrary, plaintiffs made an offer of proof with respect to the resales, failure to release and damages contained in the second cause of action. There was therefore only a ruling of the court as to admissibility of evidence not consented to by plaintiffs. This did not eliminate the second cause of action from the case. The court was not bound by it and could change its position on it at any time. It did so in making its final decision, findings and conclusions of law. It must be noted that for the court's decision that there was no duty to reconvey because

plaintiffs were in default none of the excluded evidence was relevant. The language of the agreement and the fact of the refusal to reconvey were undisputed; the matters relating to plaintiffs' default were tried and findings made on them also in the first cause of action. The question decided by the court was in issue and litigated. For a question to have been litigated it is not always necessary that witnesses have been heard with respect to it.

[5] Appellants also contend that the above decision cannot be res judicata because it is wrong because a release clause remains in force also after default. *Sacramento Suburban Fruit Lines Co. v. Whaley*, 50 Cal.App. 125, 136, 194 P. 1054. Matters decided in a judgment which has become final are equally res judicata whether decided correctly or erroneously. (15 Cal.Jur. 104.) It may, however, be stated in passing that the special formulation of the release agreement in this case, which gives the debtor a right to request release only, leaves more room for a right to refuse on reasonable grounds than the formulation in the case cited.

Judgments affirmed.

DOOLING and KAUFMAN, JJ., concur.

Hearing denied; CARTER, J., dissenting



129 Cal.App.2d 715

Cliff C. WESTBROOK, Plaintiff and
Respondent,

v.

Henry RENEAU, Hugh E. Macbeth,
Defendants and Appellants.

Civ. 20330.

District Court of Appeal, Second District,
Division 1, California.

Dec. 22, 1954.

Rehearing Denied Jan. 10, 1955.

Hearing Denied Feb. 16, 1955.

Action for moneys had and received and for money loaned to defendants, who used money contributed by plaintiff's as-

signors for purchase, reconversion and operation of a vessel, which was to be used in commercial venture. From adverse judgment of Superior Court, Los Angeles County, Percy Hight, J., the defendants appealed. The District Court of Appeal, Doran, J., held that evidence sustained finding that moneys contributed were loaned to the defendants, that there was a total failure of consideration for the loan and that contributors were not partners.

Judgment affirmed.

1. Appeal and Error ⇨931(1), 1011(1)

A reviewing court will not reverse the trial court on a disputed issue of fact where there is any substantial evidence to support the finding, and all reasonable inferences must be indulged toward upholding such finding.

2. Money Lent ⇨7(3)

Partnership ⇨53

In action for money had and received and for money loaned to defendants, who used money contributed by plaintiff's assignors for purchase, reconversion and operation of a vessel which was to be used in a commercial venture, evidence sustained finding that moneys contributed were loans to defendants, that there was a total failure of consideration for the loans, and that contributors were not partners in the venture.

3. Evidence ⇨418

In action for money had and received and for money loaned to defendants, who used money for purchase, reconversion and operation of vessel which was to be used in a commercial venture, and represented that contributors would become limited partners but never effected such a partnership, admission of evidence concerning loan of money to defendants did not violate parol evidence rule even though contributors executed the articles and certificate of limited partnership.

4. Money Lent ⇨1

Money Received ⇨11

Where plaintiff's assignors contributed money to defendants, who used money for purchase, reconversion and operation of a small vessel which was to be used in a commercial venture, notice of rescission of contract and articles of limited partner-

ship was not necessary to maintenance of action for moneys had and received and for money loaned on ground that there had been a total failure of consideration.

5. Money Lent ☞3

Money Received ☞12

Where defendants, who used money contributed by plaintiff's assignors for purchase, reconversion and operation of vessel which was to be used in a commercial venture, assured contributors of the near success of the enterprise, and guaranteed a return of money furnished; plaintiff was not barred by laches when action for moneys had and received and for money loaned was commenced within 19 months after the contributions had been made.

6. Appeal and Error ☞717

Neither the opinion of a trial judge nor his remarks in the course of trial can impeach the findings of the court.

7. Work and Labor ☞28(1)

In action for money had and received and for money loaned to defendants, who used money contributed by plaintiff's assignors for purchase, reconversion and operation of vessel which was to be used in a commercial venture, evidence sustained finding that one of assignors rendered services in connection with conversion and operation of the vessel for which he was entitled to compensation.

8. Pleading ☞237(6)

In action for money had and received and for money loaned to defendants, who used money contributed by plaintiff's assignors for purchase, reconversion and operation of a vessel, trial court did not err in permitting plaintiff to amend complaint during trial so as to include claim for services rendered by one of assignors.

Hugh E. Macbeth, Hugh E. Macbeth, Jr., Los Angeles, for appellant.

David A. Fall, San Pedro, for respondent.

DORAN, Justice.

The present appeal is concerned primarily with the nature of certain contributions made towards the purchase, reconversion

and operation of a small vessel known as the "M. V. Star of Honduras". It is contended by plaintiff that these contributions were by way of loans, for services rendered, etc., and were not intended as partnership contributions.

During the early part of 1948, Henry Reneau and Hugh E. Macbeth banded together for the exportation of such items as bananas, cocoanuts and hardwood from British Honduras. In an attempt to finance this venture these parties obtained certain moneys from various individuals, promising that a limited partnership would be formed, and that the money contributed would be returned at any time demanded regardless of whether the partnership made a profit. The funds obtained were used by Reneau and Macbeth to purchase the vessel, previously known as the "L.C.I. 1062", and to convert the same into a cargo vessel. Title was taken in the name of Henry Reneau. The various claims had been assigned to plaintiff.

Henry Reneau employed plaintiff's assignor, Percy Anderson, to work aboard the vessel while it was being converted, at wages of \$400 per month, and later when the ship sailed on September 11, 1949, Anderson was persuaded to continue employment as purser or owner's agent. It was promised that money would be sent ahead to finance operations, but at several ports Percy Anderson was obliged to expend personal funds for this purpose.

Prior to the sailing of the M. V. Star of Honduras from Long Beach, appellant Hugh E. Macbeth prepared articles and certificates of limited partnership, but these papers were not signed by all of the parties named therein, none of the signatures were notarized, and the papers were never filed; nor was an accounting ever given to plaintiff's assignors. One of the parties, Brandon A. T. Bowlin, refused to sign, and received back the money paid.

During the trip, at the defendants' demand, plaintiff's assignors on various occasions furnished more money for operating expenses, some of which was sent to Percy Anderson. When the vessel arrived at Havana, Henry Reneau flew there to take charge of affairs and Percy Anderson re-

turned to the United States. Thereafter the ship was grounded on a reef off British Honduras; after being removed therefrom, a cargo of lumber was carried to the Port of Isabela de Sagua, Cuba, at which port the vessel was sold by Henry Reneau on November 16, 1949.

It is appellant's contention that the trial court's findings to the effect that the moneys contributed by plaintiff's assignors were loans to the defendants, "are not supported by the evidence or the law". A similar contention is made in reference to the finding that "there was a total failure of consideration for the payments made by plaintiff's assignors".

[1] As stated in respondent's brief, "The appellants grounds for appeal all involve questions of fact which were decided by the trial judge, and should be affirmed if there is any substantial evidence to support the question of facts so found". The above statement represents a long established rule of appellate practice that a reviewing court will not reverse the trial court on a disputed issue of fact where there is any substantial evidence to support the finding. And in this regard, all reasonable inferences must be indulged in toward upholding such findings.

[2] In the instant case, the record undoubtedly discloses very substantial evidence in support of the trial court's findings. The over-all picture, as derived from the plaintiff's witnesses and reasonable inferences to be drawn from the circumstances surrounding the transaction furnish abundant support for the findings in reference to loans of money and failure of consideration.

The record discloses evidence to the effect that upon Reneau's return to the United States in December, 1949, plaintiff's assignors were falsely informed that the vessel had been seized by a Court of Admiralty in Havana, and to placate plaintiff's assignors, Macbeth told Reneau, "You go back and get a cargo of lumber and pay these people their money", which Reneau promised to do. Not being satisfied with Reneau's statement that the vessel had been seized, an attorney was employed to go to Cuba to investigate, and the present action

for "money had and received and for money loaned" was filed. Reneau, Macbeth and others then filed a cross-complaint for "Accounting and Dissolution of Copartnership".

After a trial before a judge without a jury, judgment was rendered in favor of plaintiff in the sum of \$18,096.46 and costs. The findings of the trial court were to the effect that plaintiff's assignors had loaned various sums of money to the defendants Reneau and Macbeth; that the said Percy Anderson had been employed by defendants as laborer and purser at a salary of \$400 per month, for which services defendants were indebted in the sum of \$1,600 with interest, and that Anderson had loaned the sum of \$1,500 to defendants, which accounts had been assigned to the plaintiff.

The trial court further found that the defendants Reneau and Macbeth had represented to plaintiff's assignors that "said defendants would make all of them Limited Partners in the Honduras Products Company, Ltd. if they would contribute money towards the purchase of the S.S. 'Star of Honduras' and in the costs of the operation of said vessel. That it is true that the defendants * * * did not cause the creation of a limited partnership, although each of plaintiff's assignors executed the articles and the certificate of limited partnership". The court also found that "It is not true that the plaintiff's assignors became general partners in the Honduras Products Company, Ltd."; that there was a "total failure of consideration for the payments made", and that the assignors received no "benefits from the defendants in return for money paid". The defendants Reneau and Macbeth were found to have "engaged themselves in a copartnership".

The trial court further found that Reneau had sold the vessel in Cuba, "and that the vessel was neither lost or seized under the decree of any court in Cuba, and that said defendant Henry Reneau concealed the fact of the sale" from all of the plaintiff's assignors. From these findings the trial court concludes that plaintiff "is entitled to a judgment rescinding the partnership agreement for a Limited Partnership", and to receive back all moneys paid.

Nor are the findings and judgment contrary to the law. Much of appellant's argument is predicated upon the assumption that plaintiff's assignors were partners; that if any loan was made it was to the partnership and not to appellants, and that this action could not be maintained "prior to an accounting and settlement of the partnership affairs". This argument, as said in respondent's brief, "ignores the fact that the trial court found that no partnership relationship had ever been created. * * * These findings are supported by substantial evidence, and are not a subject of this appeal."

[3] There is likewise no merit in appellant's assertion that the parol evidence rule was violated in the admission of evidence concerning the loan of money to the defendants. Although, as the trial court found, there were representations that contributors would become limited partners and articles were signed, no such partnership was ever effected. In such a situation as is here present the parol evidence rule does not prevent a searching inquiry into the real nature of the transaction.

[4] The same may be said in reference to appellant's assertion that "The trial court had no jurisdiction to render its judgment adjudicating the rescission of the contract and Articles of Limited Partnership without having all the parties". This apparently relates the trial court's Conclusion of Law I, "That the plaintiff Cliffie C. Westbrook is entitled to a judgment rescinding the partnership agreement for a Limited Partnership" and to receive back all moneys paid. As said in respondent's brief, "The Conclusion, though not necessary to support the Judgment rendered, merely * * * rescinds the agreement 'for a partnership' which in itself was never consummated", and was consistent with the finding that at no time was there a partnership between plaintiff's assignors and the defendants. And, as respondent avers, plaintiff's action was based on total failure of consideration, in which case no notice of rescission or offer to restore was essential. *Orton v. Privett*, 202 Cal. 754, 262 P. 713; *Cherry v. Hayden*, 100 Cal. App.2d 416, 223 P.2d 878.

[5] Appellant's contention that the plaintiff did not act promptly in bringing the action and is barred by laches, is likewise untenable. The record discloses that during the 19 months which elapsed, the defendants continued to assure the contributors of the near success of the enterprise, and to guarantee a return of the money furnished. It will also be recalled that Henry Reneau did not return to California and make a report until December of 1949, at which time plaintiff's assignors were not advised of the sale of the vessel but were told that it had been seized by a Court of Admiralty in Cuba. The present action was filed some four months after Reneau's report, and even at that time all the facts were not known to plaintiff's assignors. Moreover, the relief granted was not in equity, but in law.

[6] Complaint is also made "that the trial court erred in ruling at the close of plaintiff's case * * * that 'There need be no accounting on the basis of plaintiff's evidence and that the defense may introduce evidence to determine the issues of contributions, loans and services'". As answered in respondent's brief, "The reading of the evidence as a whole, makes it readily apparent that the trial court properly refused evidence as to an accounting, and did not prejudice the issues nor limit in any manner the defense of the defendant". And, as said in *Saphire v. Los Angeles Transit Lines*, 99 Cal.App.2d 880, 884, 222 P.2d 956, 958, "It has long been established that neither the opinion of a trial judge nor his remarks in the course of trial can impeach the findings of the court".

[7, 8] Appellant's contention that "The Court erred in awarding judgment against the defendants in the sum of \$1,600 or any other sum on account of the assigned claim of Percy Anderson for services rendered", is without merit. The record discloses substantial evidence that Anderson was employed aboard the "Star of Honduras" for a period of four months, the first two months in the reconversion of the vessel and as chauffeur and ship's agent, and the last two months in the capacity of ship's agent and purser. Anderson was employed by the defendant Reneau, the rate of pay

was \$400 per month, and the employment was continuous. Appellant's claim that Anderson's services as purser were under a separate oral contract and barred by the two year Statute of Limitation provided for in Section 339(1) of the Code of Civil Procedure is untenable. Nor was reversible error committed in permitting plaintiff to amend the complaint during the trial so as to include the latter claim. Such an amendment was well within the discretion of the trial court. The trial court properly awarded judgment for the various sums of money loaned by Percy Anderson.

Examination of the entire record indicates that the defendants were accorded a full and fair trial of all issues, and that no prejudicial error was committed.

The judgment is affirmed

WHITE, P. J., and DRAPEAU, J.,
concur.



John M. LYNCH, Jr., a minor by his guardian ad litem, John M. Lynch, Sr., and John M. Lynch, Sr., individually, Plaintiffs and Respondents,

v.

Jack Wayne BIRDWELL, C. W. Birdwell, and Geraldine Birdwell, Defendants and Appellants.*

Civ. 16018.

**District Court of Appeal, First District,
Division 2, California.**

Dec. 27, 1954.

As Modified on Denial of Rehearing

Jan. 26, 1955.

Hearing Granted Feb. 24, 1955.

Actions arising out of accident, occurring while minor plaintiff was guest

in automobile driven by minor defendant. in which plaintiff sustained personal injuries. The Superior Court, Contra Costa County, Hugh H. Donovan, J., entered judgment adverse to defendants and they appealed. The District Court of Appeal, Nourse, P. J., held that informality or insufficiency of verdict could not be urged on appeal where not called to attention of trial court when verdict was rendered.

Judgment affirmed.

1. Trial \Rightarrow 295(12)

In personal injury action by guest involved in automobile collision, giving of instruction defining negligence, although action was based on wilful misconduct only, was not erroneous, where such instruction was normal complement to instruction given explaining difference between negligence and wilful misconduct, and where it was impossible that from all instructions taken together jury could derive prejudicial impression that they could hold defendants liable for negligence not amounting to wilful misconduct.

2. Automobiles \Rightarrow 181(7), 243(7)

Excessive speed, under certain conditions, may amount to wilful misconduct in suit by guest involved in automobile collision, and speed with which motorist was driving may be considered in that respect by jury along with all other circumstances.

3. Automobiles \Rightarrow 246(56)

In personal injury action by guest involved in automobile collision, instruction that excessive speed might amount to wilful misconduct and that speed with which defendant was driving might be considered in that respect was not erroneous, where complaint expressly alleged reckless speed as basis of wilful misconduct.

* Opinion vacated 285 P.2d 919.

4. Appeal and Error ⇨971(2)

Evidence ⇨546

Question of qualification of expert witness is within discretion of trial judge, and only manifest abuse of such discretion will permit reviewing court to interfere.

5. Appeal and Error ⇨207

In personal injury action, witness' mention of insurance was not reversible error, where no objection had been made and where there had been no motion to strike or request to declare mistrial at proper time.

6. Trial ⇨133(6)

Where defendants asked only that jury be instructed to disregard statement of plaintiff's counsel which referred to prima facie speed limit on curved road in question and did not ask for mistrial, and trial court instructed as so requested, defendants could not complain on appeal that incidental reference to prima facie speed limit was prejudicial and could not be cured by admonition.

7. Damages ⇨220

In action by minor plaintiff and his father against minor defendant and his parent for personal injuries in which minor plaintiff's father sought award of \$3,354.16 as special damages incurred by such father, award of \$13,354.16 to minor plaintiff as general damages did not show on its face that jury gave special damages claimed by father also to son. Vehicle Code, § 352.

8. Appeal and Error ⇨218(1)

Informality or insufficiency of verdict cannot be urged on appeal if not called to attention of trial court when verdict is rendered. Code Civ.Proc. § 619.

Evans, O'Gara & McGuire, San Francisco (E. James McGuire, San Francisco, of counsel), for respondents.

NOURSE, Presiding Justice.

The minor plaintiff John M. Lynch, Jr. was injured when he was a guest in an automobile driven by the minor defendant Jack Wayne Birdwell, which automobile plunged off the road on the way down the Mount Diablo highway. The action, based on wilful misconduct of the minor defendant, was brought for general damages of the minor plaintiff and for special damages of his father John M. Lynch, Sr., consisting of costs of treatment of his injured son. It was directed against the minor defendant and his parents, who had been instrumental in securing his driver's license, § 352, Vehicle Code. At the trial before a jury it was stipulated that the expenses incurred by the plaintiff father amounted to \$3,354.16. The jury returned the following verdict:

"We, the Jury in this case, find for the plaintiff John M. Lynch, Jr. and against the defendants and assess said plaintiff's damages against defendant Jack Wayne Birdwell in the sum of \$13,354.16 and against defendants C. W. Birdwell and Geraldine Birdwell in the sum of \$1,645.84.

"And we further find for the plaintiff John M. Lynch, Sr., as and for his special damages herein and against the defendants and assess said plaintiff's damages against Jack Wayne Birdwell in the sum of \$0.00 and against defendants C. W. Birdwell and Geraldine Birdwell in the sum of \$3,354.16."

On this verdict judgment was entered that plaintiff John M. Lynch, Jr., recover from the defendant Jack Wayne Birdwell the sum of \$13,354.16 and from the defendants C. W. Birdwell and Geraldine Birdwell the sum of \$1,645.84 and plaintiff John M. Lynch, Sr., recover from the defendants C. W. Birdwell and Geraldine Birdwell the sum of \$3,354.16. Defendants appeal.

Weinmann, Rode, Burnhill & Moffitt, Oakland (Cyril Viadro, San Francisco, of counsel), for appellants.

Appellants first contend that the judgment as a whole must be reversed on the ground of prejudicial errors of the court. We have found these contentions without merit. (There is no contention that the conflicting evidence does not support a judgment for plaintiffs.)

[1] The giving of an instruction defining negligence, although the action is based on wilful misconduct only, is not erroneous because it is a normal complement to an instruction given explaining the difference between negligence and wilful misconduct. Appellants do not complain of the latter instruction (B.A.J.I. instruction 209 J) and could not do so because they themselves proposed more than one instruction comparing wilful misconduct and negligence (proposed instructions 4 and 10). Moreover the B.A.J.I. instruction given contains the following clear statement: "A guest may not recover against his host-driver for negligence, however it might be classified, unless that negligence amounted to wilful misconduct * * *" Another instruction read: "Under our law the host is not legally obligated to his guest to exercise ordinary care in the operation of the vehicle. The driver's only legal obligation to the guest is to refrain from being intoxicated and from wilful misconduct." It then seems impossible that from all of the instructions taken together the jury could derive the prejudicial impression that they could hold defendants liable for negligence not amounting to wilful misconduct.

[2,3] The instructions that excessive speed, under certain conditions might amount to wilful misconduct and that the speed with which defendant was driving might be considered in that respect by the jury among all the other circumstances are not erroneous. Such is correct law, *Hallman v. Richards*, 123 Cal.App.2d 274, 281, 266 P.2d 812, and authorities there cited and the giving of the instructions was apposite where the complaint express-

ly alleged reckless speed as a basis of wilful misconduct. Other instructions clearly stated the general requirements of liability for wilful misconduct.

[4] To permit to qualify as an expert on skid marks the ranger Bassett, who was shown to have been twenty years earlier lieutenant of traffic of Santa Barbara for six years and as such to have investigated many traffic accidents there and to have investigated skid marks in a thousand cases and who at the time of the trial was Chief Ranger of Mount Diablo State Park in charge of 18 miles of roadways in the park and the investigation of the accidents there, including observation of skid marks, was within the discretion of the trial judge as to the qualification of experts; there was no manifest abuse of said discretion which alone permits an appellate court to interfere. *Huffman v. Lindquist*, 37 Cal.2d 465, 476, 234 P.2d 34, 29 A.L.R.2d 485.

[5] The mention of insurance by witnesses twice during the trial is no ground for reversal. In neither of the instances was there an objection or motion to strike or a request to declare a mistrial at the proper time. A motion for a new trial was denied.

[6] The contentions as to prejudicial misconduct of plaintiffs' counsel are also without merit. The mentioning of the prima facie speed limit of 15 miles an hour on the curved road in question was not objectionable because it may be considered together with all other circumstances on the issue of wilful misconduct. *Anderson v. Newkirch*, 101 Cal.App.2d 171, 178, 225 P.2d 247. When the court ordered the jury to disregard it, plaintiffs got all they had asked for, *Ades v. Brush*, supra, 66 Cal.App.2d 436, at page 445, 152 P.2d 519, and more than they were entitled to. As to the other two alleged instances there is no indication of any prejudice.

Appellants next contend that the judgment in favor of the minor plaintiff is

erroneous because it includes an award of \$3,354.16, the stipulated amount of special damages sustained by the father, and that it gives an award of \$1,645.84 against the parents of the minor over and above the award given him against the minor. The judgment follows the literal language of the verdict, but the verdict is not a normal or logical one in the action here instituted and does not conform to the instructions given.

[7] It cannot be said that the verdict shows on its face that the jury gave the special damages claimed by the father also to the son. It seems very improbable that they would do so after special instruction, given at their request pending their deliberations, to the effect that the father was entitled to the special damages in the amount stipulated to.

[8] Moreover such informality or insufficiency of a verdict, § 619, Code of Civil Procedure, cannot be urged on appeal if not called to the attention of the trial court when the verdict is rendered. (There is here no verdict for special damages unsupported by the evidence, as contended by appellants, because it does not appear that the recovery granted to the minor plaintiff includes special damages.)

In *Brand v. Norris*, 121 Cal.App.2d 367, 369, 263 P.2d 456, 457, we said: "The following language from *Curtis v. San Pedro Transp. Co.*, 10 Cal.App.2d 547, 548-549, 52 P.2d 528, is apposite to this case:

"If the defendant was dissatisfied with the form of the verdict, he should have asked, at the time it was announced, that it be made formal and certain; otherwise it was the duty of the court to construe it so as to give it the effect intended by the jury, if the intended effect could be ascertained from its language, considered in connection with the pleadings and evidence * * * and as a general rule, a party will not be heard to object to a verdict for the first time on appeal from the judgment, if it is susceptible of a construction which may have a lawful and relevant effect [citation], and this case does not appear to fall within any exception to the rule."

In this case the verdict is susceptible of the construction stated and the effect, though not perfect, seems lawful and relevant.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.



129 Cal.App.2d 688

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Alexander L. OSTER, Defendant and
Appellant.

Cr. 1015.

District Court of Appeal, Fourth District,
California.

Dec. 20, 1954.

Hearing Denied Jan. 19, 1955.

Prosecution for issuing bank checks without sufficient funds with intent to defraud. From judgment of the Superior Court of San Diego County, John A. Hewicker, J., and from order denying a motion for a new trial, the accused appealed. The District Court of Appeal, Mussell, J., held that evidence was sufficient to sustain the conviction.

Judgment and order affirmed.

1. False Pretenses §49(3)

Evidence was sufficient to sustain conviction for issuing bank checks without sufficient funds with intent to defraud. Pen.Code, § 476a.

2. False Pretenses §5

Intent to defraud person to whom a check is delivered is an essential element of offense of issuing a check without sufficient funds and it is the subject of evidence in same manner and to same extent and depends on same general rules of procedure, as any other necessary fact in the case. Pen.Code, § 476a.

3. False Pretenses \S 51

Whether a check was delivered with intent to defraud person receiving it is a question of fact for the jury or court to determine. Pen.Code, \S 476a.

4. False Pretenses \S 49(2)

Intent to defraud person to whom a check was delivered may be proved by circumstantial evidence if circumstances are such as to reasonably justify an inference of intent. Pen.Code, \S 476a.

5. Jury \S 29(6)

Where record disclosed that accused, in open court, expressly waived appointment of counsel as well as trial by jury, even though there was no express consent of deputy district attorney to waiver of jury trial, there was no invasion of accused's constitutional rights.

6. Criminal Law \S 1142

Presumption existed that minutes of court were correct. Code Civ.Proc. \S 1963, subd. 15.

7. Jury \S 29(6)

Even if there was no express consent of deputy district attorney to waiver by accused of a jury trial, conduct of district attorney in going forth with trial without demanding a jury constituted an express waiver upon his part.

Alexander L. Oster, in pro. per.

Edmund G. Brown, Atty. Gen., and Jay L. Shavelson, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellant was charged in an information with three counts of issuing bank checks without sufficient funds with intent to defraud, in violation of section 476a of the Penal Code. Count one alleged the issuance of a \$50 check to an employee of the U. S. Grant Hotel in San Diego. Counts two and three each alleged the issuance of \$25 checks to an employee of the San Diego Hotel. The check described in count one was drawn on the Main and Ninth Street Branch of the Bank of America National Trust and Savings Association and the checks in counts two and three were drawn

on the International Office of the Bank of America National Trust and Savings Association.

Appellant appeared in the Superior Court in propria persona, pleaded not guilty and waived appointment of counsel and trial by jury. After he was found guilty as charged in the information, he moved for a new trial. This motion was denied and he was granted three years probation conditioned upon his spending the first 90 days in the county jail, making restitution of \$150 to those defrauded and paying a fine of \$150.

The only issues raised by this appeal are whether the evidence was sufficient to support the conviction and whether there was a constitutional waiver of a jury trial.

[1] It was stipulated at the trial by appellant and the deputy district attorney conducting the prosecution that appellant wrote a total of four checks, two at the San Diego Hotel and two at the U. S. Grant Hotel in said city; that the two checks written at the U. S. Grant Hotel were written March 11th and March 12th and that each check was for the sum of \$50; that appellant wrote two checks at the San Diego Hotel, one on March 26th for \$25 and the other on March 30th for a like amount; that these checks were cashed by appellant and that payment was not made on any of them; that the checks dated March 11th and 12th were drawn on the Ninth and Main Street Branch of the Bank of America in Los Angeles and at the time the checks were written appellant did not have an account in that bank and has never had an account in said bank; that the other two checks, the ones written March 26th and 30th, were drawn on the International Office of the Bank of America at 220 North Main Street, Los Angeles; that Mr. Oster at one time had an account at that bank, in the months of September, October and to the middle of November, 1953, and that the bank closed out that account November 18, 1953; that at the time these checks were cashed and at the time they were written "there was no discussion with the people who cashed them regarding any lack of their validity or any lack of funds that would not cause the checks to be made good."

The checks were offered and received in evidence and appellant then called Mr. Flanagan, assistant manager of the San Diego Hotel, as a witness. Mr. Flanagan testified that appellant checked into the San Diego Hotel around the last of March and did not check out of the hotel; that on April 4th they found appellant's room vacant, removed his baggage therefrom and marked him up as a "skip"; that appellant had stayed at the hotel on previous occasions and on one such occasion had made a cash deposit at the hotel and had a credit coming when he checked out. Flanagan further testified that he "oked" the check dated March 26, 1950 (Exhibit 1); that he questioned appellant as to whether the check was good or not and appellant stated that "it was all o.k."; and that the checks had been returned "no account".

Appellant was sworn as a witness in his own behalf and testified that he was an attorney; that on March 10 (Wednesday) he came to San Diego to do some work for a client who had agreed to pay him \$100 per day whenever he could get down; that the client had gone to Los Angeles and was "due back" Monday; that he, appellant, did not have enough cash and therefore cashed two \$50 checks at the Grant Hotel, expecting to obtain sufficient money to cover them from the San Diego client and from the son of a client who owed him \$150; that he left the Grant Hotel and went to Los Angeles without checking out and without taking his personal effects; that he became ill and was unable to return to San Diego; that he wrote to the hotel telling them to check him out and stating to them that he knew the checks would not clear; that he returned to San Diego about March 25th, Thursday, and checked in at the San Diego Hotel, where he cashed the two additional checks; that he then knew he did not have a balance at the International Office of the Bank of America to pay these checks; that on March 26th he tried to get some money from his San Diego client but the client was again in Los Angeles; that he was unable to obtain money from the client or from other sources but that he did not intend to defraud the hotel people.

Appellant contends that there is no evidence of lack of credit within the meaning of Penal Code section 476a and no evidence of his intent to defraud. Neither contention is tenable. Appellant admitted that he had no funds in either bank at the time of drawing the checks involved and that he had written to the Grant Hotel stating that he knew the checks would not clear. He stipulated at the trial that he never had an account at the Main and Ninth Street branch (on which the check described in count one was drawn) and that his account at the International Office (on which the checks described in counts two and three were drawn) had been closed for over four months before the checks were drawn. Appellant testified that he expected to receive certain sums of money which would make possible subsequent deposits to cover the checks. He made no contention that he had made arrangements for credit at either bank and the evidence is sufficient to support a finding that no such arrangement was made. There was ample evidence to establish appellant's intention to defraud. He cashed the checks knowing that he did not have funds in the banks on which they were drawn to pay said checks or any of them and after he was unable to obtain funds in San Diego or Los Angeles to deposit in these bank accounts, he did not inform the employees at either hotel of that fact or that there were no funds on deposit to cover the checks. He informed Mr. Flanagan at the San Diego Hotel that the check of March 26th was "o.k.", knowing at the time that there were no funds to pay it and that his client from whom he expected to obtain money was in Los Angeles. He left both hotels without checking out and without taking his personal effects. No funds were placed on deposit at either bank to meet these checks upon presentation.

[2-4] An intent to defraud the person to whom a check was delivered is an essential element of the offense of issuing a check without sufficient funds. *People v. Griffith*, 120 Cal.App.2d 873, 880, 262 P.2d 355. However, it must be and is the subject of evidence in the same manner and to the same extent, depending on the same general rules of procedure, as is any other neces-

sary fact in the case, and is a question of fact for the jury or court to determine. *People v. Gaines*, 106 Cal.App.2d 176, 180, 234 P.2d 702. The proof of such intent may be by circumstantial evidence if the circumstances are such as to reasonably justify an inference of the intent. *People v. Wepplo*, 78 Cal.App.2d Supp. 959, 965, 178 P.2d 853. In the instant case appellant was given ample opportunity to prove that he had no such intent and while he testified to that effect, the circumstances and facts were such that the intent could be and was reasonably inferred from the whole evidence. *People v. Rose*, 9 Cal.App.2d 174, 175, 48 P.2d 1009.

[5-7] Appellant further contends that there was no constitutional waiver of trial by jury. This contention is without merit. The clerk's transcript contains the following: "This being the time heretofore set for trial, comes now the District Attorney, by Marvin J. Mizeur, and comes defendant, in propria persona. Defendant waives his statutory right to trial by jury, and the District Attorney consents * * *" In *Walling v. Kimball*, 17 Cal.2d 364, 373, 110 P.2d 58, 63, the rule is stated that:

"It is a well established rule in this state that 'an appellate court will never indulge in presumptions to defeat a judgment. It will never presume that an error was committed, or that something was done or omitted to be done which constitutes error. On the contrary, every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the orders and judgments of superior courts.'"

The presumption is that official duty has been regularly performed. Code Civ.Proc., sec. 1963(15), and that the minutes of the court are correct. The appellant does not contend that he did not waive a jury trial and the record is clear that he, in open court, expressly waived appointment of counsel as well as trial by jury. Even if we assume that there was no express consent of the deputy district attorney to a waiver of a jury trial, there was no invasion of appellant's constitutional rights thereby. The conduct of the district at-

torney in going forward with the trial without demanding a jury constituted an express waiver upon his part. *People v. Pughsley*, 74 Cal.App.2d 70, 168 P.2d 27.

The judgment (order granting probation) and the order denying motion for a new trial are affirmed.

BARNARD, P. J., concurs.



129 Cal.App.2d 721

In the Matter of the ESTATE of Harry SHERMAN, Deceased.

Jacob H. KARP, Executor, Petitioner and Respondent; Gross-Krasne, Inc., Respondent; California Studios, Inc., Respondent

v.

Theodora Lois SHERMAN, Arlynne Sherman, Gordon B. Lockerbie, Ruth Britton Moon, Contestants and Appellants.

Civ. 20071.

District Court of Appeal, Second District,
Division 2, California.

Dec. 23, 1954.

Hearing Denied Feb. 16, 1955.

Proceeding on executor's petition for order approving sale of estate's shares in bankrupt corporation pursuant to compromise agreement. The Superior Court, Los Angeles County, Newcomb Condee, J., approved the sale, and interested parties appealed. The District Court of Appeal, Moore, P. J., held that evidence of value of stock, financial condition of corporation, danger to estate, best interests of estate, and whether better offer had appeared warranted order approving sale.

Judgment affirmed.

I. Constitutional Law §306

Where no party to proceeding on executor's petition to sell estate's shares in bankrupt corporation filed pleading or traversed petition, and all interested parties were represented or present and acquiesced in statements made by court and counsel and

made no objection, protest or assignment, claimed failure to provide a hearing or to introduce proof before ordering the sale was not a denial of due process.

2. Trial ☞105(2)

Failure of present or represented interested parties to object to colloquy or to any factual statement made in proceeding on executor's petition to sell certain assets was an effectual waiver of objection to unsworn proof.

3. Executors and Administrators ☞269

A statement in an executor's petition that it is for the best interests of the estate to enter into a proposed agreement of compromise gives a court jurisdiction to consider the petition.

4. Executors and Administrators ☞333

Permitting a person to testify without being sworn in proceeding upon executor's petition to sell certain assets of estate did not affect court's jurisdiction in proceeding.

5. Executors and Administrators ☞67

It is not necessary that all assets of estate be inventoried before there can be appraisalment of an item.

6. Executors and Administrators ☞343

In proceeding by executor to sell estate's shares in a bankrupt corporation pursuant to compromise agreement, evidence of value of stock, financial condition of corporation, danger to estate, best interests of estate, and whether better offer had appeared warranted order approving sale. Bankr. Act, § 301 et seq., 11 U.S.C.A. § 701 et seq.; Probate Code, §§ 718.5, 755, 771, 772.

Morris Lavine, Los Angeles, for appellants.

John J. Irwin, O'Melveny & Myers, Pierce Works, Los Angeles, for respondents Gross-Krasne, Inc. and California Studios.

H. P. Babson, John C. Goff, Los Angeles, for respondent Jacob H. Karp.

MOORE, Presiding Justice.

Appeal from order authorizing sale of corporate stock and directing a compromise of the estate's claim in the sum of \$36,000 against California Studios, Inc. for \$34,000.

At the time of his decease, September 30, 1952, Harry Sherman owned 1,550 of the outstanding 1,750 shares of the California Studios, Inc. The remaining 200 shares were owned by attorney Babson, counsel for the executor. The corporation was indebted as follows:

Labor claims	\$ 28,000
Unpaid rent	9,000
Delinquent taxes	5,300
Note and chattel mortgage	43,000
Account due decedent	36,000 ¹

Total \$132,000

The shades of decedent had but scarcely departed from the scene when the corporation, fearing dispossession for unpaid rent, determined that to conserve its assets and to avoid an ouster, a petition for its reorganization under Chapter XI of the Bankruptcy Act, 11 U.S.C.A. § 701 et seq., should be filed. Such act was accordingly done on October 27, 1952. Proceedings under such petition were pending when the executor filed his petition for a sale of his 1,550 shares of the insolvent corporation.

That petition sets forth the facts above recited and declared that there was no cash to pay current operating expenses; that if any assets of the corporation were to be saved, action by the federal court would have to be invoked under the provisions of Chapter XI of the Bankruptcy Act. The executor then proceeds to relate that he has secured the agreement of Gross-Krasne, Inc. to purchase the shares held by the estate for \$5,316.50 and to pay \$34,000 in full settlement of the estate's claim against the corporation, by paying cash in the sum of \$4,000 and the balance at the rate of \$1,000 monthly on condition that the executor acquire for Gross-Krasne, Inc. the remaining 200 shares of the Studios' stock "at the same relative price," and had the agreement

i. One Mick asserted ownership of one-half interest in the \$36,000, but such claim is not material to the instant controversy.

of attorney Babson, the owner of such 200 shares, to make sale of same on the basis above designated; that Gross-Krasne has agreed to assume and pay all outstanding obligations of the Studios and to secure payment of such debts by procuring extensions for the payment of such obligations and Gross-Krasne has endorsed "the notes of the corporation, representing such extended indebtedness covering all obligations of said corporation."

The petition proceeds to declare that it is for "the best interest of said estate that its stock in California Studios, Inc., referred to herein, be sold for the price set out herein and that the claim of decedent against California Studios, Inc. be settled for \$34,000 under the terms and conditions above set forth. Your petitioner believes that if said sale is not made as outlined, no better offer can be secured and time does not avail for extended negotiations * * * no better proposal can be secured. * * * That for the purpose of securing * * * an adequate offer of payment of the amount of indebtedness * * * it is essential that all obligations of the corporation should be assumed and paid by the proposed purchaser. * * * Such proposed assumption of indebtedness is a material part of the consideration herein; that * * * extension from the landlord has been secured only in view of said proceeding under Chapter XI."

Notice that the executor's petition had been filed and that a hearing thereon would be held on December 3, 1952, was duly posted. Thereupon, proof of posting was filed and at the same time notice was served upon Arlynne Sherman, pursuant to her request for special notice.

Pending the hearing on such petition, the referee in bankruptcy had a hearing upon the plan of reorganization. Counsel for Arlynne was present; Gross-Krasne, Inc., was represented by its attorney. It was there shown that if the Studios, Inc., had not obtained an order to allow Studios, Inc. to remain in operation, the landlord would have been entitled to dispossess the Studios. At that time the bank accepted Gross-Krasne as the new obligor and mortgagor of the \$43,000 and the landlord approved

of an extension of the lease. When the hearing on the executor's petition was called on December 3, it appeared that if the court should not approve of the transaction, as proposed by Gross-Krasne, loss would be suffered through the bankruptcy court; that the bankruptcy court had confirmed an arrangement whereby the proposed purchaser had guaranteed the indebtedness of the creditors. After admonishing the lawyers to work out a settlement, the matter was continued to December 4. After the exchange of a few words, the matter was continued to December 5 at 9:15 a.m. when a discussion of the sale and compromise continued.

Prior to that date, no pleading had been filed by any party participating. No denial of any allegation of the petition was offered. All parties apparently considered all the statements of the petition true. Not a single proposal was uttered in traversal of the facts alleged in the petition. Arlynne had been present at all sessions of court. Neither she nor Theodora opposed the sale or the compromise on the theory that either was not for the welfare of the estate. They emphasized that they were seeking further continuance in order to find prospective buyers or for the purpose of making a bid with better understanding of the situation. There was no intimation that they lacked knowledge of the preceding events. All appellants knew from November 20th that the Studios, Inc. was in a precarious situation. Despite such knowledge, Theodora's attorney requested "a few days" to get "some other people interested * * * we think it is possible some one may pay considerably more for the stock." Arlynne's counsel objected to the "proposed sale and compromise on the ground that we wish to bid." But counsel for Gross-Krasne laid the facts fully before the court, substantially as follows: We found the landlord had filed a notice cancelling the lease for nonpayment of rent. That would have expired the day after Studios, Inc. caused the petition under Chapter XI to be filed. The landlord had a chattel mortgage on all the assets of the Studios, Inc. Also, the bank had a chattel mortgage for \$43,000 senior to that of the landlord. If counsel for Studios, Inc. had not obtained an order to allow the studio to

continue in operation, the landlord would have been entitled to declare and enforce his forfeiture. Our offer for the stock was fair. It was appraised at \$5,400. We agree to pay \$6,000 and assume the indebtedness of the Studios, Inc. to the Sherman estate. We face a critical situation. There is a loss of \$6,000 above the rent. If this matter should be delayed further, the referee in bankruptcy may insist that the matter be adjudicated, or that a receiver be appointed. In such event, the bank and the landlord will take over the assets.

The trial judge felt extreme anxiety about "killing the deal." It would get the estate out whole. The value of the stock cannot be much more than that indicated by the appraisal for the reason that the lease has only two and a half years. Unless this sale is made and the compromise be effected, it appears that the estate will suffer a total loss. The minute they put a receiver in bankruptcy, the estate would not have a penny in it. You are "right along" with the bank and its chattel mortgage. The petition must be approved but the stock must be put up for auction to bidders with money. The terms of sale are as follows: The sale price of the 1,550 shares is \$6,000 although the price quoted in the petition is \$5,316.50, and the settlement for the estate's claim against Studios, Inc. is \$34,000. If a different buyer bids for the stock, he will have to buy the estate's claim for \$34,000. That is the only way. Then the estate will be out of it. The sale will be confirmed on the proposition that the purchaser has paid \$34,000 to the estate. The estate would be satisfied with \$39,316.50; then you lawyers can worry about it elsewhere. The bid will be for the 1550 shares and must be ten per cent more than the \$5,000 and pay the estate \$34,000 in settlement of the Studios' debt to the estate. Miss Sherman stated that she could get the \$39,000 plus ten per cent on the \$5,000. She thereupon announced she had the money in her bag. The matter was then adjourned to be concluded at three o'clock. The court announced that (1) there will be no delay, no arguments; (2) simply, money will talk; (3) five thousand three hundred sixteen dollars and fifty cents plus ten per cent is

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\$5,848.15 plus \$34,000, a total of \$39,848.15; (4) the \$34,000 can be handled by a note with securities, either listed securities or government securities, government bonds at ten per cent excess, and listed securities on the New York exchange at fifteen. The bid for the stock must be by a cashier's check.

Recess having been taken until three p.m., the court reconvened at that hour. At 3:09 p.m. the court stated that the postponement had been taken "for the sole purpose of seeing if a bid would be forthcoming on this stock which is being sold for \$5,361.50, and would require an additional ten per cent" and security for the \$34,000 due the estate. Is a bid forthcoming?

Arlynne's attorney offered to file written objections on the ground that Arlynne is being treated inequitably by being required to meet the terms of 110 per cent United States bond collateral.

The court declined to permit objections to be filed and offered the stock "under the conditions and as the matter of the compromise agreement. Offered once, twice, sold, and the compromise agreement is approved."

Arlynne's counsel thereupon stated: "I would like to make a record of the point that the time element of one, two, three passed before I could open my mouth."

"The Court: * * * I didn't intend to give any more chance to talk. I gave you a chance to bring the money * * * you didn't bid. There is no proof necessary."

Miss Arlynne Sherman: "There is \$6,000 there, and a guarantee on \$34,000."

Due Process

[1, 2] The contention that there was no hearing, no proof offered, no evidence taken is unavailing. There was no pleading filed by any appellant, no traversal of the allegations of the petition. There was no issue to be tried. All the interested parties were present or represented and all acquiesced in the statements made by the court and the lawyers. Prior to the sale not a single objection was made; not a protest; not an assignment. Failure to object to the colloquy or to any factual statement was an effectual waiver of objection to the unsworn proof. In re Estate of Wilson, 116 Cal.

App.2d 523, 526, 253 P.2d 1011; In re Estate of Da Roza, 82 Cal.App.2d 550, 555, 186 P.2d 725; Tennant v. Civil Service Commission, 77 Cal.App.2d 489, 497, 175 P.2d 568.

[3, 4] The Estate of Wilson is especially pertinent. There the residuary legatee appealed from an order entered under conditions parallel to those at bar. The executor had reported the facts in his petition, showing the advantage of the compromise and relating that a dispute had arisen between the estate and an heir and asserting his "belief that it is * * * for the best interests of said estate to enter into' the proposed agreement of compromise." Such statement gave the court jurisdiction to consider the petition, 116 Cal.App.2d at page 525, 253 P.2d at page 1013. A discussion followed the reading of the compromise agreement in which the executor and counsel of all parties participated. No objection was made. That no witness testi-

fied or was sworn was unnoticed by the appellant and his counsel. Objection to the procedure was therefore waived. If any, it should have been made while the evidence was offered when it could have been remedied. 116 Cal.App.2d at page 526, 253 P.2d 1011. Likewise, in the Estate of Da Roza, the same experiences were recorded and the reviewing court affirmed by virtue of the same doctrine. Permitting a person to testify without being sworn does not affect the court's jurisdiction. Tennant v. Civil Service Commission, supra, 77 Cal.App.2d at page 498, 175 P.2d 568.

The Findings are Supported

[5] This brings us to the contention that the findings are not supported by the evidence. By virtue of the foregoing discussion and authorities, the statements made by the participants in the colloquies with the court afford substantial support for the findings.² The notion that there can be no ap-

2. I. That the Executor has in his possession as Executor of the above entitled estate 1550 shares of no par value stock in California Studios, Inc. which belonged to the decedent in his lifetime, and to the estate of decedent; that the said stock has been appraised by Paul Grimm, Inheritance Tax Appraiser duly appointed by this Court, as having a value of \$5,400.00.

II. The Court finds that all of the allegations of the petition of the Executor concerning the impaired financial status of California Studios, Inc., a debtor of this estate, are true.

III. The Court finds that if the sale is not confirmed and the plan of reorganization referred to in said petition is not forthwith concluded, there is grave danger to the probate estate herein that the stock referred to and the claim of the estate against California Studios, Inc. will be seriously, if not totally destroyed.

IV. The Court finds that it is to the best interest of the estate that the petition of the Executor to sell the 1,550 shares of stock of California Studios, Inc. to Gross-Krasne, Inc. and that the indebtedness of California Studios, Inc., to the Estate of Harry Sherman, Deceased, in the approximate amount of \$36,000.00 be compromised in the amount of \$34,000.00, payable \$4000.00 on the 5th day of April, 1953, and \$1000.00 per month thereafter, commencing on the 1st day of May, 1953, and continuing on the

1st day of each and every month until the total sum of \$34,000.00 has been paid in full, such payments to be evidenced by the note of California Studios, Inc. payable to Jacob H. Karp, as Executor of the Estate of Harry Sherman, Deceased, upon the usual commercial form, but without interest, and that payment thereof be guaranteed by Gross-Krasne, Inc., a California corporation. The Court further finds that it is to the best interest of the estate that the 1550 shares of stock be escrowed with H. P. Babson, of Los Angeles, California, as further security for the payment of the \$34,000.00 claim of the estate against California Studios, Inc.

V. That after Findings I, II, III and IV were made objectors requested time within which to meet said offer and the Court set the formal approval of Executor's petition until three P.M., December 5, 1952, to afford objectors an opportunity to be present in Court with a bona fide offer which would be for an amount equal to the offer of Gross-Krasne, Inc. for the stock, plus 10% and for the purchase of the claim of estate against California Studios Inc. by a note in the same terms as above, secured by a pledge of Bonds, in the amount of \$34,000.00, plus 10% or securities listed on the New York Stock Exchange with a market value of 115% of \$34,000.00 to be pledged with the estate as security for payment to the estate of said note for the

praisement of any item of the assets of the estate until all has been inventoried is utterly fanciful. Courts are not required to abandon the use of common sense because they deal with serious affairs. It may often occur that an executor must act speedily with reference to an item of property to prevent the loss of it. No statute or rule of court is so sacrosanct as to require an estate to suffer a loss rather than have the item specially appraised and sold if necessary to prevent loss.

As to the impaired financial condition of the Studios, Inc., that was a fact openly discussed and never questioned. It was implied in the statements of practically every party to the colloquy with the court; especially in the statement that the corporation had no funds; required the assistance of the bankruptcy court; owed \$132,000.

The finding that there is grave danger to the estate if the sale to Gross-Krasne is not approved and the compromise of the estate's claim against the Studios, Inc. is not effected, is the only deduction fairly to be drawn from the discussions with the court, the poverty of the corporation, and the order of the referee in bankruptcy.

As to the finding that it was to the best interests of the estate to sell the stock and to compromise its claim of \$36,000 for \$34,000, it is supported by the facts reported in the petition and stated by counsel to the court. There was no objection to the

sale of the stock or to the settlement of the claim for \$34,000 payable on the terms suggested. In truth, Arlynne Sherman, in the closing "moments of the court's session on December 5" stated that she had the money to bid for the stock and the securities with which to effect the purchase of the estate's claim against Studios, Inc. There was no question raised as to the wisdom or propriety of the sale or of the compromise which was in truth established by the executor's petition. The fact that the findings may have been prepared prior to the conclusion of the hearing presents neither a novelty nor proof of corrupt dealing. The interest of the executor and his prospective purchaser in the success of the executor's petition was sufficient, under the circumstances, to spur them to diligent action in an effort to consummate the sale and compromise before the referee in bankruptcy might take over the assets of California Studios, Inc.

Appellants crown their argument on the findings by the statement "that after findings I, II, III and IV were made they requested time within which to meet the offer and the court set the hour for a formal approval of executor's petition at 3 p. m. to afford objectors an opportunity to be present in court with a bona fide offer," etc. Now as to their securing \$34,000 by either 110% in U.S. bonds or 115% in listed securities, no objection was

purchase of the claim against California Studios, Inc. The objectors offered no objections to the conditions imposed by the Court.

The Court having adjourned further consideration of the matter until three P.M. the consideration of the matter was again resumed at 3 P.M. The Court inquired of the objectors whether they were prepared to meet the conditions set down by the Court at the time of noon adjournment. At that time and place the objectors did not, nor did any one of them, present any bidder to meet the conditions laid down by the Court, the Court thereupon, after offering the stock and the compromise of claim in open Court, one, two and three times, ordered that the petition of the Executor, Jacob H. Karp, be approved.

VI. No written objections to the petition of said Executor were offered at

any time up to the hour of 3:08 P.M., December 5, 1952, and the Court approved the petition of the Executor.

Conclusions of Law

It being to the best interest of the Estate of Harry Sherman, Deceased, and the court in the exercise of its sound discretion imposed upon it under the law it is hereby ordered and the Court concludes that the Executor should sell 1550 shares of the capital no par value stock of California Studios, Inc. to Gross-Krasne, Inc., for the sum of \$5316.50, and that the claim of said estate against California Studios, Inc. be compromised in the amount of \$34,000.00, payment therefor to be represented by the note of California Studios, Inc. and guaranteed by Gross-Krasne, Inc., a California corporation.

Dated at Los Angeles, California, this 5 day of December, 1952.

at the time interposed by any one to such conditions. There was no intimation of opposition to the sale or the compromise until the afternoon session which was to be held solely to enable the objectors to offer a higher sum than that made by Gross-Krasne. Nor was there objection to the conditions the court had attached to the offers to be made by others. After the court had waited nine minutes for advanced offers it reminded those present that the postponement had been taken for the "sole purpose of seeing whether a bid would be forthcoming on this stock which is being sold for \$5,361.50 and would require that the estate be secured in the matter of the \$34,000." Thereupon, Arlynn's counsel objected "to accepting bids upon the terms which have been offered * * * on the grounds that * * * Arlynn * * * a beneficiary, is being treated inequitably by being required to meet the terms of 110 per cent United States bond collateral." She made no offer to meet the requirements of the court. She had enjoyed the ten-day period after November 20 to prepare for the fatal hour. It was then she had heard the discussion in the bankruptcy court. She had known of the executor's petition and the Gross-Krasne offer since November 14 and the counter offer that another would have to make to supplant that reported in the petition. Moreover, the condition that a counter offer must include a guaranty that the \$34,000 would be, in fact, paid was not unreasonable. Any business man under the same circumstances would have required some insurance that so much money would certainly be paid. A court should do no less on behalf of a decedent's estate than the latter would have done in his lifetime.

Finding VI is supported by the evidence which has been recited in the foregoing. No written objections were ever filed or even offered until the preliminaries and the argument had passed and the court's decision had been announced; yea, not until the court had finally called for counter offers for the stock. If she and her attorney were in good faith, the written objec-

tions held then by Arlynn's lawyer might have been filed before the first day of the hearing. But, filed at any time, the court was not obliged to sustain them. She was treated as any other bidder. Her being an heir did not require the court to adopt a special rule for her bid. Likewise, the asserted offer of proof was entitled to no consideration after the court, counsel and the parties had threshed out the subject. The afternoon of December 5 was selected as the occasion for the final bid. The court then properly declined to enter into a skirmish over the form or contents of a new offer.

[6] No finding is without support.

The complaints that (1) no notice was given with an order fixing the terms and conditions of sale, Probate Code, § 771; (2) personalty may be sold only after ten days' public notice in three public places and sales must be made at the courthouse door (*Idem*, § 772); (3) the probate court lacked jurisdiction to direct affairs and improve conditions to benefit corporations; (4) the executor may act after 60 days under circumstances set forth in section 718.5 of the Probate Code; (5) the probate judge had no jurisdiction to direct the corporate acts of California Studios, Inc.; (6) no appraisal was filed; (7) a California corporation cannot sell all its assets without the consent of its stockholders; (8) there was no compliance with section 755 of the Probate Code; (9) there was no statutory authority to combine a sale of assets of an estate with a compromise of the estate's claim—the replies to such contentions are all answered in the foregoing discussion. The executor faced a crisis immediately upon qualifying. He met it in a bold, straightforward manner, expeditiously and conscientiously. Had he not done so, the judge who is now criticized for his orders might already have installed a new administrator.

Order affirmed.

McCOMB and FOX, JJ., concur.

Hearing denied; CARTER, J., dissenting.

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Grady C. TERRY and Lloyd Fred Rossi,
Defendants.*

Lloyd Fred Rossi, Defendant and Appellant.
Cr. 5186.

District Court of Appeal, Second District,
Division 3, California.

Dec. 30, 1954.

Rehearing Denied Jan. 10, 1955.

Hearing Granted Jan. 28, 1955.

Defendant was convicted of attempting to bribe prospective witnesses. The Superior Court, Los Angeles County, Harold W. Schweitzer, J., rendered judgment and denied motion for new trial, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence of negotiations between defendant and officer and a third party, did not support implied finding that defendant had not been entrapped into offering the bribes.

Judgment reversed with instructions.

Wood, J., dissented.

1. Criminal Law §37

Where the criminal intent originates in the mind of the entrapping person and the accused is lured into the commission of the offense charged in order to prosecute him therefor, no conviction may be had.

2. Criminal Law §37

The defense of entrapment raises factual questions whether accused or, in the usual case, the officer who made the arrest, conceived the commission of the act constituting the offense and whether the officer encouraged and induced accused to commit the act.

3. Criminal Law §254

If all evidence in case, both direct and circumstantial, proves facts which constitute entrapment, trial court is powerless to ignore it and to make determination of fact contrary thereto.

4. Criminal Law §304(2)

There can be no facts known to the court other than those that are deemed to

be known to all men and those that are established by the evidence in the case.

5. Criminal Law §306

Inferences must have a rational basis in the facts proved.

6. Criminal Law §260(11)

Where there was no conflict in evidence as to any material fact in criminal case, reviewing court was not bound by trial court's determination of fact.

7. Criminal Law §569

In prosecution for bribery, evidence of negotiation between defendant and officer and a third party did not support implied finding that defendant had not been entrapped into offering the bribes. Pen. Code, §§ 67½, 137.

William H. Rosenthal, Marshall Gumbiner and Joseph Ostrow, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

By information, Grady C. Terry and Lloyd Fred Rossi were accused of offering and giving a bribe to one Norman Moore, alleged to be a ministerial officer, employee and appointee of the City of Los Angeles, in violation of section 67½ of the Penal Code. They were also accused of the additional offense of bribery in violation of section 137 of the Penal Code in that they did offer money and promise to give to Norman Moore and John Malick, persons about to be called as witnesses, a bribe upon the understanding and agreement that the testimony of such persons about to be called as witnesses would be influenced. It was alleged that defendant Terry, under the name of G. C. Wood, had been convicted in Oklahoma of offering a forged instrument for sale, a felony, and had served a term of imprisonment therefor in the state prison.

In a nonjury trial defendants were acquitted on the first count of the information

and convicted on the second. It was found that Terry had suffered the former conviction. Proceedings were suspended and each defendant was granted three years' probation and fined \$400. Rossi appeals. Points on appeal are (1) insufficiency of the evidence and (2) that if Rossi did violate the law, he was entrapped into the violation.

In our summary of the evidence we shall state the facts that were established by the testimony of Norman Moore, a Los Angeles police officer, and shall disregard the testimony of the defendants in the few respects in which it was contradictory of that of Moore.

Terry operated a restaurant and bar on Seventh Street in Los Angeles. Rossi operated a similar establishment on Seventh Street. Police Officer Moore and Terry had been acquainted for about six years. About four months prior to the events which led to the arrests, Terry and Moore had met in Division 7 of the Municipal Court. Terry made a proposition to Moore, to be referred to later, with respect to obtaining money from persons arrested by Moore for violation of the liquor laws. Rossi's bartender was arrested by Moore and his "partner." At about 2:00 p. m., on July 24th, at Terry's invitation, Moore and Officer Malick entered Terry's cafe. Terry, ascertaining that Moore had made the arrest, stated that Rossi was a friend of his and asked if something could be done for him, that "it would be the price of a couple of boxes of cigars"; Moore said, "Well, I don't know about that," and started to leave the place. As he passed out the door, Terry tapped him on the shoulder, held up two fingers and whispered "two hundred." Terry also asked to see the officers again that night. Moore and Malick then went to the Central Police Station and had a conversation with their sergeant. At about 6:00 p. m. Moore again went to police headquarters; at about 8:30 p. m., Moore, Malick and Sergeant Thompson went to Terry's place, but Terry was not in; by 9:30 he had not arrived. At about 10:50 p. m., Moore and Malick entered Terry's place; Sergeant Thompson

was standing across the street. The officers talked with Terry. Moore asked Terry what the "deal" was. Terry said it would be worth \$200 if Moore could do something for Rossi. Moore said he might be able to do "something along that line" but would have to have "something to go on" and that it would take "at least \$50 to get started." In this conversation with Terry, Moore reminded him of the previous conversation outside of Division 7. When asked to relate that conversation, Moore testified: "I asked him what the deal was on making these ABC pinches. Mr. Terry stated that the only thing I would have to do is make ABC pinches and that he would go to the bar the next day and just happen to be in there." He said, "Of course the owner will tell me about receiving a pinch and I will tell him that I might be able to do something for him." He says, "The only thing you have to do is when you make the arrest is to substitute the drink that you take with a non-alcoholic beverage or change your testimony in some way." He said, "It will be worth \$500 or \$1,000 or whatever we can get on the thing." Moore was asked: "Was that the substance of the conversation, that part of the conversation, that you had with Terry at around 10:50 p. m. on July 24th" and he answered "That is correct, sir." Terry testified that the arrangement with Moore was made when they had met in Division 7, on a previous occasion, and that Moore re-stated, it in the 10:50 p.m. meeting. Moore, recalled for further testimony, did not dispute this testimony of Terry's. This significance of Terry's testimony is that Moore did not deny any part of it. Moore told Terry that he wanted him (Terry) to handle the case; he asked Terry if he (Terry) could give him something on account and Terry said he could not, "that the guy Rossi wasn't worth a dollar to him." Terry said he (Terry) didn't want any money out of it; that Moore said to Terry: "You see, are we going to run into all these troubles on all these other deals with me if I go on the other deals with you?" Terry said: "I don't know what the score is. I am just trying to tell you."

Moore asked, "How about all these other deals?" To which Terry replied, "I can't tell you that. In other words, I don't know. I don't think anybody would get any money advanced on any of these." Terry then said he would have to talk with Rossi. The officers remained and reported to Sergeant Thompson, who was nearby. Terry went to see Rossi, told Rossi that he had known Moore for five or six years and volunteered to get Moore to help out Rossi. Moore testified that after this conversation Terry returned to his cafe and reported to Moore that he had talked with Rossi and had told Rossi it might cost him "a few hundred dollars"; that Rossi said "see what you can do", that he had fired his bartender, and that Terry had said to Rossi, "No, you can't go chicken on the damn thing because you bing-bing-bing." Rossi said "Hell, I know that" and Terry said "You'd be taking a pinch every day if you were to go rotten on it." Terry, after relating this conversation with Rossi to Moore, said "he'll go for \$500." Shortly thereafter the officers and Terry went to Rossi's place, Moore and Rossi were introduced and the three had a conversation on the sidewalk. Rossi asked what the deal was. Moore inquired of Rossi whether Terry had not explained it and Rossi replied that Terry had said "it was \$500 bucks," but that he had been "taken for \$1,500 once" and "would like to put the thing in escrow or work something along those lines." Moore declined. Moore testified that Terry told Rossi "that we needed \$50 now and the rest could come after the pinch was taken care of * * * that he would personally guarantee the \$50 and that if we didn't do something for him he would get the \$50 back." And Officer Moore testified that Terry also told Rossi in Moore's presence *"that if he welshed on this deal he would take a pinch every day. Mr. Rossi said, 'Well, I am not trying to welsh on this thing * * * I just want to have all the facts straight.' He then asked me if I wanted the \$50 now. I told Mr. Rossi he would have to see Mr. Terry on that thing; that Mr. Terry was handling all of the details."* Terry and Rossi went inside and in a few

minutes returned and Terry handed Moore \$50 in bills. Moore took the money, which he turned over to headquarters. The bills were received in evidence.

Both Terry and Rossi testified for the defense. Lest it be thought that Rossi made admissions at the trial which would militate against the defense of entrapment, we may refer briefly to his testimony. It was to the effect that Terry came to him and volunteered to intercede on his behalf with Moore; that Rossi stated that he did not wish to meet Moore; that Terry brought Moore and Malick to Rossi's place of business unsolicited by Rossi and without his knowing that they were coming and that the first he knew of their coming was when Terry informed him that they were there. He testified that Terry told him that Officer Moore's son was ill and that he needed \$50 that night; that in the conversation with Moore, Terry said "we need the \$50 tonight and if you should welsh on the deal a pinch could be made every day"; that Officer Moore assented by nodding his head; that Rossi said "I'm not trying to welsh on any deal. I want to know the facts." When Rossi and Terry went inside, Rossi told Terry it was a shake-down to get \$50 and Terry agreed, but Rossi testified that he never authorized Terry to pay any money to Moore. The arrest of the bartender was the only one that had been made at Rossi's place. Rossi said he suggested that the transaction go through escrow because he wanted to find out what Moore wanted; Moore said he needed \$50 that night. There was some talk about trouble Rossi might have with the State Board of Equalization. Rossi testified that he did not agree to pay the \$50, did not pay it and that at no time did he intend to pay the officer not to testify against him. Terry gave the money to Moore and guaranteed to Rossi that he (Rossi) would lose nothing by it. He (Rossi) thought that Terry could get Moore to talk favorably to someone on the State Board and that he (Rossi) was not particularly interested in talking to Moore. However, it was clear to Rossi that Terry and Moore expected him to eventually pay \$500. Officer Sillings testi-

fied that in an interview with Rossi at Police Headquarters, on July 27th, Rossi stated that on July 23rd Terry had offered to intercede with Officer Moore and that he, Rossi, had stated that he "naturally wanted to meet the officer and talk it over with him."

We do not see how anyone could read the record without being convinced that Terry believed he had an understanding with Moore that Moore was willing to accept bribes and that it was with that belief that Terry first volunteered to help Rossi out of his difficulty, believing that Rossi could be persuaded to pay something for Moore's assistance. It is equally clear that Rossi was reluctant to become involved and that even after extreme pressure had been put upon him, he was not willing to pay any money. To be sure he did not protest Terry's putting up the \$50 and gave tacit consent to paying \$500 after "it was all over" or the prosecution was "killed" by Moore, but this was after he had been threatened with repeated arrests if he failed to pay.

Out of the mouth of Moore came the story of the sordid and unconscionable transaction. To be sure Terry broached the scheme to the officer, but the latter agreed to the plan. Whatever may have been in Terry's mind, it was in the mind of Moore to entrap someone into offering a bribe. There was, of course, no entrapment of Terry. He suggested the scheme to Moore. In order to have it understood that they were not working at cross purposes, Moore reminded Terry of the arrangement they had made some months before. That arrangement, it will be recalled, was that they were to get from \$500 to \$1,000 in return for Moore's efforts to defeat a prosecution after arrests made by Moore for violation of the liquor laws. Moore testified:

"Q. Now, Officer Moore, did Mr. Terry at any time offer you \$500 to do any specific thing? Answer that yes or no.

"A. Yes.

"Q. He did. What did he offer you \$500 to do?

"A. Well, the first time was outside of Division 7, as I testified at the preliminary hearing, approximately four months prior to this particular arrest.

"Q. We are talking about this particular case involving Mr. Rossi and this transaction of the 24th of July. Now, did Mr. Terry offer you \$500 at any time?

"A. I kind of take it's all kind of one case now."

When the former discussion was re-stated by Moore and the amounts mentioned, Terry undertook to get \$500 from Rossi. Moore, as we have seen, testified that it was "all one deal," meaning, we assume, that it was a deal between himself and Terry pursuant to the original understanding. And, as we have seen, Moore even asked Terry about other arrests or deals, again referring to the original arrangement that Terry was to solicit bribes for Moore. It is immaterial what Terry's motives or expectations were, whether he believed he would share in any money Rossi might part with, or wished to help Rossi out of trouble, or to fatten the purses of the officers. He acted throughout as the emissary and confederate of Moore, whose motive, by his own admissions, was to use Terry for the purpose of ensnaring Rossi, and then to arrest them both.

[1] The law of entrapment has been expounded by all the courts. However, it has the meaning and only the meaning approved in *People v. Bradford*, 84 Cal.App. 707, 712, 258 P. 660, 662, that "'where the criminal intent originates in the mind of the entrapping person and the accused is lured into the commission of the offense charged in order to prosecute him therefor no conviction may be had.'" We venture to say that no court has ever held the law to be otherwise. It would not be without profit that those who are charged with the enforcement of the laws, including prosecutors and judges, both below and above, should become acquainted with and reflect upon some of the views on the subject that have been expressed by men of great wisdom and learning in the law. It was said

in *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 213, 77 L.Ed. 413, 418: "The federal courts have generally approved the statement of Circuit Judge Sanborn in the leading case of *Butts v. United States* [8 Cir., 273 F. 35, 38, 18 A.L.R. 143], *supra*, as follows: 'The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it,' and in the concurring opinion of Justices Roberts, Brandeis and Stone: "There is common agreement that where a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan ought not to be permitted by any self respecting tribunal. Equally true is this whether the offense is one at common law or merely a creature of statute. Public policy forbids such sacrifice of decency. The enforcement of this policy calls upon the court, in every instance where alleged entrapment of a defendant is brought to its notice, to ascertain the facts, to appraise their effect upon the administration of justice, and to make such order with respect to the further prosecution of the cause as the circumstances require. * * * The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal

law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention. Quite properly it may discharge the prisoner upon a writ of habeas corpus. Equally well may it quash the indictment or entertain and try a plea in bar. But its powers do not end there. Proof of entrapment, at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty. If in doubt as to the facts it may submit the issue of entrapment to a jury for advice. But whatever may be the finding upon such submission the power and the duty to act remain with the court and not with the jury." Other cases are *Cline v. United States*, 8 Cir., 20 F.2d 494; *United States v. Healy*, D.C.Mont., 202 F. 349, 350; *United States v. Eman Mfg. Co.*, D.C.Colo., 271 F. 353, 356; *United States v. Lynch*, D.C.N.Y., 256 F. 983; *United States v. Echols*, D.C.Tex., 253 F. 862; *United States ex rel. Hassel v. Mathues*, D.C.Pa., 22 F.2d 979; *People v. Gallagher*, 107 Cal.App. 425, 290 P. 504; *Sam Yick v. United States*, 9 Cir., 240 F. 60; *Woo Wai v. United States*, 9 Cir., 223 F. 412, 415; *People v. Mills*, 178 N.Y. 274, 70 N.E. 786, 67 L.R.A. 131.

[2-5] Whenever an accused relies upon the defense of entrapment, the factual question is presented whether the accused or, in the usual case, the officer who made the arrest, conceived the commission of the act constituting the offense and the further question whether the officer encouraged and induced the accused to commit the act. These questions can be answered only through a reasonable and logical consideration of the evidence. If all the evidence in the case, both direct and circumstantial, proves the facts which constitute entrapment, the trial court is powerless to ignore it and to make determinations of fact contrary thereto. There can be no facts known to the court other than those that are deemed to be known to all men and those that

are established by the evidence in the case. Inferences must have a rational basis in the facts proved. They cannot be taken from the thin air.

[6] The grave questions presented to us on the appeal cannot be passed off with the remark that we are bound by the trial court's determinations of fact upon conflicting evidence. There was no conflict in the evidence as to any material fact.

[7] The trial court impliedly found that Rossi and not Moore and Terry originated the plan of bribery. The positive evidence of all the witnesses was to the contrary. The trial court impliedly found that Terry and Rossi were acting independently of any arrangement with Moore. The uncontrovertible testimony of Moore was to the contrary. He sent Terry to Rossi after reminding him of the arrangement they were to get from \$500 to \$1,000 as a bribe, and Terry raised the demand from \$200, which he had suggested to Moore, to \$500. And Moore inquired of Terry concerning other possible victims from whom money might be obtained. The trial court impliedly found that Moore and his confederate Terry did not induce Rossi to consent to the payment of a bribe. The evidence of Moore and of Terry and of Rossi was that Moore and Terry not only held out to Rossi the hope of benefit to be gained through the bribery of Moore but also threatened him with successive arrests if he refused to pay the money which they demanded. Even the most inexperienced and poorly trained police officer should know that it would be a crime for him to extort money from a citizen under threat of arrest. Officer Moore was acting in collaboration with his superiors. It is surprising that they should have shared the too common belief that the ends of law enforcement justify the employment of unlawful means. It is a benighted and recidivous belief entertained by some unthinking individuals who have no understanding or appreciation of the time and effort it has taken in our own country to bring about protection of its citizens from brutality and oppression at the hands of the

organized power of the State. Such beliefs and practices deserve only rebuke and repudiation by the courts.

There is one feature of the case which, alone, is sufficient to require a reversal of the judgment. If Rossi gave tacit consent to the payment of money to Moore it was not the sort of consent that would make him the giver of a bribe. Moore knew, before he ever met Rossi, that Terry had told Rossi that unless he came through with the money he would be subjected to repeated arrests. Moore and Terry and Rossi testified that Terry repeated that threat in the presence of Moore. Terry and Rossi testified that Moore expressed his agreement by nodding his head. Moore did not deny that he had expressed his approval of Terry's threat. Moore and Terry were not satisfied with mere efforts at persuasion. They felt it necessary to employ threats. This was not an ordinary case of entrapment. The plan of Moore and Terry was preconceived. Rossi was not only caused to believe that Moore might help him but he was put in fear of the police. We would not have thought it could happen that a citizen would be convicted of bribery for paying or agreeing to pay money to a policeman under threats that if he refused to pay he would be subjected to repeated arrests upon trumped-up charges. How, we ask, was Rossi to know what false charges might be made against him through the activities of the pair who brazenly solicited bribes? Of what undefined and non-existent violations was he to be accused? Trouble with the police in the precarious business of dispensing liquor could cost him his license. He was an unwilling victim. We cannot agree that the law will permit a citizen to be branded as a criminal by the unlawful means that were employed by Moore and Terry.

The judgment is reversed with instructions to the Superior Court to dismiss the cause.

VALLÉE, Justice.

I concur.

Rehearing denied.

PARKER WOOD, Justice (dissenting).

I dissent. I cannot agree that the evidence shows, as a matter of law, the commission of the offense as a result of entrapment. In the recent case *People v. Brad-dock*, 41 Cal.2d 794, 264 P.2d 521, the ap-pellant therein made such a contention with reference to the evidence therein, but the court held that entrapment was not shown as a matter of law.

In the present case, the bartender in Rossi's saloon was arrested by Officer Moore on July 8, 1953, upon a charge of violating the Alcoholic Beverage Control Act, in that, he sold intoxicating liquor to an obviously intoxicated person. Prior to July 24, 1953, Officer Moore had been sub-poenaed as a witness in the trial of the bar-tender upon that charge. Section 137 of the Penal Code provides: "Every person who gives or offers * * * to any wit-ness * * * any bribe, upon any under-standing * * * that the testimony of such witness shall be thereby influenced * * * is guilty of a felony." Terry's saloon was about five blocks from Rossi's saloon, and Rossi had known Terry about two years.

Officer Sillings testified that he was present when Rossi was questioned by officers at the police station (after Rossi and Terry had been arrested). Rossi said in that conversation that on *July 23, 1953* (the day before Terry first talked to Offi-cer Moore about the bartender), Terry was in Rossi's saloon passing out pamphlets in behalf of a candidate for public office, and they (Rossi and Terry) talked about the arrest of the bartender "just like some-one else would talk about a traffic ticket." Rossi said that (at that time) Terry asked him if he knew the arresting officers. Rossi said that he replied that he thought one of them was Moore, and Terry said that he had known Moore about five years. Rossi said that the substance of that con-versation (between Rossi and Terry—be-fore Terry first talked to Officer Moore about the bartender) was "that through the influence of Mr. Terry, Officer Moore could do Mr. Rossi some good on his ABC

[Alcoholic Beverage Control Act] pinch." Rossi then said (to the officers who were questioning him), "So, naturally I wanted to meet the officer and talk it over with him," and a meeting was arranged for the following night (July 24). The officers asked Rossi what he expected Officer Moore to do. Rossi replied, "Well, it is a kind of a friendship deal between Terry and I. We are both bar owners in the vicinity and I thought maybe the officer could kind of go easy on the evidence; and if I were found not guilty, then I wouldn't have to go to the State Board [Board of Equalization]." It could be inferred from that testimony that, on the day before Terry first talked to Moore about the bar-tender's case, Rossi had formed the idea that Officer Moore could do "some good" in the bartender's case, could be influenced to go easy on the evidence therein, and he (Rossi) "naturally" wanted to meet the officer and "talk it over with him."

On July 24 (the next day after Rossi had formed such idea), about 2 p. m., while Officers Moore and Malick were in Terry's saloon, Terry asked Moore if he made the arrest at Rossi's place. Moore replied in the affirmative, and then Terry "wanted" to know if Moore could do something about the arrest inasmuch as Rossi had just re-ceived his whisky license and he did not want a suspension of his license; and Terry said that if Moore could do some-thing for him it would be worth a couple of boxes of cigars. Moore asked what he could do, and Terry suggested that he could fall down and break the evidence. Moore, after stating that he did not know about that, started to leave. As Moore was leaving (about 2:15 p. m.) Terry whis-pered "two hundred." Then Terry said that he would like to see the officers that night. The officers went to the police sta-tion and talked with their sergeant. About 10:50 p. m., the officers talked with Terry in front of his saloon, and Moore asked him what the deal was. Terry said Rossi would be worth \$200 if Moore could do anything for him. Moore said he might be able to do something along that line but he would have to have something to go on.

Terry asked how much and Moore said it would take at least \$50 to get started. Terry said he would have to see Rossi, and then he left and walked east (toward Rossi's) on 7th. The deputy district attorney asked Moore (on direct examination) if during that conversation (on July 24 about 10:50 p. m.) any mention was made about a conversation that Terry and Moore had about four months previously in Division 7 (Municipal Court). Moore answered that he directed Terry to the conversation that they had outside Division 7 and asked him what the deal was on making these ABC pinches. Terry then made a statement, quoted in the majority opinion, to the effect that Terry would tell the arrested persons that he could do something for them, that Moore could change his testimony, and it would be worth whatever they could get. Moore testified that that was the substance of the conversation that was had on July 24, about 10:50 p. m. In relating that conversation, he did not state what was said in the conversation that was had four months previously. He said that (on July 24) he directed Terry to that conversation and asked what the deal was on the pinches. (Later in his testimony [p. 183] he said that Terry offered him \$500 outside Division 7 about four months previously. Also later [p. 202], the judge said that although it appeared to him that Moore had testified that the conversation [wherein Moore referred to Division 7] occurred on July 24, he wanted to be sure that Moore was not relating the conversation that occurred about four months previously. Terry's attorney said that on his cross-examination he said he was referring to the July 24 conversation and he nailed it down specifically as to the date.) There was no evidence as to what Moore said at that prior conversation. There was no evidence that Moore made any reply or said anything when Terry told him on July 24 what the deal was. In the fourth paragraph of the majority opinion reference is made to the conversation of July 24 at 10:50 p. m. and then it is stated: "In this conversation with Terry, Moore reminded him of the previous conversation

outside of Division 7. When asked to relate that conversation, Moore testified: 'I asked him what the deal was * * *.' As above stated, the trial judge made an inquiry to be sure that it was not the conversation of four months previously that was then (at the trial) being related by Officer Moore.

After said conversation of July 24 at 10:50 p. m., Moore talked with his sergeant who was across the street.

Later that evening Terry returned to the automobile in which Officers Moore and Malick were sitting. Terry then told Moore that Rossi wanted to meet Moore. About 11:50 p. m. on that day, Moore and Terry went to Rossi's place of business. Then Rossi or Terry said it would be better if they (the three of them) went out on the sidewalk to talk. They went out to a place on the sidewalk about 75 feet from the entrance to Rossi's place of business.

Officer Moore testified that when they were on the sidewalk, Terry told Rossi that Moore was the officer who made the arrest there. Terry said that "The kid [Moore] is in a hurry; we got to get going on this thing." Rossi said, "All right; what is the deal?" Moore said to Rossi, "Well, didn't Terry give you the details on this thing?" Rossi said, "Yes, he said it was 500 bucks; but I got taken for \$1,500 once, so I would like to put the thing in escrow or work something along those lines." Moore said that he could not do anything like that. Terry then told Rossi that "we needed \$50 now and the rest could come after the pinch was taken care of," that "he [Terry] would personally guarantee the \$50 and if we didn't do something for him he would get the \$50 back," and that "if he [Rossi] welshed on this deal he would take a pinch every day." Rossi replied, "Well, I am not trying to welsh on this thing. I just want to have all the facts straight." Rossi then asked Moore if he "wanted the \$50 now." Moore replied that Rossi "would have to see Mr. Terry on that thing; that Mr. Terry was handling all of the details." Then Terry and Rossi went into Rossi's saloon, and about three minutes later Terry returned and handed

five ten-dollar bills to Moore. Then Moore went to the police station and gave the bills to a police lieutenant.

In rebuttal Moore testified that when he saw Rossi and Terry on July 24 he had a wire-recording device, known as a Minifon recorder, on his person—the microphone was under his tie and the unit was strapped under his arm. The device was operating when he saw Rossi and Terry. After the conversation the words that were on the recording were reduced to typewriting at the police station. He compared the typewriting with the recording and the words in typewriting were the same as the words on the recording.

Rossi had been asked, on cross-examination (as a foundation for impeachment), whether he had made certain statements when he was talking with Moore and Terry, and he said that he had not made the statements. One of the questions was whether he had said: "How do you want to handle it [the \$50]? Do you want me to come out and give it to you now?" He answered: "No, sir. The first part of that, but 'give it to you now' was never said." Another question was whether Rossi had said: "The total will be 500, and then we have it killed in the City. In other words, you wouldn't have to kill it up there." He answered that he did not say that. When Moore was testifying in rebuttal he was asked whether Rossi had made the certain statements which were so referred to on cross-examination of Rossi. Moore, in replying thereto, used the typewritten transcription of the recording to refresh his recollection, and he replied that Rossi had made said statements.

In *People v. Braddock*, supra, 41 Cal.2d 794, at page 802, 264 P.2d 521, at page 525, it was said: "'Where an accused has a pre-existing criminal intent, the fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment.'" In my opinion the question herein regarding entrapment was one of fact for the trial judge and there was ample evidence to support his finding that there was no entrapment. As above shown, the

trial judge could have inferred that on July 23, before Terry or Rossi had talked to Officer Moore about Rossi's bartender, Rossi had the idea that Moore could be influenced to go easy on the evidence, and Rossi wanted to meet Moore and talk it over with him. Certainly, in view of the evidence that neither Terry or Rossi talked to Officer Moore about Rossi's bartender before July 24, it cannot be said that such idea which Rossi had on July 23 was implanted by Officer Moore. Certainly that idea could not be attributed to Officer Moore as a result of the conversation between Terry and Officer Moore which occurred four months previously, for the reason there was no evidence herein as to what that conversation was, except that Officer Moore did say that Terry offered him \$500. There was no evidence as to what Officer Moore said in reply to that offer. As above shown, the conversation wherein Terry stated "what the deal was" on the ABC pinches occurred on July 24—the trial judge emphasized that point by stating that he understood that said conversation occurred on July 24, but he wanted to be sure that the witness (Officer Moore) was not relating the conversation that occurred four months previously; and thereupon the attorney for Terry said that in his cross-examination he referred to July 24, and had nailed it down specifically to that date. It seems to me, therefore, that the reference in the majority opinion to what was said in the conversation of four months previously is in error. The statement by Terry to Officer Moore on July 24 as to "what the deal was" cannot, of course, be assigned as a scheme on the part of Officer Moore which implanted in the mind of Rossi the said idea which he formed on July 23, that Officer Moore could be influenced to go easy on the evidence. I think that Terry's statement, referred to in the majority opinion, that Moore re-stated the previous conversation is without significance since the evidence is to be viewed on appeal in the light most favorable to the judgment of the trial court.

The majority opinion states that Officer Moore sent Terry to Rossi. As I view the

evidence, especially with respect to the conversation between Rossi and Terry on July 23, the trial judge might well have found, and probably did find, that Rossi sent Terry to Officer Moore, or that both Rossi and Terry planned to approach Officer Moore. There was testimony by Officer Sillings that Rossi said on July 23 that he wanted to meet Officer Moore and a meeting was arranged for the following night. In my opinion the trial judge could have found, and probably did find, that Terry brought up the matter (with Officer Moore) of doing "some good" for Rossi's bartender and, Terry having revealed himself as a fixer and racketeer, Officer Moore became a good listener and did not discourage Terry as he brazenly proceeded with his pre-existing ideas as a fixer. The evidence shows that Terry asked Officer Moore if he could do some good on the bartender's case, and offered him a couple of boxes of cigars, then \$200, and then \$500. Certainly, it cannot be said that Officer Moore promoted those bribery efforts. Also, the trial judge could have found, under the evidence, that Rossi joined Terry in his fixing proposal before Terry talked with Officer Moore about the bartender and before Officer Moore appeared on the scene at Rossi's place. Rossi was not merely a "passive instrument" in the transaction. He asked what the deal was. He wanted to handle the matter in escrow. He was impeached in material respects. He denied that he asked if he should come out and "give it [\$50] to you now"; and he denied that he said, "The total will be 500, and then we have it killed in the City." Officer Moore (using the typewritten transcription of the recording to refresh his recollection) testified that Rossi did make those statements. In my opinion, it was for the judge to say as a matter of fact whether Rossi had a pre-existing intent to commit the offense. I agree with the trial judge. The several quotations, in the majority opinion, from the testimony of talkative Terry indicate the ample opportunity which the trial judge had to judge of his credibility. I would affirm the judgment and the order denying a new trial.

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Bruce Alexander MacEWING and Sam
Eugene Hewitt, Defendants and
Appellants.***

Cr. 5187.

**District Court of Appeal, Second District,
Division 1, California.**

Dec. 22, 1954.

Hearing Granted Jan. 19, 1955.

Prosecution for conspiring to commit an abortion and for procuring an abortion. From adverse judgment of Superior Court, Los Angeles County, Joseph M. Maltby, J., and from orders denying motions for new trial, the defendants appealed. The District Court of Appeal, Doran, J., held that the evidence was sufficient to sustain the conviction.

Judgment affirmed.

1. Abortion ☞11

In prosecution for conspiracy to commit an abortion and for procuring an abortion, evidence was sufficient to corroborate testimony of abortee. Pen.Code, § 1108.

2. Criminal Law ☞507(6)

Under statute providing a conviction cannot be had upon testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect defendant with commission of offense, woman, who submits to an abortion, is not an "accomplice" of person performing abortion, or of her husband, who may be an accomplice. Pen.Code, § 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

3. Criminal Law ☞511(1)

With respect to "corroboration" of an accomplice's testimony, the word "corroboration" denotes a strengthening or confirming and is essentially a relative term and refers to some antecedent which it is said to strengthen or fortify. Pen.Code, §§ 1108, 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Corroboration".

* Opinion vacated 288 P.2d 257.

4. Abortion ☞11

Under statute providing that in a prosecution for procuring or attempting to procure an abortion, or aiding or assisting therein, defendant cannot be convicted upon testimony of abortee, unless she is corroborated by other evidence, prosecution is not required to prove its entire case by independent corroborative evidence before abortee's testimony can be considered as having any weight or effect. Pen.Code, § 1108.

5. Abortion ☞11

Under statute providing that person charged with procuring or attempting to procure an abortion cannot be convicted upon testimony of abortee unless her testimony is corroborated by other evidence, such evidence may be circumstantial and need only be sufficient to reasonably satisfy the trier of fact that abortee is telling the truth. Pen.Code, § 1108.

6. Abortion ☞13

In prosecution for conspiring to commit abortion and for procuring an abortion, instruction, that test in determining whether testimony of abortee was corroborated was to eliminate her testimony and examine other evidence to see if it, standing alone, tended to connect defendants with commission of alleged crime and that corroborating evidence could take interpretation and direction from abortee's testimony to give it value and meaning, was not erroneous. Pen.Code, § 1108.

7. Criminal Law ☞822(1)

Instructions given must be read and considered as a whole.

8. Criminal Law ☞1169(2)

In prosecution for conspiring to commit an abortion and for procuring an abortion, permitting prosecutor to read testimony given at preliminary examination by one of defendant's assistants, who was absent from the state and could not be found did not prejudice defendants in view of other evidence. Pen.Code, § 1108.

9. Abortion ☞11

Conspiracy ☞47

Evidence was sufficient to sustain conviction for conspiring to commit an abor-

tion and for procuring an abortion. Pen.Code, §§ 274, 1108.

Joseph A. Ball, Long Beach, for appellant, MacEwing.

A. H. McConnell, Long Beach, for appellant, Hewitt.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

The appellants were convicted of conspiracy to commit abortion on the person of one Gertraut Frawley, and of the substantive offense defined in Section 274 of the Penal Code.

It is the main contention of appellants that there was insufficient corroborative evidence to connect the defendants with the offenses charged, and that the trial court incorrectly instructed the jury on this issue. Complaint is also made that "The Court erred in permitting the District Attorney to refresh the memory of an absent witness".

The record discloses that appellant MacEwing is a licensed physician and surgeon; that appellant Hewitt was employed as a painter by the Douglas Aircraft Company and had worked the same shift as the complaining witness Gertraut Frawley. Hewitt and Gertraut Frawley, had exchanged rides to and from work, and on or about April 5, 1953 at a motel, participated in two acts of sexual intercourse. Mrs. Frawley later consulted a Dr. Johnson and was informed of the existence of pregnancy. On informing appellant Hewitt of this fact, Hewitt stated, "There is a doctor I know, I have worked for him and he has performed an abortion on my sister and I will call him up and make arrangements with him". Thereafter Hewitt said, "I have talked with the doctor and there's something what can be done but you have to go up there and talk to him", and gave Mrs. Frawley a paper containing Dr. MacEwing's name, address and phone number. Hewitt then stated, "I

have made an appointment for you with Dr. MacEwing for Monday, the 17th of August, 9:00 o'clock in the morning".

On the specified date Mrs. Frawley went to Dr. MacEwing's office at 1081 Atlantic Avenue, in Long Beach, and described the office, its equipment, nurses, etc., in some detail. The trial judge and jury viewed the premises during the progress of the trial. According to Mrs. Frawley's testimony, Dr. MacEwing entered the examination room after the complaining witness had been placed on an examination table, inquired who had referred the patient and was told the "Mr. Hewitt" had done so, and that the patient was pregnant, "I don't know exactly how far". After making a manual examination, the doctor said nothing and left the room.

Mrs. Walling, a nurse, then entered the room and informed Mrs. Frawley that the price would be \$400, which amount would have to be in cash. Thereafter, the complaining witness met and talked with appellant Hewitt at the doctor's office, and an unsuccessful attempt was made to get the price reduced. Hewitt claimed to be unable to give financial aid, and upon obtaining the necessary money Mrs. Frawley returned alone to Dr. MacEwing's office on August 20, 1953 for an appointment previously made. The nurse, Mrs. Walling, apparently took charge of the patient, received the money, administered hypodermic shots and otherwise prepared Mrs. Frawley, who was directed to get on an operating table.

At this point Dr. MacEwing entered the room and said, "Well, you are too far gone. We cannot do any surgery on you, we have to do it the hard way". Mrs. Frawley described MacEwing as then wearing a mustache, although at the trial appellant did not have a mustache. Mrs. Walling placed a black cloth over Mrs. Frawley's eyes; somebody walked in and Mrs. Frawley felt an instrument inserted in her private parts and experienced much pain. After the unseen person had left the room, the blindfold was removed and Mrs. Frawley was put to bed. About 10:00 p. m. that evening Mrs. Frawley drove home and the next day talked to Dr. MacEwing by telephone who

inquired, "Don't let's beat around the bush. Did you miscarry yet? Yes or no?", to which Mrs. Frawley replied, "No", and the doctor said, "Well, don't be alarmed. * * I see you Monday".

On returning to the doctor's office on Monday as instructed, complaining witness was given further shots by a Miss Perry and by Dr. MacEwing, which Miss Perry said were given to "bring on cramps". Finally a cab was called to take Mrs. Frawley home, and the patient left in a hallway to await the cab. The cabmen testified to having picked up the complaining witness in front of Dr. MacEwing's office and observed that Mrs. Frawley looked pale and disheveled, in a hurry, nervous, and appeared ill. The expected miscarriage occurred that evening, and thereafter the patient was sent to the hospital by a Dr. Johnson who had originally diagnosed the pregnancy.

[1] There is no merit in appellants' contention that there was no sufficient corroboration of the complaining witness' testimony, and that therefore the jury should have been advised to acquit the defendants. The record discloses ample evidence, which if believed by a jury, furnishes sufficient corroboration.

Section 1108 of the Penal Code, reads: "Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein * * * the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, *unless she is corroborated by other evidence*". (Italics added.)

Apparently the latest case law on this subject is that contained in *People v. Reed*, 128 Cal.App.2d 499, 501, 275 P.2d 633, 634, where the reviewing court says: "If such (corroborating) evidence connects the defendant with the crime in such a way as to reasonably satisfy the trier of fact that the accomplice is telling the truth it is sufficient", citing *People v. Wilson*, 25 Cal.2d 341, 153 P.2d 720, and *People v. Reimringer*, 116 Cal.App.2d 332, 253 P.2d 756. In the same advance sheet is found another abortion case containing similar expression of the law, namely, *People v. Berger*, 128

Cal.App.2d 509, 513, 275 P.2d 799, 801, where it is said that "The necessary corroboration may consist of inferences from the circumstances surrounding the criminal transaction". The Berger case further says that "Whether the corroborating evidence by itself is as compatible with innocence as it is with guilt, is a question for the trier of fact, not for the reviewing court", citing *People v. Estes*, 99 Cal.App.2d 745, 222 P.2d 454, and *People v. Allen*, 104 Cal.App.2d 402, 231 P.2d 896.

[2] At this point it may be noted that, although a woman's husband may well be an accomplice, the woman submitting to an abortion is not an accomplice of the person performing the abortion, or of the husband, within the meaning of Section 1111 of the Penal Code, providing that "a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense."

[3] The word "corroboration", quoting from the case of *People v. Griffin*, 98 Cal. App.2d 1, 27, 219 P.2d 519, 535, "in its etymological sense denotes 'a strengthening or confirming.' (Webster's New International Dictionary, Second Edition.) It is essentially a relative term and refers to some antecedent which it is said to strengthen or fortify. The jury in determining the question of corroboration must obviously compare the residue of the other evidence with the accomplice's testimony, in order to ascertain the truthfulness of the latter". This definition would seem to apply with equal force to the corroboration of an abortee.

[4,5] There is no requirement in the law, as appellants' briefs seem to imply, that the prosecution must prove its entire case by independent corroborative evidence, and that unless and until this is done, the abortee's testimony cannot be considered as having any weight or effect. Such argument misses the entire point and meaning of the term "corroboration". As indicated by Section 1108 of the Penal Code, hereinbefore cited, the only requirement is that the defendant cannot be convicted unless "she (the abortee) is corroborated by other

evidence". As seen from the cited cases, such evidence may be circumstantial, and it need only be sufficient to reasonably satisfy the trier of fact that the abortee is telling the truth. The appellants' argument would seem to reverse this process and make the abortee's testimony merely corroborative of what must be proven by independent evidence. Such is not the law.

[6] The trial court gave the following instruction offered by appellant MacEwing: "The legal test you must apply in determining whether the testimony of Frawley was corroborated is to eliminate the testimony of Frawley and examine the other evidence to determine if such other evidence, standing alone and without support from the testimony of Frawley, fairly, logically, directly and immediately tends to connect the defendant with the commission of the alleged crimes".

Appellants complain that the trial court erroneously "modified and contradicted the above statement of law" by adding thereto the statement: "The corroborating evidence may take interpretation and direction from the testimony of Frawley to give it value and meaning".

A second instruction relating to the same matter is likewise criticized, reading as follows: "The test of the corroboration of an abortee is whether the evidence other than such testimony of Mrs. Frawley, by reasonable inference, connects the defendant with the crime, or whether it satisfies the jury that the woman is telling the truth".

[7] In all this there appears to be no reversible error. Following the usual rule that instructions given must be read and considered as a whole, it seems clear that the jury could not have understood the trial court to mean anything other than that, in order to secure a conviction, the prosecution must present adequate corroboration of the complaining witness' story. The language used is neither inconsistent with nor contrary to the rules of corroboration as expressed in the cited cases.

[8] Appellants' contention that "The Court erred in permitting the District At-

torney to refresh the memory of an absent witness", is thus explained and answered in respondent's brief: "Appellants state that the jury was permitted to consider as evidence written statements of Miss Perry (assistant in Dr. MacEwing's office) made at the police station on the night of the arrest. Respondent submits that this is not correct. The District Attorney read the testimony of Miss Perry given at the preliminary examination inasmuch as she was absent from the state and could not with due diligence be found within the state. It was stipulated that she could not be found and that a diligent search had been made. (See Penal Code Section 686.) The District Attorney contended that the People were entitled to read the entire testimony given at the preliminary as it was there elicited in order to put it completely before the jury".

The record discloses that this witness, at the preliminary examination, repeatedly answered, "I don't remember", and "I don't recall", when questioned concerning the giving of shots to Mrs. Frawley and other matters which were contained in a written statement in Miss Perry's handwriting delivered to the police officers at the time of arrest. While admitting the authenticity of the handwriting, the witness claimed to have been coerced into making it. It is also claimed that the trial court should have limited the effect of such evidence, although no request for such an instruction was offered.

[9] In view of the evidence disclosed by the record, it does not appear that appellants have suffered any prejudice in this respect which would justify a reversal. As stated in appellant MacEwing's brief, "The defendants offered no evidence at the close of the prosecution's case. They relied upon the legal defense offered by Section 1108 of the Penal Code. The fundamental issue was the sufficiency of the evidence to corroborate the witness Frawley". Neither Dr. MacEwing nor the defendant Sam Hewitt took the witness stand. A survey

of the record indicates that both defendants received a fair and impartial trial, that there is substantial evidence in support of the judgment of conviction, and that no prejudicial error occurred.

The judgment is affirmed.

DRAPEAU, J., concurs.

WHITE, Presiding Justice.

I concur. However, I do not subscribe to the theory advanced in some of the cases in the foregoing opinion that the corroborative evidence is sufficient if it connect the defendant with the crime *in such a way as reasonably* to satisfy the fact-finding body that the accomplice is telling the truth. The statute is specific in its meaning that before a jury may even consider the credibility of an abortee (or accomplice) there must be in the record other evidence which of itself, "shall tend to connect the defendant with the commission of the offense". The question is not whether the corroborative evidence *tends* to convince the jury that the abortee (or accomplice) was telling the truth, but, as was said in *People v. Morton*, 139 Cal. 719, 725, 73 P. 609, 611, after eliminating the evidence of the accomplice, does an examination of the evidence of the other witnesses reveal inculpatory evidence, "tending to connect the defendant with the offense". If so, but not otherwise, the accomplice is corroborated. That this is the true test was the holding in many cases, including *People v. Davis*, 210 Cal. 540, 293 P. 32; *People v. Shaw*, 17 Cal.2d 778, 808, 112 P.2d 241; *People v. Buffum*, 40 Cal.2d 709, 256 P.2d 317; *People v. Gallardo*, 41 Cal.2d 57, 257 P.2d 29; *People v. Reingold*, 87 Cal.App.2d 382, 197 P.2d 175.

However, from a careful review of all the circumstances urged as constituting corroborative evidence, I am convinced that in the case now engaging our attention they tended to connect the accused with the commission of the crimes charged against him and that such circumstances measured up to the required *substantial* corroboration.

129 Cal.App.2d 844

ROLLEY, Inc., Plaintiff and Appellant,

v.

MERLE NORMAN COSMETICS, Inc., a corporation et al., Defendants and Respondents.

Civ. 16101.

**District Court of Appeal, First District,
Division 2, California.**

Dec. 29, 1954.

Rehearing Denied Jan. 28, 1955.

Action for a decree enjoining defendants from doing certain acts in violation of the Cartwright Act and directing an accounting of the damages allegedly suffered by plaintiff. From a judgment sustaining a demurrer to the complaint in the Superior Court for the City and County of San Francisco, Albert C. Wollenberg, J., the plaintiff appealed. The District Court of Appeal, Dooling, J., held that where defendant was a single competitor in the cosmetic field, and offered an exclusive franchise of his own products to certain retailers and at least four of them considered the exclusive franchise of sufficient value so as to agree not to purchase cosmetics from other competitors including the plaintiff, no violation of the Cartwright Act was shown.

Judgment affirmed.

1. Monopolies ⇐10

At common law, combinations and contracts in restraint of trade were illegal and void as against public policy and the Cartwright Act is basically merely a statutory enactment of the common law on such subject. Business and Professions Code, § 16700 et seq.

2. Monopolies ⇐10

The Clayton Act is not a codification of existing common law and is broader in its prohibitions than the Sherman Act, and in some respects is broader than the Cartwright Act. Clayton Act, §§ 1 et seq., 3, 15 U.S.C.A. §§ 12 et seq., 14; Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7, 15 note; Business and Professions Code, § 16700 et seq.

3. Pleading ⇐214(1)

On a demurrer pleadings must be construed as true and they may be reasonably interpreted.

4. Monopolies ⇐17(2.8)

Where defendant was a competitor in the cosmetic business and had no monopoly thereon or the ability to become one, and offered an exclusive franchise of his own products to certain retailers, some of whom were customers of plaintiff, and at least four of the retailers considered the exclusive franchise of sufficient value to agree not to purchase cosmetics from other competitors, including the plaintiff, and that plaintiff's sales have decreased as a result thereof, no violation of the Cartwright Act was shown so as to authorize recovery of damages by the plaintiff. Business and Professions Code, § 16700 et seq.

Joseph A. Brown, Harry Gottesfeld, San Francisco, for appellant.

Littler, Lauritzen & Mendelson, John B. Lauritzen, Warren H. Saltzman, San Francisco, for respondents.

DOOLING, Justice.

This is an appeal from a judgment entered from an order sustaining a demurrer to a third amended complaint without leave to amend.

The third amended complaint alleges the following: Defendant Merle Norman Cosmetics, Inc., (hereinafter referred to as Norman) is a competitor of plaintiff in the cosmetics business; that defendant Norman distributes in excess of 3% of all perfumery and cosmetic products; defendant retailers are engaged in business of purchasing cosmetics, etc., from manufacturers and distributors thereof for resale to the general public; upon information and belief plaintiff alleges that defendant Norman refuses to sell its products to retailers unless the latter agree to purchase so much of defendant Norman's products without selection or distinction that defendant reserves the right of unilateral termination of the franchise with-

out cause, and that the franchise is evidenced by writing but not all the above terms and conditions are set forth in it; in return defendant Norman granted its retailers exclusive franchises within certain designated areas, the privilege of using the name "Merle Norman", and other benefits such as advertising materials, accounting and sales record forms, etc.

Plaintiff further alleged on information and belief that on or about November 1, 1947, defendant Norman called a meeting at the Palace Hotel of certain of the franchise holders including the defendant retailers, that they were instructed by defendant Norman to cease purchasing any cosmetic products manufactured, sold or distributed by any person other than defendant Norman and that defendant retailers had a six month period within which to dispose of all products of competitors, and if they failed or refused to comply with this mandate defendant Norman would terminate the exclusive franchise and would also refuse to sell or deliver any further products of defendant Norman; the four defendant retailers who were customers of plaintiff complied with this order and thereafter refused to purchase any further products of plaintiff and cancelled orders for its products made at a prior time. Plaintiff further alleges in a general manner that such "agreement, concert and undertakings" by defendants was designed and intended by them and had the tendency and effect of fixing, determining and controlling terms, prices, business methods, etc. of the perfume and cosmetic products, that it tended to restrict trade and commerce, free and lawful competition and to promote a monopoly of this phase of the cosmetics industry in California and the other states. Therefore plaintiff prayed for a decree enjoining all defendants from doing any of the above acts and that the court direct an accounting be made so that the amount of damages plaintiff has suffered may be ascertained and that plaintiff have judgment for twofold the damages sustained by it.

Appellant's argument is based on the general rule that "every contract, combination, or arrangement of which the

direct purpose, probable effect, or necessary tendency is to stifle or unduly to restrict legitimate competition is unlawful at common law and under the anti-trust statutes."

[1] At the common law combinations and contracts in restraint of trade are illegal and void as against public policy. California courts had long recognized this public policy before the advent of the Cartwright Act, Business and Professions Code, § 16700 et seq., and, as a matter of fact, the latter act is considered basically merely a statutory enactment of the common law of the state. *Speegle v. Board of Fire Underwriters*, 29 Cal.2d 34, 44, 172 P.2d 867.

Before discussing the law applicable, it seems best to restate the essential facts of which appellant complains so that they can be more easily compared to cases with analogous fact situations. From a negative standpoint the following facts can be deduced from the failure of the complaint to allege otherwise:

(1) There is no express contract alleged that sets forth the conditions under which the exclusive franchise is granted. Therefore defendant Norman and defendant retailers can discontinue their mutual relationship at their pleasure.

(2) There are no specific allegations of fact to indicate that Norman is a monopoly or has the ability to become one, that Norman is engaged in price fixing or has the ability to do so, or that defendants are restraining competition.

From an affirmative standpoint the specific acts complained of are:

(1) Defendant Norman offered an exclusive franchise of its own products to certain retailers, some of whom were customers of plaintiff.

(2) At a meeting of certain of these retailers defendant Norman offered them the alternative of dealing exclusively with it in obtaining cosmetics for resale or else of losing their right to act as retailers for its products.

(3) At least four of the retailers considered the exclusive franchise of sufficient

value so that they agreed not to purchase cosmetics from other competitors. One of the competitors was the plaintiff.

(4) As a result of this plaintiff's sales have decreased in amount.

In *Speegle v. Board of Fire Underwriters*, supra, 29 Cal.2d 34, 172 P.2d 867, 873, the Supreme Court reversed a judgment entered from the trial court's order sustaining a demurrer without leave to amend. The plaintiff was an insurance agent who entered into written contracts of agency with fourteen defendant insurance companies, all members of the Board of Fire Underwriters. The board, acting in concert with the local agents' association, accused plaintiff of violating his contracts with members of the board by placing orders with non-board companies. When plaintiff refused to discontinue this practice, defendants caused the termination of his contract with board companies.

Plaintiff alleged inter alia that it was the purpose of the board to dominate the class of insurance written by its members, fix terms, conditions and rates for such insurance, etc., and by such methods to limit and restrict fair competition.

This case raised five separate questions but the one of interest here is Justice Traynor's discussion of whether the plaintiff has stated a cause of action under statutory or common law rules against restraint of trade.

He first states the rule that the "Cartwright Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law." He then goes on to say: "The public interest requires free competition so that prices be not dependent upon an understanding among suppliers of any given commodity, but upon the interplay of the economic forces of supply and demand. Combinations between insurers or insurers and insurance agents for the purpose of stifling competition in the insurance market and fixing insurance rates are clearly in violation of the common law rules against restraint of trade. (Citing cases.) Insurance is a matter of such public concern that many states regard the protection afforded

the community by statutory or common law rules against restraint of trade as insufficient and have accordingly enacted special statutes against combinations that seek to dominate the field of insurance or have given their insurance commissioners special powers over insurance rates."

Two things make this case significantly distinguishable from the one at bar. (1) There was a combination of competing underwriters cooperating with a group of agents to compel the plaintiff to cooperate with them in their efforts to dominate this phase of the insurance business. Here there is only a single competitor whose business is less than 4% of that done who requires his customers to deal exclusively in his own products before he will sell to them. (2) Insurance is a matter of public concern because of its universal importance in people's lives. Although the cosmetics industry may be considered by many as a great morale booster, it can hardly be said to be an industry of fundamental importance in which the general public has a crucial interest.

In *Getz Bros. & Co. v. Federal Salt Co.*, 147 Cal. 115, 81 P. 416, 417, the court held that a contract whereby one party agreed to refrain from purchasing salt from anyone else in the state or abroad and also "to 'discourage in any possible manner any such shipments or importations of salt by any other parties' " in consideration of \$10,000 was void under the code (now Bus. & Prof.Code, § 16600).

Respondent distinguishes this case from the instant one because here there was no contract pleaded that was binding on defendant retailers to purchase exclusively from defendant Norman. Therefore the code section is inapplicable.

Another distinction in the two cases which is suggested by respondent is the fact that the court stressed the monopoly aspects of the contract. That is, one party agreed to do its best to discourage competitors "in any possible manner". Here the defendant Norman acting as a competitor has simply made a better offer in the eyes of the four defendant retailers. If plaintiff wants its customers back its re-

course is to itself make a better offer rather than attempt to get the courts to act as its guardian, so to speak, in the business world.

Morey v. Paladini, 187 Cal. 727, 203 P. 760, is a case where the court held that a contract was in partial restraint of trade under the then statutory equivalent of Bus. & Prof. Code, § 16600 and therefore void, and was monopolistic in nature thereby violating the Sherman Anti-Trust Act, 15 U.S.C.A. §§ 1-7, 15 note. The plaintiff's assignor agreed to supply defendant with lobsters during the closed season in California. The contract contained a clause whereby the defendant was given the exclusive right to sell these lobsters in part of California, Oregon, Washington and Nevada. Plaintiff's assignor represented a fisheries company that controlled the entire supply of lobsters coming into California from Mexican waters.

Here again the case is clearly distinguishable because the court emphasized the monopolistic aspect in the contract. In the case at bar defendant Norman required of his customers with exclusive franchises that they purchase only its cosmetic lines. The retailers are free to purchase any other company's cosmetics if they wish to, but in the *Paladini* case there was simply no other source of lobsters during the closed season.

Respondents have submitted to this court a comprehensive, accurate and well-reasoned brief. They rely heavily on *Whitwell v. Continental Tobacco Co.*, 8 Cir., 125 F. 454.

Plaintiff, a tobacco jobber, sued defendant Tobacco Company under the authority of the Sherman Act on the sole ground that defendant company refused to sell tobacco to him at prices which would enable him to resell at a profit, unless he refrained from buying, selling or handling tobacco made by competing companies. The court states the question thusly, 125 F. at page 456: " * * * may one engaged in commerce among the states lawfully select his customers, and sell only to those who do not buy or sell the wares of his competi-

tors, or is such a restriction of his own trade by a manufacturer or merchant and his employes a 'contract, combination or conspiracy in restraint of trade' * * *." As pointed out above the Cartwright Act is basically a codification of common law and the Sherman Anti-Trust law is also considered to be a restatement of common law. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 498, 60 S.Ct. 982, 84 L.Ed. 1311. Therefore, while not controlling, the reasoning in the *Whitwell* case is persuasive.

The court first stated that the purpose of the act was to prevent the stifling or substantial restriction of competition and therefore the test of the legality of a combination under the act is its direct and necessary effect upon competition in commerce. 125 F. at page 459.

"The right of each competitor to fix the prices of the commodities which he offers for sale, and to dictate the terms upon which he will dispose of them, is indispensable to the very existence of competition. Strike down or stipulate away that right, and competition is not only restricted, but destroyed."

The court goes on to point out that tobacco companies (like cosmetic companies) do not dispense articles of prime necessity, and therefore can refuse to sell their commodities at any price.

The court concludes that the combination between the defendant employe and defendant company is the type that is the essence of competition and operated in no way to restrict competitors in their rights to fix prices of goods and the terms of the sales of similar products according to their discretion. 125 F. at page 461.

In rejecting the argument that this agreement was an attempt to monopolize, the court again pointed out that the fundamental purpose of the whole act is to prevent the stifling of competition, and all competition, in a sense, is an attempt to monopolize. 125 F. at page 462.

Two distinctions in the facts of the *Whitwell* case should be noted. One is that plaintiff based his suit on the agreement between defendant Tobacco Company and his employe relating to the terms

under which tobacco would be sold to jobbers. In the instant case the agreement objected to is between defendant supplier and four of his customers. Also, the suit was brought by a customer and not by a competitor. The distinctions, however, seem unimportant and do not weaken the reasoning of the court in its application to this case.

The Whitwell case has been cited with approval in several federal cases, the latest being *Brosious v. Pepsi-Cola Co.*, 3 Cir., 155 F.2d 99. There the defendant Pepsi-Cola Company and Cloverdale Spring Co. were alleged to have refused to sell Pepsi-Cola to the plaintiff unless the latter refrained from buying, selling or handling soft drinks made by independent manufacturers who were competing with the defendants for the trade of the public. The court held that the fixed conditions of sale to plaintiff did not constitute a restriction upon competition because defendants' competitors were free to sell their commodities to plaintiff and all others who did not purchase from defendant and also to compete for sales to customers of defendant company by offering them goods at better prices or on better terms in general than offered by Cloverdale Spring Co.

In *Great Western Distillery Products v. J. A. Walthen D. Co.*, 10 Cal.2d 442, 445-446, 74 P.2d 745, 746, the defendant and plaintiff entered into a contract whereby defendant agreed that as long as plaintiff continued to purchase from defendant all its warehouse receipts for whisky and refrained from selling warehouse receipts from any other distillery, the defendant would not sell warehouse receipts to any other person except one in California.

In holding that this was not a contract in restraint of trade under Bus. & Prof. Code, § 16600, the court said: "* * * both the purpose and effect of the contract are, not to restrict the sale of the defendant's receipts, but to create an instrumentality by which the receipts will be exploited and sold. The contract does not restrain anyone from exercising a trade or business of any kind within the

purview of section 1673 (now Bus. & Prof. Code, § 16600) of the Civil Code." Cf. *Katz v. Kapper*, 7 Cal.App.2d 1, 44 P.2d 1060.

[2] The Clayton Act, 15 U.S.C.A. § 14, provides specifically that it is unlawful "for any person * * * to lease or make a sale or contract for sale of goods * * * on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor * * * where the effect of such * * * agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." However, the Clayton Act, 15 U.S.C.A. § 12 et seq., is not spoken of as a codification of existing common law but is entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes." The U. S. Supreme Court pointed out in *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 460, 42 S.Ct. 363, 366, 66 L.Ed. 708, that the Clayton Act is broader in its prohibitions than the Sherman Act. It is in the same respects broader than the Cartwright Act so that cases based on the Clayton Act are inapplicable here.

[3] It is the rule that on a demurrer pleadings must be construed as true and they must be reasonably interpreted. That is, "they must be read as a whole and each part must be given the meaning that it derives from the context wherein it appears. (Citing cases.) 'Allegations must be liberally construed, with a view to substantial justice between the parties' * * * which is not served when technical forfeitures prevent a trial on the merits." *Speegle v. Fire Underwriters*, supra, 29 Cal.2d at page 42, 172 P.2d at page 872.

[4] With that rule in mind it is still quite a step to say that a single competitor whose business is not extensive enough to stifle competition and who offers his product to a retailer coupled with an exclusive franchise for the area provided he purchases only the supplier's line of products is liable for damages and can be enjoined by another competitor who is the losing

suitors in this triangle. The defendant Norman is one competitor in a field occupied by many, and the four defendant retailers are even more insignificant in relation to the number of retailers in this business. To say that this relationship will prevent competition is unrealistic. It should prompt the plaintiff to build a better mousetrap, and that after all is the essence of competition.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J.,
concur.



129 Cal.App.2d 853

**Robert CHASE, Plaintiff, Appellant and
Respondent,**

v.

NATIONAL INDEMNITY COMPANY, a Nebraska corporation, Rainier National Insurance Company, a Washington corporation, and Bank of America National Trust & Savings Association, a National Banking Association, Defendants, Respondents, and Appellants,

Kurt Hitke and Company, Inc., a California corporation, and Walter H. Yung, Defendants and Respondents,

L. G. Maulhardt Equipment Company, a copartnership, and John Maulhardt, Respondents.

Civ. 20396.

**District Court of Appeal, Second District,
Division 1, California.**

Dec. 29, 1954.

Action by insured on automobile policies covering motor vehicle, wherein bank holding lien on the vehicle filed cross-complaint and all defendants filed answers and cross-complaints. The Superior Court of Ventura County, Walter J. Fourt, J., rendered judgment for plaintiff, and defendants appealed. The District Court, of Appeal, Mosk, J. pro tem, held inter alia that

evidence supported finding that liability on policy first issued was not discharged by substitution of a new policy.

Affirmed.

1. Insurance ⇨612(1)

Generally, compliance with terms of warranty is a condition precedent to recovery on policy. Insurance Code, §§ 444, 445.

2. Insurance ⇨146(1)

Insurance contract must be governed and interpreted by same rules which ordinarily apply to other contracts, and it will be enforced only according to manifest intention of parties.

3. Insurance ⇨371

Requirements contained in insurance policy may be waived by parties.

4. Estoppel ⇨52

To constitute "waiver" there must be an existing right, knowledge of its existence, and actual intention to relinquish it or such conduct as warrants inference of the relinquishment.

See publication Words and Phrases, for other judicial constructions and definitions of "Waiver".

5. Estoppel ⇨52

"Waiver" is a voluntary act and implies abandonment of a right or privilege; an election to dispense with something of value or to forego some advantage which one might, at his option, have demanded.

6. Estoppel ⇨53, 58

Waiver will not be presumed or implied contrary to intention of party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into honest belief that such waiver was intended or consented to.

7. Insurance ⇨383

A general agent has authority to waive conditions in policy by mere parol, though policy requires waivers to be in writing.

8. Insurance ⇨665(8)

Evidence supported finding that automobile insurer had waived warranty that use of insured tractor and trailer would

be restricted to 50-mile radius of specified place.

9. Insurance ⇨580(1)

Provisions of a loss payable indorsement attached to policy control over any contrary provisions in body of policy.

10. Insurance ⇨232

Cancellation of insurance by insurer or insured must be strictly in accordance with loss payable indorsement, to be effective as to loss payee.

11. Insurance ⇨229(1)

Where no attempt was made to give lienholder notice of request for cancellation of automobile policy as required by loss payable indorsement, cancellation was not effective so as to extinguish insurer's liability for loss, regardless of whether insured was under contractual obligation to procure insurance for lienholder.

12. Insurance ⇨234

A bank holding lien on insured motor vehicle did not ratify acts of insured and insurance agent in attempting to substitute a new policy with a different company without giving notice of cancellation required by loss payable indorsement, merely by retaining possession of both policies and making both insurers parties cross-defendant to a cross-complaint for declaratory relief, in absence of other acts indicating acceptance of substitution, and hence first insurer was not discharged from liability on the policy.

13. Insurance ⇨580(2)

Rights of holder of lien on insured motor vehicle became fixed at moment of loss and it could not be bound by acts of insured and insured's agent attempting to substitute a different policy, of which it had no knowledge at that date.

14. Insurance ⇨606(2)

Generally, an insurer is not entitled to subrogation unless it discharges the entire mortgage debt.

15. Insurance ⇨606(1)

Where two policies covering same automobile each contained pro rata clause and neither insurer could pay, or was will-

ing to pay, the whole principal sum and interest due from insured to lienholder, and judgment was rendered against each insurer for but a proportion of total loss, neither insurer was subrogated to lienholder's rights.

16. Pleading ⇨237(1)

An amendment to conform to proof may always be made where cause of action is not changed thereby.

17. Pleading ⇨237(3)

Amendment to conform to proof may be made either during trial or after all evidence has been presented.

18. Pleading ⇨237(1)

Amendments to conform to proof are liberally allowed under California practice.

19. Pleading ⇨236(1)

Power to allow amendments in interest of justice is in trial court's discretion.

20. Insurance ⇨643(1)

In action on insurance policies, permitting plaintiff to amend complaint to conform to proof by deleting allegation that person was acting as insured's agent was not abuse of discretion where court found on conflicting evidence that such person was agent for insurer.

21. Insurance ⇨100

Evidence supported finding that insurance agent represented insurer rather than insured.

22. Insurance ⇨665(4)

Conflicting evidence supported finding that automobile insurance was written on actual cash value basis rather than stated amount value basis, as ground for recovery of full cash value of vehicle destroyed in collision.

23. Insurance ⇨131(1)

Insurance coverage may be contracted by oral request and oral acceptance or ratification by authorized agent.

24. Insurance ⇨559

Any defense based on policy requirements as to formal proof of loss was waived by totally repudiating any obligation or liability on policy.

25. Insurance Ⓒ395

Insurer may not repudiate policy, deny all liability and at same time stand on a provision inserted in policy for its benefit.

26. Interest Ⓒ39(3)

Where insured promptly notified insurers of total damage to insured equipment, but insurers repudiated all liability, interest was properly awarded from date of such repudiation rather than merely from date of judgment. Civ.Code, § 3287.

27. Interest Ⓒ19(2)

Interest may be denied on claims where person liable does not know what sums he owes and cannot be in default for not paying, but this reason does not exist when exact sum of indebtedness is known or can be ascertained readily.

28. Interest Ⓒ39(1)

Where insured motor vehicle was totally destroyed and insurer took charge of salvage, resort could be had to appraisers or other means to arrive at fair market value, and hence insurer could not avoid liability for interest from date of repudiation of liability on ground that damages were not certain or capable of being made certain by calculation. Civ.Code, § 3287.

29. Insurance Ⓒ646(8)

Insured as plaintiff in action on policies covering same property, and holder of lien on such property as cross-complainant, had burden of producing testimony as to ability of either insurer to respond to judgment, and in absence of any testimony on the subject, court properly concluded that both policies were collectible and therefore subject to proration.

Churchill & Teague, by E. Perry Churchill, Ventura, for plaintiff, appellant and respondent Chase.

John S. Bolton and F. V. Lopardo, Los Angeles, for defendant, respondent and appellant National Indemnity Co., and defendant and respondent Kurt Hitke & Co.

Hindman & Davis, by E. Eugene Davis, Los Angeles, for defendant, respondent and appellant Rainier Nat. Ins. Co.

Samuel B. Stewart, San Francisco, Hugo A. Steinmeyer, Winfield Jones, Los Angeles, for defendant, respondent and appellant Bank of America Nat. Trust & Savings Ass'n.

Edward C. Maxwell and Robert B. Maxwell, Oxnard, for defendant and respondent Yung.

William A. Reppy, Oxnard, for respondents L. G. Maulhardt Equipment Co. and John Maulhardt.

MOSK, Justice pro tem.

Four separate appeals have been filed in this proceeding involving a complaint and three cross-complaints, all arising from questions revolving about insurance coverage of a truck and van involved in a collision near Phoenix, Arizona, on July 13, 1950.

Plaintiff Robert Chase purchased under a conditional sales contract from L. G. Maulhardt Equipment Company (hereinafter called Maulhardt) an International tractor and a closed van standard utility trailer on or about March 10, 1950. The total purchase price was \$28,638.11, of which \$3,777.42 was paid in cash at the time of the sale and the balance of \$24,860.69, was payable in monthly installments of \$690.74. The interest of Maulhardt in the contract and equipment was sold immediately and assigned to the Bank of America National Trust and Savings Association (hereinafter called Bank).

On or about May 10, 1950, Rainier National Insurance Company, a Washington corporation (hereinafter called Rainier) issued through its agent at Oxnard, Walter H. Yung, a policy insuring the equipment for actual cash value, less \$250 deductible, against loss or damage arising from collision or upset, and for actual cash value against loss arising from fire, transportation or theft for the period from May 18, 1950, to May 18, 1951. This policy was issued to Chase as insured and it bore a loss payable endorsement in favor of the Bank and was delivered to the Bank to be held in connection with the conditional sales contract.

This policy also contained, among other provisions, a special warranty whereby Chase agreed that "the regular or frequent use of the commercial type vehicle(s) described in such policy is and will be confined to the territory within fifty miles of Oxnard, California." Being desirous of handling long haul freighting beyond the fifty-mile limit, Chase discussed with Yung the necessity for less limited insurance coverage. Yung in turn consulted Rainier's managing general agent at Los Angeles and was advised that Rainier did not desire to write long haul insurance.

Thereafter Yung contacted Kurt Hitke & Company, Inc., (hereinafter called Hitke) and with that agency obtained coverage through the National Indemnity Company (hereinafter called National). There is a serious and irreconcilable conflict in the evidence as to whether Yung assured Chase that he had obtained full coverage through Hitke and National on an actual cash value basis, or whether Yung was told that National would insure only on a stated amount value basis. In any event on or about July 6, 1950, Yung forwarded a completed insurance application to Hitke requesting insurance coverage of the tractor for fire, theft and collision, less \$500 deductible for the sum of \$10,000, and the utility trailer for fire, theft and collision, less \$500 deductible for the sum of \$4,000, or a total of \$14,000 on both pieces of equipment. The application purportedly bore the signature of Chase but in fact Yung signed Chase's name to the application. The application stated that this equipment had not been previously insured, although it had been theretofore and was then actually insured by Rainier. The application stated that the proposed insured, Chase, had an estimated net worth of \$100,000, whereas his net worth was little more than the equity in the equipment. The application further stated that Chase maintained his own repair shop, which was false.

Hitke, as general agent of National, issued a policy effective at 2:00 p. m. July 12, 1950, for fire, theft and collision in the total sum of \$14,000, less the \$500 deductible as to each piece of equipment. The

policy was not physically delivered by Hitke to Yung until July 25, 1950.

On the 12th, Yung advised Chase that the new insurance was effective and Chase thereupon notified his drivers in order to expedite their crossing of state lines. Chase had agreed with Yung that as soon as their binder in the other company became effective, coverage for the tractor and van would be eliminated from the Rainier policy and Chase would be given credit for the return premium on these items in the Rainier policy. In the early morning of July 13, 1950, some distance east of Phoenix, Arizona, the tractor and van were involved in an accident which the court found to be a collision and, as determined by the court, both pieces of equipment were totally destroyed. Testimony indicated that the fair market value of the equipment as of the date of loss was \$21,000.

After the accident National took charge of the salvage and offered to pay the loss of \$14,000, but denied any liability over that sum. It has to date paid no sum whatever. The subsequent controversy gave rise to this complicated law suit. Chase initiated the action naming as defendants National, Rainier and the Bank of America. All three defendants filed answers and cross-complaints naming all of the others as cross-defendants, and in addition thereto Yung, Hitke and Maulhardt.

The trial court found the facts and issues in favor of Chase on his complaint and the Bank on its cross-complaint, rendered judgment in favor of Yung, Hitke and Maulhardt and in favor of all of the cross-defendants on the cross-complaints of National and Rainier. Separate appeals have been filed by Rainier, National, Chase and the Bank.

The Rainier Appeal

In its second, separate defense to the amended complaint, Rainier contended Chase breached the fifty-mile radius warranty. The court should have so found, it maintains on this appeal.

[1] A statement in an insurance policy importing an intention to do or not to do a

thing which materially affects the risk is a warranty that such act or omission will take place. Insurance Code, § 445. A warranty may relate to the past, the present, the future or to any or all of these. Ins. Code, § 444. Generally speaking, compliance with the terms of a warranty is a condition precedent to a right of recovery. *De Campos v. State Comp. Ins. Fund*, 122 Cal.App.2d 519, 530, 265 P.2d 617. For a discussion of warranties in insurance contracts see *McKenzie v. Scottish Union & National Ins. Co.*, 112 Cal. 548, 554-555, 44 P. 922.

[2-6] A contract of insurance must be governed and interpreted by the same rules which ordinarily apply to other contracts, and it will be enforced only according to the manifest intention of the parties. *Stevenson v. Sun Insurance Office*, 17 Cal. App. 280, 288, 119 P. 529. Thus requirements contained in a policy of insurance may be waived by the parties. To constitute a waiver there must be an existing right, a knowledge of its existence, and an actual intention to relinquish it, or such conduct as warrants an inference of the relinquishment. It is a voluntary act and implies an abandonment of a right or privilege—an election to dispense with something of value or to forego some advantage which one might, at his option, have demanded. In no case will a waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to. *McDanels v. General Ins. Co.*, 1 Cal.App. 2d 454, 460, 36 P.2d 829.

[7] On cross-examination Chase produced records of his hauls with equipment involved herein and they indicated numerous trips taken beyond the prohibited distance. On the other hand the evidence established beyond question that Yung was a general agent for Rainier and as such he signed and issued the policy to Chase. In that capacity he had been told that most of Chase's hauls were from Oxnard to Los Angeles points and occasionally to the San

Francisco area, both being more than fifty miles distant. It has long been established in this state that a general agent has the authority to waive conditions in an insurance policy by mere parol, even though the policy itself requires waivers to be in writing. As stated in *Mackintosh v. Agricultural Fire Ins. Co.*, 150 Cal. 440, at page 449, 89 P. 102 at page 106: "Waivers such as that here made, constituting, as they do, a new contract upon a sufficient consideration, need not be evidenced by a writing, and need not be indorsed on the policy, no matter what limitations or conditions are expressed in the policy, provided, always, they are made by an agent who would otherwise have authority to make the contract." To the same effect are *Golden Gate Motor Transport Co. v. Great American Indem. Co.*, 6 Cal.2d 439, 58 P.2d 374; *Bank of Anderson v. Home Ins. Co.*, 14 Cal.App. 208, 111 P. 507, 29 Am.Jur. 625.

[8] It seems that Rainier, acting through its general agent, placed its own construction on the territorial limitation provisions and did not consider the trips taken by Chase to be violative thereof. It is true that upon inquiry the company indicated it would not write long haul insurance for Chase. But the evidence discloses Rainier clearly waived its prohibition as to the previous trips and to the particular trip involved herein, the unreached destination being Omaha. The trial court so held, and the evidence, though conflicting, supports that finding.

Rainier contends that by mutual agreement prior to the loss its coverage was eliminated and canceled by virtue of the substitution of the National policy. However, the provisions of the Rainier policy made it impossible for it to be canceled or modified without 10 days notice to the Bank. Paragraph 4 of the loss payable indorsement provided that if the company elected to cancel the policy for any reason it "will forward a copy of the cancellation notice to the Lien-Holder at its office" and that "In no event, as to the interest only of the Lien-Holder, shall cancellation of any insurance under this policy covering the property described in the policy be ef-

fects at the request of the insured before ten (10) days after written notice of request for cancellation shall have been given to the Lien-Holder by the Company." This could not be accomplished in this instance since the loss occurred one day after the purported substitution.

[9,10] The law is clear that provisions of a loss payable indorsement attached to a policy of insurance control over any contrary provisions in the body of the policy. *Fageol Truck & Coach Co. v. Pacific Indemnity Co.*, 18 Cal.2d 731, 117 P.2d 661. Any cancellation of the insurance by the insurer or insured must be strictly in accordance with the provisions of the indorsement to be effective as to the loss payee. *Tarleton v. De Veuve*, 9 Cir., 113 F.2d 290, 132 A.L.R. 343. For a discussion of the inability to cancel a policy unless there has been strict compliance with all of its provisions, see *Frieze v. West American Ins. Co.*, 8 Cir., 188 F.2d 331.

[11] Therefore it seems clear that the Rainier policy was not canceled at the time of the loss, since no attempt was made to terminate the policy in accordance with requirements of the loss payable indorsement. As stated in *Tarleton v. De Veuve*, supra, 113 F.2d at page 298, "Thus no cancellation attempted by the mortgagor or insurer, of which the mortgagee was ignorant and to which she had not consented, could suffice to relieve the mortgagee of any rights arising under the mortgage clause. * * * In view of the authorities we are constrained to hold that, in the absence of knowledge on the part of the mortgagee which would constitute a waiver, ten days' notice before cancellation was essential to extinguish the mortgagee's interest in the policy."

It is no answer to the foregoing to insist Chase was not obligated to procure insurance for the Bank pursuant to his conditional sales contract. The fact is that the insurance was provided by mutual agreement and the parties are bound by its provisions.

Next Rainier urges that the Bank became bound by the acts of Chase and Yung in their purported substitution of the National

contract for the Rainier policy. The testimony shows that Chase procured the insurance and had the loss payable indorsement attached to the Rainier policy and caused the policy to be delivered to the Bank. When the National policy was acquired Chase also delivered that to the Bank. The Bank at all times retained both policies. This, insists Rainier, gave rise to a ratification of the transaction by Chase.

In a supplemental memorandum, Rainier placed emphasis upon the case of *Wells Petroleum Co. v. Fidelity-Phenix Fire Ins. Co.*, D.C., 121 F.Supp. 739, decided only a few months ago. In that case, the substitution was made by a broker who admittedly acted as agent for the insured. And most important as the distinguishing feature, the court related, 121 F.Supp., at page 743, that "Ratification of the replacement and substitution of the original policies was made by the insured long prior to the occurrence of the fire * * *." That element plus confirmation by virtue of suing on the substituted policies was held to imply a cancellation of the original policies.

[12,13] In this case, however, there is no testimony of any act by the Bank indicating that it had accepted the substitution or ratified the conduct of the insured and the agent in making the purported substitution. Nor may we infer a ratification by the Bank bringing in this lawsuit a cross-complaint for declaratory relief naming both insurance companies as parties cross-defendant. The rights of the Bank became fixed at the moment of the loss, and clearly as of that date the Bank had no knowledge of the negotiations or transactions between Chase and Yung. It therefor could not be bound by them.

Although Rainier has insisted that ratification resulted from the mere act of suing National as well as Rainier, it is interesting to note that the Bank in proceeding against both carriers on its cross-complaint was actually benefiting Rainier. For not having been informed of the proposed substitution within ten days, the Bank, if compelled to make an election, would be obliged to choose Rainier as the company responsible to it for the entire loss.

In *Pagliari v. Merchants Fire Assurance Corporation*, 9 Cir., 169 F.2d 373, also relied upon by Rainier, the insured was attempting to make a double recovery for the single loss and the court properly held that the insured had made an election with regard to one policy, and could not recover on the other. Obviously that situation does not prevail in the instant case.

[14] Finally Rainier claims the court erred in denying it subrogation of the mortgagee's rights. As a general proposition an insurer is not entitled to subrogation unless it discharges the entire mortgaged debt. *Halstead Lumber Co. v. Security Title Ins. & Guarantee Co.*, 116 Cal.App. 679, 3 P.2d 52; *Finnell v. Goodman & Co. Bank*, 156 Cal. 18, 103 P. 483; *Obici v. Furcron*, 160 Va. 351, 168 S.E. 340, 91 A.L.R. 855; 9 A.L.R. 1607; *Phoenix Ins. Co. v. First Nat. Bank*, 85 Va. 765, 8 S.E. 719, 2 L.R.A. 667; *Northwestern Fire & Marine Ins. Co. v. Fred T. Ley & Co.*, 238 App.Div. 255, 264 N.Y.S. 517. As stated in *Maryland Casualty Co. v. Cincinnati C., C. & St. L. Ry. Co.*, 74 Ind.App. 272, 124 N.E. 774, 775: "It is a general rule, applicable to actions based on the ground of subrogation, that such right does not exist, unless the whole debt involved has been paid. (Citing cases.) This rule applies to conventional as well as legal subrogation, unless the contract by which such right is created provides otherwise. (Citing additional cases.)" In this instance the loss payable indorsement contains an express provision that to be entitled to subrogation of the Bank's rights as against the insured, the insurer must "pay to the Lien-Holder the whole principal sum and interest due or to become due from the insured on the obligation secured by the property * * *."

Rainier relies upon *Surratt v. Fire Ass'n of Philadelphia*, 4 Cir., 43 F.2d 467, 469. There are several distinguishing features in that case, but primarily the policy involved differed in that it provided the company shall "On payment to a mortgagee of any sum * * * to the extent of such payment be subrogated * * *." That

clearly varies materially from a policy providing for subrogation upon payment of "the whole principal sum and interest due".

[15] In view of the pro rata clause in both the Rainier and National policies, neither company qualifies for subrogation, since neither can, nor has either indicated a willingness, to pay the whole principal sum and interest due or to become due from the insured. The court judgment, against each company for but a proportion of the total loss, is determinative of the issues of the case.

The National Appeal

In his amended complaint Chase alleged in one paragraph that Yung was acting as his agent in dealing with Hitke and National. At the conclusion of the trial counsel for Chase moved to amend his complaint by deleting that provision. National contends the trial court erroneously granted the motion.

It appears from all of the pleadings that the issue was presented as to whether Yung in his negotiations regarding the National policy was an agent for National or was acting for Chase. Evidence was received on this subject during the course of the trial and no objection was made by any of the parties that such evidence was outside of the scope of the pleadings.

[16-20] An amendment to conform to proof may always be made where the cause of action is not changed thereby. *Mays v. Wann*, 96 Cal.App. 760, 764, 274 P. 1020. Such an amendment may be made either during the trial or after all the evidence has been presented. *Lee v. Murphy*, 119 Cal. 364, 51 P. 549, 955. Amendments to conform to the proof are liberally allowed under our practice. *Genger v. Albers*, 90 Cal.App.2d 52, 202 P.2d 569; *Groover v. Belmont*, 114 Cal.App.2d 623, 250 P.2d 686. The power to allow amendments in the interest of justice is uniformly held to be in the discretion of the trial court. *Mays v. Wann*, *supra*; *Gartlan v. C. A. Hooper & Co.*, 177 Cal. 414, 422, 170 P. 1115. No abuse of discretion is shown here. If the court were convinced

the evidence established Yung's agency for National and this were not indicated in the pleadings, the court would have had the power to direct the pleadings to be amended to conform thereto. Code Civ.Proc. § 470; *Firebaugh v. Burbank*, 121 Cal. 186, 193, 53 P. 560; *Genger v. Albers*, supra.

But, on the contrary, maintains National, the evidence does not establish that Yung was its agent. There were conflicts in the evidence on this subject. But Yung's testimony and oral declarations of agency were supported by his receipt of an agent's commission and a formal written appointment as an agent, delivered to Yung on July 24, the very day on which he received the written policy for Chase. The relationship of the two events seems to be an irrefutable circumstance.

[21] The evidentiary conflict was resolved by the trial court in favor of Yung's agency for National. We see no reason to disturb that finding, since it is supported by substantial evidence.

The principal issue raised by National is the trial court's finding of liability on an actual cash value basis, which in this case was established at \$21,000, rather than on a stated amount value basis of \$14,000.

Donald Groves, an underwriter employed by Hitke, testified that his office was requested by written application for merely \$14,000 coverage. He stated that he sent quotation rates to Yung; that Yung subsequently telephoned him and sought nothing other than the \$14,000 policy. Yung testified that Groves told him he had bound the coverage for \$14,000 on fire and theft. Leland C. Friel, a broker for Lloyds of London, testified that customarily long haul insurance or trucking insurance is not written on any but a stated amount basis. Groves further testified that his company did not write insurance of this kind except on an actual cash value basis.

On the other hand testimony was contradicted that only Yung dealt with Chase and that Chase had no knowledge of any special requirements or limitations on the part of Hitke or National. Yung testified he understood Chase wanted actual cash

value coverage, eliminating only the distance restriction of the type contained in the Rainier policy. Yung told Chase prior to the loss that he had obtained the desired insurance with National and that Chase was fully covered in accordance with his instructions. As to the application form, containing numerous misstatements, the record indicates that Yung filled this out and signed Chase's name thereto without Chase's knowledge or approval. Thus it seems clear that the representations contained in the application, even if material and false, were those of the National agent, not of Chase. Testimony was offered by Chase that there was a general custom in the insurance business in Southern California to write liability risks in the amount of actual cash value less any agreed deductible sum.

[22, 23] As thus very briefly indicated, there was an irreconcilable conflict in the evidence concerning National's coverage for the actual cash value. The trial court found that Yung was the agent for National and Hitke, acting within the course and scope of his agency, that the general custom in this area permitted liability insurance to be written in the amount of actual cash value less an agreed deductible item and that in this instance National was bound by the acts of its agent in contracting for a policy in the amount of actual cash value. See, *State Farm Mut. Auto Ins. Co. v. Porter*, 9 Cir., 186 F.2d 834, 841-842. We see no reason to resolve this conflicting evidence in any manner other than that reached by the trial court, a conclusion amply supported by the evidence. The law permits insurance coverage to be contracted by oral request and oral acceptance or ratification by an authorized agent. *Guipre v. Kurt Hitke & Co.*, 109 Cal.App.2d 7, 15, 240 P.2d 313.

Finally National complains about the assessment of interest from September 1, 1950, the date on which the court found National to have repudiated any and all liability. With regard to Rainier the date was fixed at November 30, 1950. The interest, National maintains, should run only from the date of judgment.

[24-26] The trial court found that Chase had promptly notified National and Rainier of the total damage to the insured equipment. That the equipment had a fair market value of \$21,000 was apparently contradicted in the evidence. No defense was interposed at the trial on the ground of the requirements of the policy as to a formal proof of loss. The companies waived any such defense by totally repudiating any obligation or liability on their policies. As stated in *Grant v. Sun Indemnity Co.*, 11 Cal.2d 438, 440, 80 P.2d 996, 997: "It is a well-recognized rule, which we conclude is applicable to the special circumstances here, that the insurer may not repudiate the policy, deny all liability, and at the same time be permitted to stand on a provision inserted in the policy for its benefit." Under these facts, Chase was entitled to interest at the legal rate to be calculated from the date when the companies should have made payment under their policies, which date is not later than that on which they repudiated liability or finally refused to pay.

[27, 28] National insists, however, that the damages were not certain or capable of being made certain by calculation, as required by section 3287 of the Civil Code. It relies upon *Perry v. Magneson*, 207 Cal. 617, 279 P. 650, which held in a suit on a bond that the surety could not know the extent of the loss until determined by court and the claim was therefor uncertain and unliquidated until final judgment. In that case, however, the amount of the loss consisting of the cost to the owner in completing the building, was in dispute. It was therefor necessary for the court to determine whether there had been a loss and the amount thereof before the obligation of the bonding company was fixed. The reason for denying interest on claims is that where the person liable does not know what sum he owes, he cannot be in default for not paying. *Cox v. McLaughlin*, 76 Cal. 60, 67, 18 P. 100. When the exact sum of the indebtedness is known or can be ascertained readily, the reason suggested for the denial of interest does not exist. *Courteney v. Standard Box Co.*, 16 Cal.App. 600, 615, 117

P. 778. In the instant case the evidence was undisputed that the equipment was totally destroyed. National took charge of the salvage and could ascertain from it and from list prices on the equipment what the fair market value was on the date of loss. Resort may be had to appraisers if necessary, *Koyer v. Detroit Fire & Marine Ins. Co.*, 9 Cal.2d 336, 345, 70 P.2d 927, and other means to arrive at fair market value. The mere unwarranted denial of the validity of the contract, or liability thereunder, on the part of the insurance company will not have the effect of defeating the right to recover interest otherwise recoverable. *Jacobs v. Farmers' Mut. Fire Ins. Co.*, 5 Cal.App.2d 1, 12, 41 P.2d 960.

The Bank and Chase Appeals

Both the Bank and Chase have filed appeals admittedly motivated by an excess of caution. Their only point on appeal is that the court should have held both companies fully liable, with protective provisions against double recovery, rather than to prorate their liability.

The loss payable indorsements attached to both policies provided that if there be other insurance the companies shall bear liability only for the proportion of such loss or damage that the insurance bears to the whole amount of valid and collectible insurance on the property. Both the Bank and Chase maintain that there was no evidence as to the ability of either company to respond to the judgment and therefore nothing to indicate the other insurance was "valid and collectible."

[29] Conversely, there was no testimony with regard to either policy indicating the "other insurance" was not valid and collectible. Since Chase was the plaintiff and the Bank a cross-complainant, the burden was on both of them as moving parties to produce testimony on that subject. The court properly concluded, in the absence of any testimony to the contrary, that both policies were collectible and therefore subject to proration.

Yung and Maulhardt

Yung has filed three responding briefs and Maulhardt one. While they were

helpful to the court, essentially they indicated satisfaction with the judgment and raised no substantive points requiring further discussion.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



130 Cal.App.2d 87

Grady P. HICKS et ux., Plaintiffs and
Appellants,

v.

William CORBETT et al., Defendants and
Appellants.

Civ. 20412.

District Court of Appeal, Second District,
Division 1, California.

Jan. 4, 1955.

Hearing Denied March 3, 1955.

Action for rescission of written contract for exchange of real and personal properties. The Superior Court, Santa Barbara County, Ernest D. Wagner, J., entered judgment for defendants after sustaining a demurrer to the first amended complaint without leave to amend, and plaintiffs appealed. The District Court of Appeal, Doran, J., held that where the verified original complaint was demurrable because it had alleged a final Washington judgment adverse to the plaintiffs on the same issues, and the amended complaint merely omitted all reference to the Washington judgment, the trial court had properly considered the original complaint in ruling upon the demurrer to the amended complaint.

Affirmed.

1. Pleading Ⓒ252(2)

As general rule, a superseded pleading is functus officio.

2. Pleading Ⓒ252(1)

Exception to general rule that superseded pleading is functus officio exists in

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that a defect in a verified complaint, consisting of an allegation which renders it vulnerable, cannot be cured simply by omitting the allegation without explanation in a later pleading.

3. Pleading Ⓒ254

Where demurrer was sustained to verified original complaint in California action for rescission because the complaint alleged a final Washington judgment adverse to plaintiffs on same issues, and plaintiffs filed amended complaint which merely omitted all reference to Washington judgment, trial court properly considered original complaint in ruling upon demurrer to amended complaint.

4. Courts Ⓒ29

Courts of one state cannot make decree which will operate to change or to affect directly the title to real property beyond the territorial limits of its jurisdiction, but court may render personal decree which will be enforceable in another state by requiring conveyance of lands lying outside the state.

5. Specific Performance Ⓒ103

Action in Washington state court, which action was for specific performance of contract for exchange of real and personal properties, and wherein cross-complaint for rescission was filed, was an action in personam, and that court had jurisdiction of parties and of contract, though part of real property concerned was in California.

6. Judgment Ⓒ822(4)

Where plaintiffs brought action in Washington state court for specific performance of contract for exchange of real and personal properties, and cross-complaint for rescission was filed, and court rendered decree adverse to plaintiffs, including provision to effect plaintiffs had no interest in California property they had agreed to convey, and plaintiffs did not appeal, decree was bar, under full faith and credit clause, to plaintiff's subsequent California action for rescission, despite contention Washington court had no jurisdiction over California realty. U.S.C.A. Const. art. 4, § 1.

Cornwall & Westwick, Santa Barbara, Cleve Groome, Caldwell, Idaho, of counsel, for appellants.

Ross & Harris, Santa Barbara, for respondents.

DORAN, Justice.

This is an appeal from a judgment entered after the sustaining of a demurrer to appellant's first amended complaint without leave to amend. The first cause of action seeks a rescission of written agreements for the exchange of certain real and personal properties of appellants in Santa Barbara, for real and personal properties of respondents William and Gertrude Corbett, in the State of Washington, based on alleged failure of consideration. Another count sought rescission on the ground of fraud.

Appellants' original complaint in this action set up the fact that on February 8, 1952, appellant Grady Hicks brought an action in the Superior Court of King County, Washington, seeking specific performance of the contract of exchange. The appellees cross-complained in the Washington action, asking for rescission, based on alleged fraud of appellants. Appellant Lydia Joan Hicks was joined as an additional cross-defendant. On June 2, 1952 the Washington court dismissed the cross-complaint for rescission, and decreed specific performance of the contracts of exchange, but as conditions precedent demanded certain performance by appellants within sixty days, providing that on a failure of such performance the court would enter such other judgment as would do justice between the parties.

On September 30, 1952, the Washington court found that the Hicks, now appellants, had not performed the conditions precedent which required the furnishing of title insurance covering the Santa Barbara real estate, and the payment of \$2,214.29 to respondents Corbett, and that the latter had been ready, willing and able to convey the Washington real estate to the Hicks.

The Washington court further found that "in said exchange transaction defendants paid unto plaintiff the sum of \$1000.00 cash,

paid plaintiffs' real estate commission in the sum of \$2,000.00 cash to the broker, Mr. King, and delivered the title to the vessel 'Rambler' to plaintiffs, who in turn sold it to an innocent purchaser for \$6,500.00 cash; that defendants did not convey to plaintiffs the King County (Washington) real estate of the value of \$5,000.00; that plaintiffs conveyed to defendants' nominee, Peggy Harris, the Santa Barbara property * * * of the approximate value of \$5,000.00". The court then found that the Hicks had "no claim, right, title or interest in either King County property or the Santa Barbara property", and gave judgment against the Hicks in favor of the Corbetts for \$4,500. This amount was the difference between a total of \$9,500 made up of the \$1,000 cash, \$2,000 paid to plaintiffs' broker, and \$6,500 value of the vessel Rambler; and \$5,000 representing the value of the Santa Barbara real estate conveyed by plaintiffs to the defendants' nominee.

The Hicks, now appellants, took no appeal from the Washington judgment, but some five months later served a notice of rescission of the agreement, and on February 25, 1953 filed the original complaint in the present California action. Respondents' general demurrer to this complaint was sustained, and thereafter an amended complaint was filed which omitted all reference to the former action in Washington. The California court then sustained a demurrer to this amended complaint, without leave to amend, which was followed by the present appeal.

It is appellants' contention that the amended judgment of the Washington court is not res judicata so as to preclude appellants from bringing the present action, and that therefore the trial court erred in sustaining respondents' demurrer to the amended complaint without leave to amend. In this connection appellants argue that the amended complaint superseded the original complaint and that "Therefore, the trial court could not look to the original complaint in making its ruling upon the demurrer to the first amended complaint". It is further claimed that "The amended decree by the Washington Court being

without jurisdiction insofar as the California property is concerned, and not being in personam, Respondents herein cannot have any rights thereunder".

[1,2] Answering these arguments, respondents are correct in the assertion that "The trial court properly referred to the original complaint in ruling on demurrers to the amended complaint". Conceding the general rule that a superseded pleading is *functus officio*, respondents point to an exception thereto as expressed in *Lee v. Hensley*, 103 Cal.App.2d 697, 709, 230 P.2d 159, 166, and elsewhere, wherein it is said that "The rule is that a defect in a verified complaint, by reason of an allegation which renders it vulnerable, cannot be cured simply by omitting the allegation without explanation in a later pleading", and that, "accordingly, the court was fully justified in examining and considering the original complaint."

[3] As heretofore mentioned, appellants original California complaint alleged the complete history of the Washington action in which a final judgment was rendered against appellants, which allegations were held fatal to the complaint on demurrer. The amended complaint then simply omitted without explanation, all mention of the Washington proceedings. Accordingly the trial court was fully justified in considering the allegations of the original complaint. In the language of *Slavin v. City of Glendale*, 97 Cal.App.2d 407, 411, 217 P.2d 984, 987, "'appellant should not be allowed to breathe life into a complaint by omitting facts, previously alleged in a verified pleading, which made it fatally defective.'"

Appellants' contention that the Washington judgment was void because that court had no jurisdiction to decree that the Hicks had no right, title, interest or claim to the California property, and that therefore was not *res judicata* barring institution of the present action, cannot be sustained.

[4] While it is true that the courts of one state cannot make a decree which will operate to change or directly affect the title to real property beyond the territorial

limits of its jurisdiction, "it is also true", as said by the trial court in sustaining the demurrer to appellants' original complaint, "that the Court may render a personal decree which will be enforceable in another state requiring conveyance of lands lying outside the state of the Court rendering the decree, see *Guilloz v. Parkinson*, 204 Cal. 441, 268 P. 635. * * * In the case of *Redwood Investment Company v. Exley*, 64 Cal.App. 455, 221 P. 973, it was held that the findings of fact and questions of law adjudicated by the foreign decree are *res adjudicata* and are conclusive upon the parties even though the foreign decree itself, without actual conveyance of land, would have no operative effect upon the title of the land in question. See also *Norton v. House of Mercy*, 5 Cir., 101 F. 382.

As noted in respondents' brief, the parties hereto entered into a contract for the exchange of property, and appellants, pursuant thereto, conveyed title to the California property to respondents' nominee. Appellants then instituted the Washington action for specific performance of the contract; a full trial was had, and the Washington court adjusted the accounts between the parties by decreeing that appellants should pay to appellees the sum of \$4,500 and that under the contract, appellants "have no claim, right, title or interest in either the Kings County (Washington) or the Santa Barbara property".

[5] As said in the respondents' brief, "Thus, it is obvious that the subject matter of the Washington action was not the title to California real estate—it was not an in rem action concerning California property. The Washington action was an in personam action—the subject matter was the contract of exchange and the rights of the parties thereunder. Certainly the Washington Court had jurisdiction of the parties and of the contract".

[6] Under the Full Faith and Credit clause of the U. S. Constitution, art. 4, § 1, such a decree of the Washington court must bar a re-litigation of the parties' contractual rights in the California courts. In the respondents' words, "Appellants chose to litigate this matter in Washington-

and secured an adverse decree, they were apparently satisfied that this decree was without error for they did not appeal or in any way try to assert or correct any error in the Washington action. Now they would attempt to impose upon the courts of this state and the defendants again by relitigating the identical matter”.

The trial court was not in error in sustaining the demurrer to the amended complaint without leave to amend, and in entering judgment thereon.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



130 Cal.App.2d 93

Donaclano QUIROGA and Atilano Agulre,
Plaintiffs and Respondents,

v.

SOUTHERN PACIFIC COMPANY, a corporation, Arthur Davis, and A. S. Hale,
Defendants and Appellants.

Civ. 8454.

District Court of Appeal, Third District,
California.

Jan. 4, 1955.

Rehearing Denied Jan. 25, 1955.

Hearing Denied March 3, 1955.

Action by truck passenger against railroad engineer, fireman and conductor for injuries received in railroad crossing collision. The Superior Court, Sacramento County, Grover W. Bedeau, J., denied defendants' motions for new trial and judgment notwithstanding verdicts and entered judgment upon verdict, and defendants appealed. The District Court of Appeal, Schottky, J., held that question whether failure to give timely warning of approach of train was proximate cause of accident was for jury.

Judgment and order affirmed.

1. Appeal and Error ⇨1001(1)

Before an appellate tribunal is justified in reversing judgment on ground of insufficiency of evidence, it must appear from

record that, accepting full force of evidence adduced, together with every inference favorable to prevailing party which may reasonably be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes prevailing party from recovering.

2. Railroads ⇨350(7)

Negative testimony of witnesses, who are in position to hear and to observe an accident between train and automobile, but who declare they did not hear any warning signals made by train, presents question for jury even if opposed by positive testimony that signals had been given.

3. Railroads ⇨348(4)

In action by truck passengers against railroad for injuries received in railroad crossing collision, evidence was sufficient to sustain jury's implied finding that passengers' witnesses, who stated that they did not hear any bell or whistle as train approached, were in a position to hear but did not hear any bell or whistle because no bell was rung or whistle blown as train approached crossing. Public Utilities Code, § 7604.

4. Railroads ⇨350(32)

In action by truck passenger against railroad for injuries received in railroad crossing collision, question whether failure to give timely warning of approach of train was proximate cause of accident was for jury. Public Utilities Code, § 7604.

5. Evidence ⇨147

Witness, who lived approximately 1,000 feet north of crossing where collision between train and truck occurred, and who testified that she was in north side of her house, was properly allowed to testify that she did not hear any whistle or bell signals at time of accident, even though a strong north wind was blowing that day and she did not hear the crash of the accident. Public Utilities Code, § 7604.

6. Evidence ⇨20(2)

It is matter of common knowledge that train whistle is audible at 1,000 feet even if a strong wind is blowing toward the train.

Devlin, Diepenbrock & Wulff, Sacramento, for appellants.

Thomas C. Perkins, Sacramento, Pelton & Gunther, San Francisco, for respondents.

SCHOTTKY, Justice.

Plaintiffs Quiroga and Aguirre commenced an action against defendant railroad company and the engineer, fireman and conductor of its train to recover damages for injuries received when a truck in which they were riding was struck by the train. The action was tried with a jury, and verdicts were returned awarding Quiroga \$50,000 and Aguirre \$20,000. Defendants' motions for a new trial and for judgment notwithstanding the verdicts were denied, and judgment was entered on the verdicts. Defendants have appealed from said judgment and from the order denying their motion for judgment notwithstanding the verdicts.

As grounds for a reversal of the judgment and order appellants urge the following contentions: 1. There was an utter failure to prove any negligence of defendants; 2. Any failure to give whistle or bell signals was not a proximate cause of the accident, because it is conceded that such signals would not have been heard even if given; 3. The trial court erred in admitting the testimony of Mrs. Merle D. Day that she didn't hear any whistle or bell signals.

[1] It is a rule too well established to require the citation of authorities that, before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may reasonably be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes the prevailing party from recovering a judgment. With this familiar rule in mind we shall give a brief summary of the evidence as shown by the record.

The respondents were employed as tomato pickers by Apolinar Solis, a labor

contractor. At the time of the accident they were being transported in one of Apolinar Solis' trucks from the tomato field in which they had been working to the Solis camp for lunch. The truck was being driven by Anastasio Solis, who was employed by Apolinar Solis as a driver.

The respondents boarded the truck in the tomato field, and the truck then proceeded east to a dirt road which paralleled the railroad tracks. The east edge of this road was approximately 24.5 feet west of the westerly rim of the track. This road was not straight. It was entirely within the tomato field, unimproved and bumpy.

The truck, after reaching the dirt road, turned north (to its left) and proceeded at a speed of six to ten miles an hour to Yolo County Road 25A. According to appellants' witness Thomas Vicari, the conductor, the distance from the center of the dirt road to the most westerly rail at the intersection of Yolo County Road 25A and the dirt road was approximately 50 feet, and the distance from the east edge of the dirt road to the said westerly rail was approximately 25 feet. On reaching Yolo County Road 25A the truck turned to the east (to its right) and approached the tracks. It slowed down before crossing the tracks and went over them at a speed not greater than a man would walk at a normal pace. The driver was watching the traffic on highway 99W.

Highway 99W is a heavily traveled main highway. It is crossed by the railroad tracks at a point about 2,400 feet south of the 25A crossing. From the 99W crossing to the intersection of 99W and 25A it parallels the railroad tracks. The distance from the east rail to the west edge of highway 99W and 25A is 38 feet. There is a stop sign protecting 99W at the 25A crossing, which is situated 18 feet east of the east rail.

The over-all length of the truck was 23 feet. The train struck the extreme rear end of the truck. Only the right hand side of the locomotive was damaged. An extremely strong north wind was blowing. Respondent Quiroga was sitting down in the bed of the truck with his hands covering his face because of the wind. Many

of the laborers jumped from the truck just prior to the collision.

To support their claim that the whistle and bell were not sounded respondents called eight witnesses.

Mrs. Merle D. Day testified that she was in her home which was 987 feet from the crossing; that the wind was blowing from a northerly direction and that her home was northwest of the crossing; that no radio was playing in her home and that there was no noise in the house which would interfere with her hearing; that after the collision the locomotive which was proceeding north came to a stop on the crossing of her driveway about 300 feet from the house; that she came out of her house shortly after the collision and saw the locomotive on her driveway crossing; that she heard no bell or whistle.

Witnesses Lena Wilson, Stanley Westerberg, Jack Curnow, George Burger, and Rosemary Hurlhey were all occupants of a bus which had stopped at the crossing of the railroad tracks and U. S. Highway 99W, approximately 2,400 feet south of the crossing of Yolo County Road 25A, in order to permit the train to pass by. Of these witnesses, all but witness Lena Wilson testified that the bell or whistle was sounded as the train approached 99W. And of these witnesses, all but witness Westerberg testified he or she remembered no whistle or bell after the train passed the 99W crossing.

The witness Westerberg was asked the question: "Did you hear any whistle or bell after the train passed this crossing of 99W and the railroad?" to which he answered, "No."

Respondent Aguirre testified that he heard no bell or whistle. He was seated in the cab of the truck next to the right hand door. The window was open on the driver's side. No one in the cab was talking or otherwise distracting his attention. The truck was a 1949 Chevrolet and was going very slowly. It was not hauling a load of material. There is no evidence that it was rattling or making any noise.

Juan Castenada, another occupant of the truck, testified that he heard no whistle or

bell. His hearing was good. Nothing covered his ears. He was standing erect in the bed of the open truck, and his head was higher than the sideboards.

In appellants' case the entire train crew was called. A. S. Hale, the fireman, testified that he was the fireman on the train in question which was known as the Sacramento-Gerber Local. He testified further substantially as follows: He turned on the automatic bell ringer about a quarter of a mile before the engine reached the 99W crossing and left the bell on until after the accident. As the train approached the crossing with Road 25A, the engineer gave two series of crossing signals, each consisting of two longs, a short and a long. Approaching the 25A crossing, he noticed a truck in the tomato field to his left which was coming out of the dirt road that goes along parallel to the railroad tracks and then turned easterly onto County Road 25A. Approaching the railroad tracks, the truck almost came to a stop or slowed down like it was going to stop, and then, when the truck kept on moving, he told the engineer to "hold it." The head end of the truck was about 15 or 20 feet from the westerly rail when he told the engineer to put on the emergency brakes. The train was traveling about 35 miles per hour as it approached the 25A crossing and after he yelled "hold it" he saw the engineer's hand drop from the whistle cord to the brake valve. When the truck came into the dirt road he estimated it was about 300 feet from County Road 25A although he couldn't tell for sure. He judged that when he first saw this truck the head end of the engine was 500 or 600 feet from the truck and the train was possibly 900 feet from the 25A crossing. The truck looked to be going about 20 miles per hour when it was traveling on the dirt road. Just as the truck turned onto County Road 25A, and "just about straightened out," he saw men jump from the truck, at which time the front end of his engine was approximately 3 or 4 lengths or 120 to 160 feet from the crossing. The truck then appeared to slow down to stop when the engine was 80 to 100 feet from the crossing. When the head end of the truck was 15 or

20 feet from the first rail, it slowed down to maybe two miles an hour "like he was going to stop."

Arthur A. Davis, the engineer, testified that he had been a locomotive engineer of the Southern Pacific Company for 27 years; he was sitting in the engineer's seat on the right side of the cab. Approaching Highway 99W he gave two series of crossing whistles, a series being two longs, a short and a long. The engine bell was operating automatically. The automatic bell ringer was put on when approaching the 99W crossing and was not turned off until after the accident. When the train was about a car length past crossing 99W he started his first series of crossing signals for the Road 25A crossing, and he finished the last whistle of the second series when approximately 80 feet from crossing 25A, a "couple of car lengths." He was blowing the last series approaching 25A when the fireman yelled over to him "hold them" and he let loose of the whistle cord and dropped his hand to the emergency brake. At the moment the fireman told him to "hold them," he looked forward and the cab of the truck loomed up in front of the engine. The emergency immediately took effect and the train was brought to a stop so that the rear end of the caboose was about 80 feet or a couple of car lengths north of crossing 25A. He estimated the speed of the train as it approached the crossing 25A at 30 to 35 miles per hour. He further testified that there was a speed board in the vicinity of the crossing giving the authorized maximum speeds as 70 miles per hour for passenger trains, 50 miles per hour for steam freight trains and 79 miles per hour for streamline trains.

The other members of the train crew corroborated the testimony of the engineer and fireman as to the ringing of the bell and the blowing of the whistle.

Appellants also called Alexander B. Allen, who was the driver of the bus on which a number of witnesses called by respondents were riding. He testified that when his bus was approaching the 99W crossing he was discussing the oncoming train with the passengers on his bus who were jurors in a case being tried in the

Superior Court of Yolo County, and their attention was called thereto. After the engine had crossed over 99W crossing, Allen acted in accordance with his habit of watching cars and seeing from what different railroads they came, and he heard the whistle sounded as the engine was approaching the crossing of County Road 25A. He thought at the time that the engineer was laying on it; it sounded to him like the engineer was playing with a new toy and you could see the steam rising from it. After the train had cleared the Road 25A crossing, and he proceeded northerly on highway 99W, he saw a cloud of dust which he thought was a wind blowing "across there." He further testified that when he got out of the bus at the accident the bell on the standing engine was still "dinging."

Appellants contend that there was no substantial evidence of any negligence on their part and that their motion for a directed verdict should have been granted. They argue that the evidence of respondents was negative testimony which did not contradict or tend to contradict the positive testimony given against it by appellants' witnesses. They assert that the testimony of their witnesses was positive testimony that a warning signal was given and that this overcomes all of the testimony by several of respondents' witnesses that no warning bell or whistle was heard before the accident.

Respondents in reply contend that there is substantial evidence in the record to support the implied finding of the jury that appellants were negligent. They refer to section 7604 of the Public Utilities Code which provides that:

"A bell, of at least twenty pounds weight, shall be placed on each locomotive engine, and shall be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed the street, road, or highway; or a steam whistle, air siren, or an air whistle shall be attached, and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it

has crossed the street, road, or highway. * * *. The corporation is also liable for all damages sustained by any person, and caused by its locomotives, train, or cars, when the provisions of this section are not complied with."

They point to the testimony of several witnesses who heard no bell or whistle, some of these witnesses being occupants of the truck, some being in a bus traveling along highway 99W, and one being a woman who was in her house at the time, about 1,000 feet from the crossing. Respondents argue further that the record shows that the fireman was negligently inattentive in failing to observe the truck or in relaying a prompt warning to the engineer, in that the truck was struck in the rear, showing that it had almost cleared the track and had been in view for some time in approaching and crossing the tracks. They argue further that the engineer was also negligently inattentive.

[2] The rule as to the weight and sufficiency of negative testimony is well stated in *Jones v. Southern Pacific Co.*, 74 Cal. App. 10, at page 26, 239 P. 429, at page 434, as follows:

"In this connection it may be said that negative testimony of witnesses who are in a position to hear and to observe, who declare they heard no signals and saw none, even as opposed to positive testimony that signals were given, presents a question to be submitted to the jury, and it has been held such negative evidence may be sufficient to sustain a verdict. *Jones on Evidence*, § 898; volume 23, C.J., § 1787, where many cases upon the question are cited.

"We find in *Thompson v. Los Angeles etc. Ry. Co.*, 165 Cal. 748, 134 P. [709] 711, a holding which in principle we deem applicable, as follows: 'But we think it must be held that there was enough in the evidence to justify the jury in finding that the motorman was negligent in not giving proper warning, by bell or whistle, of his approach. It is true that the only

evidence that he did not give such warning was negative, consisting of the statements of the people in the automobile that they heard no signal. But, if they were so situated, as they undoubtedly were, as to have been able to hear a bell or whistle sounded from the motor car, their failure to hear is some evidence that no such signal was given. (Citing cases.) That there was positive testimony to the contrary does not conclusively establish that a warning was given. It creates merely a conflict of testimony, which is finally resolved, so far as this court is concerned, by the verdict of the jury. This circumstance alone supports the finding of negligence.'

"In *Exposita v. United Ry. Co.*, 42 Cal.App. 320, 183 P. 576, wherein a verdict for defendant was returned, the court, in speaking of negative testimony, held: 'The defendant offered the only kind of evidence available in the nature of the case. Its negative character affected its weight and sufficiency. Conclusive proof is never necessary to justify the verdict of a jury. The jury had the right to draw its own inference from the evidence.'"

See also *Lahey v. Southern Pacific Company*, 16 Cal.App.2d 652, 61 P.2d 461.

[3] Appellants do not dispute this well settled rule but argue that it does not apply to the instant case because, they contend, the witnesses who gave this negative testimony were not so situated that they could hear the signals. Appellants point to the evidence of the strong north wind which they say prevented the witnesses of respondent from hearing the train. However, the record shows that respondent Aguirre and the witness Castenada were in the truck at the crossing and both testified that they heard no bell or whistle; also that the passengers in the bus were south of the 25A crossing and that the wind was blowing in their direction and they testified that they heard no bell or whistle after the train passed crossing on highway 99W; and Mrs. Day, who testified that she heard no bell or whistle, was in her home

'937 feet from the crossing, with no radio going or noise in her home to interfere with her hearing. With such testimony in the record we believe that it was for the jury to determine whether the said witnesses of respondents were in a position to hear the sound of any bell or whistle, and that the implied finding of the jury that they were in a position to hear and did not hear any bell or whistle because no bell was rung or whistle blown as the train approached the 25A crossing is supported by the evidence.

[4] Appellants also contend that any failure to give a whistle or bell warning was not a proximate cause of the accident because, they assert, it is conceded that such signals would not have been heard even if given. In support of this they rely on the weather, in that the strong north wind prevented the respondents from hearing the train; and they state: "Therefore, the record shows that nobody (in or about the crossing) heard the whistle until the engine was 90 feet from the crossing or at the time of the collision because of the strong north wind, and hence, an earlier blowing of the whistle would not have been heard." Respondents in reply deny that they have conceded or do concede that the signals would not have been heard if given, and contend that the question of whether or not failure to give timely warning was a proximate cause of the accident was properly left to the jury to decide. We agree with respondents.

[5,6] There is no merit in appellants' final contention that the court erred in admitting the testimony of respondents' witness Mrs. Day that she did not hear any whistle or bell signals. Mrs. Day lived approximately 1,000 feet north of the crossing. She testified that there was a strong north wind blowing that day and that shortly before noon she was in the kitchen on the north side of her house; she did not hear the crash of the accident. Appellants objected to her testimony on the ground that no proper foundation had been laid because it had not been shown that the witness was in a position in which to hear nor that her attention had been directed to

the train. The court correctly overruled the objection, since it is a matter of common knowledge that a train whistle is audible at 1,000 feet even with a strong wind blowing.

The judgment and order are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



129 Cal.App.2d 832

In the Matter of the ESTATE of George
A. KEARNS, Deceased.

Marjorie MALLARINO and Lois Graham,
Appellants,

v.

Emma Traug HAMMERSMITH, Individually and as Executrix of the Last Will and Testament of George Anthony Kearns, Deceased, Respondent.

Civ. 16083.

District Court of Appeal, First District,
Division 2, California.

Dec. 29, 1954.

Rehearing Denied Jan. 28, 1955.

Hearing Denied Feb. 24, 1955.

Proceedings on petition by heirs for decree determining interest in estate. The Superior Court, City and County of San Francisco, Robert McWilliams, J., entered order denying petition on ground that earlier decree of partial distribution was res judicata as to issues involved. Heirs appealed. The District Court of Appeal, Kaufman, J., held that decree of partial distribution was conclusive against existence of trust in relation to real estate conveyed, but such decree was not res judicata as to portion of estate not conveyed by decree and as to construction of will in subsequent proceedings to determine interests.

Order reversed with directions.

1. Trial \S 388(1)

Where only question referred to court for decision was question whether defense

of res judicata was bar to proceeding by heirs to determine interest under will of testator, no question of fact was before the court to be passed on and no findings were required. Probate Code, § 1080.

2. Executors and Administrators ☞315(1)

Where will is ambiguous on its face, duty of Probate Court on final distribution is to determine existence and validity of any trust created by will.

3. Executors and Administrators ☞315(6)

Where decree of partial distribution of specified real property had been obtained by executrix, question of whether such decree was final determination of rights of executrix and other heirs under will and, consequently, a bar to petition by heirs to determine interest in estate, was required to be determined from record without aid of extrinsic evidence. Probate Code, §§ 1200, 1080.

4. Judgment ☞948(1)

In a subsequent action on the same matter, defense of res judicata is waived by absence of pleading or proof of a former judgment.

5. Evidence ☞43(2)

Court may take judicial notice of its own records of prior proceedings in same case.

6. Executors and Administrators ☞315(6)

Although executrix did not rely on decree of partial distribution in her proceeding for instructions, and decree in such proceeding had been reversed without directions, executrix was not estopped from raising defense that decree of partial distribution was res judicata in heirs' subsequent proceeding, involving same issues, to determine rights under will.

7. Executors and Administrators ☞315(6)

Where petition for decree of partial distribution had asked only for distribution of one parcel of property, heirs were not on notice that whole will was to be construed, and decree was res judicata only as to real property distributed thereby but not as to portion of estate not distributed, and, therefore, not a bar to subsequent

proceedings to determine interest of parties under will. Probate Code, § 1080.

Delany, Fishgold, Freitas & Rowe, San Francisco, for appellant.

Philip S. Ehrlich, Irving Rovens, San Francisco, for respondent.

KAUFMAN, Justice.

This is an appeal from an order denying petition of appellants for Decree Determining Interest in Estate.

Petitioners and appellants herein, Marjorie Mallarino and Lois Graham, are nieces of decedent, George A. Kearns. Respondent, Emma Traung Hammersmith, the fiancée of decedent, was by the will bequeathed all of testator's real and personal property and was also named executrix of his estate. Clause 1 of the will read as follows: "I hereby bequeath to my beloved and devoted fiancée, Emma Traung Hammersmith of the City and County of San Francisco, California, all of my real and personal property and belongings that I possess or are due me of whatsoever nature." Clause 2 named respondent as executrix. Clause 3 bequeathed \$1 each to testator's brother William L. Kearns, since deceased, and to Mrs. Marjorie Mallarino and Mrs. Lois Graham, and declared that if any of them contest the will "it shall avail them nothing."

Clause 5, the source of all the controversy herein, states as follows:

"I hereby direct my Executor Emma Traung Hammersmith to provide for my nieces Mrs. Marjorie Mallarino and Mrs. Lois Graham as her judgment, kindness and honesty sees fit to do, and likewise to provide for any other kin or close friend which in her judgment warrants same."

On October 11, 1946, respondent filed a petition for Partial Distribution of Estate in which she alleged that she was "the sole heir, devisee and legatee" under the will. The petition named all known heirs of decedent and asked that certain real property described therein be distributed to

her. The Order for Partial Distribution of Estate was filed on October 28, 1946, in which it was found that notice of the hearing had been regularly given "for the period and in the manner required by Section 1200 of the Probate Code," and that "no person had appeared to contest the same." The court found that all the allegations of the petition were true, and ordered that the executrix deliver to Emma Traung Hammersmith, individually, the real property describing the same, to which "she is justly entitled, to wit: all right, title and interest of every kind and nature."

On November 26, 1947, respondent in her capacity as executrix, filed a petition for instructions to determine her duties under the will, alleging that petitioner could not properly administer the estate without an interpretation of paragraph 5 of the will, but contending that the words therein were precatory. The Superior Court held the provision of Clause 5 to be precatory and on appeal this court held that said provision created a valid and enforceable trust. However, the Supreme Court in *Estate of Kearns*, 36 Cal.2d 531, 225 P.2d 218, held that these provisions were ambiguous and that extrinsic evidence should be admitted to determine the matter.

The matter was returned to the Superior Court, and appellants herein made a motion to have the matter tried by a jury which motion was denied. They then filed a petition under Probate Code Section 1080 to determine their interest in the estate and moved for a jury trial and also to consolidate this with the prior matter for trial, which motions were denied, and the petition for instructions set for hearing without notice to appellants. In a prohibition proceeding brought in this court, *Mallarino v. Superior Court*, 115 Cal.App.2d 781, 252 P.2d 993, 995, it was held that petitioners had the right to a jury trial on their petition, and the trial on the executrix' petitions for instructions was prohibited, the court declaring that "when a party is given the statutory right to a trial by jury on an issue of fact determining his right to participate in the estate, that right should not be defeated by a predatory proceeding be-

fore the court sitting without a jury designed solely to prejudge the very issue of fact which the jury must thereafter determine."

Respondent in her individual capacity then filed under Section 1080 of the Probate Code a Statement of Claim of Interest in Estate in which she alleged that the rights of persons claiming an interest in the estate had been determined by the Order for Partial Distribution made on October 28, 1946. On motion of respondent the court ordered that the separate defense set forth in respondent's Statement of Claim of Interest in Estate,—namely, that the matter had already been determined by the Order for Partial Distribution—be tried and determined by the Court separately from a determination of the other issues involved in the proceeding by the jury.

Respondents on the trial of the separate defense introduced in evidence the will, the petition of the executrix for partial distribution of the estate, an affidavit of service by mail on appellants' notice of hearing of Petition for Partial Distribution and the Order for Partial Distribution. Appellants introduced the entire file in the probate proceeding in *Estate of George A. Kearns*, deceased.

The trial court filed two memorandum opinions, in the second of which an order was made denying appellants' Petition to Determine Interest in Estate. This order in effect determined that the Decree of Partial Distribution was a prior determination of the question of who is entitled to the property in the estate, and that the defense of *res adjudicata* was a bar to further proceedings in probate on the matter. It is true that the trial court denied the petition without prejudice, being of the opinion that an independent action in equity was the method by which the appellants should seek to establish that a trust was created by the will.

[1,2] The trial court made no findings in this case, as it correctly concluded that none were required since no question of fact had been passed upon. *Wheeler v. Board of Medical Examiners*, 98 Cal.App. 267, 276 P. 1119. The only question that

had been referred to the trial court for decision was the question of whether the affirmative defense of res judicata by reason of the decree of Partial Distribution was a bar to the proceeding by petitioners Mallarino and Graham. It does appear from the memorandum opinions of the trial court that he was of the opinion that because of the decision in *Estate of Kearns*, the Supreme Court had made it imperative that extrinsic evidence be taken to determine the intent of the testator on the question of whether or not a trust was created, and that without such extrinsic evidence which the parties would not offer in this proceeding he could not determine whether or not the petitioners had any interest in the property distributed by the Decree of Partial Distribution, stating that this question could be determined by a separate suit in equity. The opinion declared that the Decree of Partial Distribution vested the legal title to the real property described therein in respondent. No opinion was expressed as to the effect of the Decree of Partial Distribution on the remainder of the estate, but the decision denying the petition is in effect a decision that the affirmative defense was good, and a bar to the jury trial on the matter of petitioners' interest in a probate proceeding. Although the trial court believed that the case was comparable to *In re Sharp's Estate*, 17 Cal.App. 634, 120 P. 1079, wherein it was held that a separate suit in equity was the proper procedure, the case seems clearly distinguishable, for in that case no trust appeared upon the face of the will, and it had to be given effect in probate according to its terms. Here, however, the will is ambiguous upon its face, and it is clearly the duty of the court in probate to determine whether or not a trust is created. On final distribution the Probate Court will have the duty to determine the existence and validity of any trust created by the will. *Wells Fargo Bank etc. Co. v. Superior Court*, 32 Cal.2d 1, 8, 193 P.2d 721.

[3] The Decree of Partial Distribution herein was obtained approximately a year prior to the filing of the Petition for Instructions by the executrix in which she

pleaded that she could not properly administer the estate without an interpretation of the terms of the will. In this petition she made no reference to the prior decree, and it was not contained in the record which was before the Supreme Court in *Estate of Kearns*. Nor did respondent rely on the decree to defeat the prohibition proceeding in *Mallarino v. Superior Court*. The question before the Superior Court in the present case was whether the Decree of Partial Distribution was a final declaration on the rights of parties to participate in this estate. If respondent is not estopped to raise the matter at this late date, it would seem that the effect of the decree must be determined from the record without the aid of extrinsic evidence, for the question is whether or not the action of the court in the proceeding on partial distribution was a final determination of the rights of the parties. Whether or not it was a correct determination is beside the point, since there was no appeal from it.

[4-6] Appellants contend that respondent is barred from asserting the defense of res judicata because she herself is subject to the bar of res judicata and the law of the case, since she did not rely on the Decree of Partial Distribution in the proceedings in *Estate of Kearns* or *Mallarino v. Superior Court*. In a subsequent action the defense of res judicata is waived in the absence of either pleading or proof of a former judgment. *Wolfsen v. Hathaway*, 32 Cal.2d 632, 638, 198 P.2d 1; *Dillard v. McKnight*, 34 Cal.2d 209, 219, 209 P.2d 387, 11 A.L.R.2d 835. However, it is stated in *Wolfsen v. Hathaway*, supra, that the authority of a court to take judicial notice of its own records is limited to the proceedings in the same case. Since this is the same probate proceeding, the court may take judicial notice of the decree which is in the files of the probate proceeding. And, see, 2 *Freeman on Judgments*, § 808, p. 1715; *Kipp v. Reed*, 183 Cal. 49, 190 P. 363. Furthermore, as noted by respondent, on the authority of *Estate of Wear*, 20 Cal.2d 124, 124 P.2d 12, respondent would not be estopped from raising the defense of res judicata after reversal without di-

rections on retrial of the issue in *Estate of Kearns*, supra, and she therefore cannot be estopped in this instant matter. In *Mallarino v. Superior Court*, this court stated that the same issue of fact was involved in this petition as was involved in the petition of the executrix for instructions.

Appellant contends that a petition for partial distribution is a proceeding in rem and affects only the property before the court, citing *Estate of Ampusait*, 131 Cal. App. 533, 21 P.2d 691, 693, to the effect that a judgment in rem in a proceeding where there has been no contest or litigation is res judicata as to any fact which affected the particular matter or res involved in it, and that it cannot be invoked in a subsequent proceeding affecting other property. In the cited case it was held that in an estate of a decedent who died intestate, a daughter of decedent was entitled to have a decree of final distribution distributing the estate to certain relatives set aside under section 473 of the Code of Civil Procedure, even though several years prior to making of said decree, a decree of partial distribution upon which the latter decree was based was made, but where the daughter was unaware of the proceeding on partial distribution, was not a party to it and her existence was not known to the court at the time the proceeding was heard and determined. The case is distinguishable from the case now before the court in that in the cited case, no will was involved as it was an intestate proceeding, and the daughter of decedent in that case received no notice of the proceedings and the court was unaware of her existence. The opinion in that case stated that "It is true also that unless set aside on appeal or under the provisions of section 473 of the Code of Civil Procedure said decree [Decree of Partial Distribution] became final and conclusive as to the portion of the estate thereby distributed (*Estate of Tymms*, 78 Cal. App. 79, 247 P. 1091), and as to the heirs who were parties to the proceeding, or who were aware of the pendency of the proceeding and made no objection thereto or appearance therein (*Estate of Murphy*, 145 Cal. 464, 78 P. 960)."

Respondent contends that *Estate of Hartenbower*, 176 Cal. 400, 168 P. 560, establishes that in California an order or decree of partial distribution is conclusive as to the construction to be given to a will insofar as the will is involved. That case involved an appeal from an order distributing a part of the estate. The widow in that proceeding had claimed she was entitled to one-half the estate and objections were filed by appellants who claimed that under the will she was entitled to only one-third thereof. Evidence was introduced and the trial court construed the will as contended for by the widow. A previous decree was introduced in evidence which had been made on application of one of the residuary legatees for partial distribution of the estate in which the court after hearing had decided that the widow was entitled to one-half the estate and that said residuary legatee was entitled to a one-fiftieth share of the remaining one-half. Appellant has pointed out that in the *Hartenbower* case the parties appeared specifically to construe the will and the court made a construction of the effect of the entire will. In *Hardy v. Mayhew*, 158 Cal. 95, 110 P. 113, a Decree of Partial Distribution was held to be a conclusive adjudication of the construction of the will in regard to a specific sum of money. And in *Estate of Carothers*, 168 Cal. 691, 144 P. 957, there was an appeal from the decree of partial distribution and the Supreme Court interpreted the will on that appeal which established the "law of the case" as to the interest of Kate Carothers. The appellants in the subsequent appeal from the decree of final distribution were grantees or successors in interest to Kate Carothers and therefore occupied no better position than she did and were bound by the "law of the case."

In the instant case the Decree of Partial Distribution was not appealed. Although respondent contends that it was a construction of the meaning of the will in regard to the entire estate, the order made therein was that respondent as executrix "pay, deliver, convey and distribute to Emma Traung Hammersmith and the

Court does hereby distribute to Emma Traung Hammersmith that portion of the real property in said Estate to which she is justly entitled, to wit: all right, title and interest of every kind and nature in and to that certain property more particularly described as follows:" [then follows a description of a certain parcel of real property in the County of Fresno, State of California.]

[7] Appellants contend that this decree should not have put them on notice that the court was holding that no trust existed as far as the real property in the estate was concerned. However the fact that the decree declared that respondent was entitled to "all right, title and interest of every kind and nature" would appear to be conclusive against the existence of a trust in relation to that property.

Although it is true that in the Petition of the Executrix for Partial Distribution of Estate, she alleged that she was the sole heir, devisee and legatee under the will, and that she was under the will entitled to receive all of said estate, these allegations were merely conclusions of law. She asked only for distribution of this one parcel of property and appellants were not on notice that she was asking for a construction of the will in regard to the total assets of the estate.

In Estate of Coberly, 90 Cal.App.2d 46, 202 P.2d 306, an order of partial distribution under which rentals from property in which the executrix was bequeathed a life estate were distributed as part of the residue of the estate. It was held that said decree was not conclusive as determining that the court construed the will to mean that the rentals should be divided share and share alike among several legatees, of which the executrix was one, where the meaning and effect of the will had not been questioned or presented to the court for determination, and where the court had not made any order purporting to construe the will.

We hold therefore that the Decree of Partial Distribution was *res judicata* as to the real property distributed thereby, and

whether erroneous or not, it distributed all interest of every kind and nature in that property to respondent. But we believe that the decree did not purport to adjudicate the rights of the parties in the remainder of the estate. The trial court should therefore have determined that the decree was not *res judicata* as to the portion of the estate not distributed, and not a bar to the trial of appellants' contention before a jury. That the issue in Estate of Kearns is the same as that involved in the petition of appellants is established by *Mallarino v. Superior Court*, 115 Cal.App. 2d 781, 784, 252 P.2d 993. There was therefore no reason why the parties should have gone into the extrinsic evidence bearing on the interpretation of the terms of the will in this hearing before the court without a jury as to the validity of the defense of *res judicata* as a bar to the very proceeding in which such evidence could properly be received.

Accordingly the order denying petition of appellants for a decree determining interest in the estate is reversed with directions to the trial court to enter a new order determining that the Decree of Partial Distribution is only *res adjudicata* as to the real estate distributed thereby and not a bar to the trial of appellants' contention before a jury as to the remainder of the estate.

NOURSE, P. J., concurs.

DOOLING, Justice.

I concur. I do so the more readily because I feel very strongly that respondent should not be allowed to play fast and loose with her opponents and the courts. After she had obtained the decree of partial distribution upon which she now seeks to rely as *res judicata*, she as executrix filed the petition for instructions which was ultimately carried to the Supreme Court and decided in Estate of Kearns, 36 Cal.2d 531, 225 P.2d 218. In that petition and in all of the adversary proceedings, trial and appellate, in connection therewith the claim of *res judicata* was not once suggested. Now she asks us to hold that the whole proce-

ture, in the trial and appellate courts, was a sham battle, because she had an ace up her sleeve which she refused to play on the first round of the game. Under the facts of this case I do not regard Estate of Wear, 20 Cal.2d 124, 124 P.2d 12, as controlling.



129 Cal.App.2d 810

**Modesto VALDEZ, Walter C. Daniels and
Constance Daniels, Plaintiffs and
Respondents,**
v.

**TAYLOR AUTOMOBILE COMPANY, a
corporation, and Robert Drobnis (substitut-
ed in place and in stead of John Doe Osoff),
Defendants,**

Taylor Automobile Company, Appellant.

Civ. 20259.

**District Court of Appeal, Second District,
Division 3, California**

Dec. 28, 1954.

Rehearing Denied Jan. 24, 1955.

Hearing Denied Feb. 24, 1955.

Action for damages for the alleged failure of defendant used car dealer to obtain public liability and property damage insurance on sale by dealer of a used automobile to plaintiff. From a judgment for plaintiff for \$18,465 in the Superior Court of Los Angeles County, William B. Neeley, J., the defendant appeals. The District Court of Appeal, Vallée, J., held that the evidence made a case of fraud and deceit in failing to procure insurance; that a stipulation was as to a conclusion of law and not binding on the Appellate Court and that the judgment should be reduced to \$8,465.

Judgment modified by reducing the amount to \$8,465 and as modified, affirmed.

1. Fraud ⇨58(1)

Evidence justified recovery against used car dealer for fraud and deceit based on failure of dealer to obtain public liability and property damage insurance on the sale of a used automobile to plaintiff.

2. Fraud ⇨20

Fact that purchaser of used automobile did not read the papers accompanying the sale did not preclude a finding that he justifiably relied on the representation and promises of the used car dealer to obtain public liability and property damage insurance on the sale of the used automobile to the plaintiff.

3. Evidence ⇨20(1)

It is a matter almost of common knowledge that a very small percentage of policyholders are actually cognizant of the provisions of their policies and many of them are ignorant of the names of the companies issuing the policies.

4. Torts ⇨16

A wrongdoer cannot shield himself by asking the law to condemn the credulity of the ignorant and unwary.

5. Negligence ⇨1

A person may become liable in tort for negligently failing to perform a voluntarily assumed undertaking even in the absence of a contract to do so

6. Negligence ⇨3

A person undertaking to perform a service for another is under duty to exercise due care in performing the voluntarily assumed duty, and a failure to exercise due care is negligence.

7. Insurance ⇨104

Though there was no contract by used car dealer selling a used automobile to plaintiff to obtain public liability and property insurance, plaintiff could recover for the defendant's negligent failure to obtain insurance where defendant voluntarily undertook to do so.

8. Stipulations ⇨3

In action by purchaser of a used automobile for alleged failure of dealer to obtain public liability and property damage insurance on the sale of the automobile to plaintiff, where parties stipulated that jury be instructed that if they found a tort the verdict should be for \$18,465, stipulation was not a stipulation of fact but a conclusion of law and was not binding on the Appellate Court where it was an erroneous

conclusion from the facts. Code Civ.Proc. § 1963, subd. 26.

9. Damages ☞1

Generally, plaintiff is required to have sustained an actual detriment from the particular injury of which he complains before he can be compensated for its infliction. Civ.Code, §§ 1709, 3333, 3356, 3359.

10. Damages ☞3

A person wrongfully omitting to perform a particular act required of him is liable in damages for all of the consequences which, in the natural course of events, may ordinarily ensue therefrom. Civ.Code, §§ 1709, 3333, 3356, 3359.

11. Damages ☞18

A proximate causal connection must exist between the damage sustained by the plaintiff and defendant's wrongful omission and detriment inflicted on plaintiff must be the legal and natural result of defendant's failure to act. Civ.Code, §§ 1709, 3333, 3356, 3359.

12. Damages ☞95, 103

Plaintiff in a tort action is not, in being awarded damages, to be placed in a better position than he would have been had the wrong not been done. Civ.Code, §§ 1709, 3333, 3356, 3359.

13. Insurance ☞104

In action by purchaser of used automobile for failure of dealer to obtain public liability and property damage insurance on the sale, where insurance if obtained would have given plaintiff protection of \$5,000 for injury to one person, \$10,000 for all persons in one occurrence and \$1,000 for property damage and damages resulting from automobile accident in which plaintiff was involved would have been \$8,465 and no more, an instructed verdict for plaintiff for \$18,465 was unauthorized. Civ. Code §§ 1709, 3333, 3356, 3359; Vehicle Code, § 415.

VALLÉE, Justice.

Modesto Valdez, referred to as plaintiff, brought this action for damages for the alleged failure of defendant Taylor Automobile Company, referred to as defendant, to obtain public liability and property damage insurance on the sale by the latter of a used automobile to plaintiff. The complaint, in several counts, alleged: breach of an oral contract to procure insurance; negligent failure to procure insurance; fraud and deceit in promising to procure insurance; estoppel. The Danielsens were joined as parties plaintiffs on the theory they were third party beneficiaries of the contract between plaintiff and defendant. The cause was tried by a jury which returned a verdict in favor of plaintiff against defendant for \$18,465. Defendant appeals from the judgment which followed.

Defendant is a dealer in used automobiles in Los Angeles. At the time in question it was licensed as an insurance broker. On April 1, 1950, and prior thereto, defendant in a large advertisement of used cars in the Los Angeles Times and other Los Angeles newspapers gave the monthly payments of various makes of cars and stated: "Monthly payments below are based on $\frac{1}{3}$ down and include insurance & sales tax." On its used car lot defendant had a large sign which said, "Free Payment Guarantee Accident Policy." One Drobnis was in defendant's employ as credit manager and "closer." On April 1, 1950, plaintiff visited the lot, talked to a salesman, selected a car, and was turned over to Drobnis by the salesman. The sale was made under a conditional sales contract. It was the duty of Drobnis to write up a purchase order, a credit statement, a conditional sales contract, and other papers. It was also his duty, when a sale was made under a conditional sales contract, to see that defendant's interest in the car was covered by insurance. He obtained from plaintiff the information necessary to write the insurance. Plaintiff told him that he (plaintiff) wanted "full coverage insurance to protect myself"; he told Drobnis, "Well, I want the kind that covers up the next party in case you have an accident," that he

Potruch, Fredricks & Lerten and Erwin Lerten, Los Angeles, for appellant.

Dreher & McLeod, Robert H. Dreher, Oakland, and Richard B. Levitt, Los Angeles, for respondents.

wanted "full coverage insurance to cover the other man." Drobnis said "O.K." Plaintiff testified Drobnis "told me he'd get it for me. He didn't tell me how much it would be." Plaintiff also testified, "[T]he way I understood full coverage insurance, the way—the kind of insurance I wanted was insurance that would protect me and protect anybody else if I ever had an accident or anything on the road with my car, and I wanted to be protected, fully protected, and protect any other party, * * I just wanted to be sure that insurance would back me in case I ever had an accident." Drobnis figured the down payment and the monthly payments on a piece of scratch paper, and showed the paper to plaintiff. The paper indicated the insurance premium was \$141. Plaintiff said to Drobnis, "How come so much?", to which Drobnis replied, "That's the kind of insurance you are asking for. That's why we are charging you that much."

The conditional sales contract, the purchase order, and the credit statement were printed forms with blanks to be filled in to fit the particular case. Plaintiff signed the conditional sales contract in blank. A filled-in copy was mailed to him later. The conditional sales contract and the purchase order stated that plaintiff made application to defendant to insure the car, "Comprehensive 18 mos: Prem. \$21.00 \$50.00 Deductible Collision 18 mos: Prem. \$120.00" On the purchase order the word "None" was written over the words "Vendor's Single Interest Fire and Theft" and over the words "Vendor's Single Interest Collision." Under the latter words there appeared "B. I. & P. D. Ins.," and opposite these in the column headed "premium" the symbol "\$" was placed by Drobnis in the presence of plaintiff. "B. I. & P. D. Ins." means bodily injury and property damage insurance. Plaintiff did not read the purchase order before he signed it, nor until after the accident to be later described. He did not read the conditional sales contract until after the accident.

About May 1, 1950, plaintiff's wife received an insurance policy through the mail. She told plaintiff it had come.

He did not see it until after the accident when he discovered for the first time that he did not have public liability and property damage insurance. The policy covered only "Comprehensive-Loss of or damage to the Automobile, except by Collision or Upset but including Fire, Theft and Wind-storm" and "Collision or Upset."

An expert in the automobile insurance field gave testimony, without objection, from which it may be inferred that in the trade "full coverage," when expressed by a layman, includes public liability and property damage insurance. He testified that if a layman asks for "full coverage" or "the kind of insurance that protects me or the other fellow," it would be understood that he meant the basic limits: "\$5,000.00 bodily injury liability for one person, \$10,000.00 for all persons in one occurrence; \$5,000.00 property damage," which were the minimum amounts written for bodily injuries and property damage in 1950. See Veh.Code, § 415.

About October 29, 1950, plaintiff was involved in a collision between the car purchased from defendant and one owned by the Danielsens. The Danielsens brought an action against plaintiff for personal injuries and property damage arising out of the collision. Plaintiff notified defendant of the action and demanded that defendant defend it. Defendant refused to do so. Judgment was rendered in that action against plaintiff for \$15,000 for injuries sustained by Walter Danielsen, for \$3,000 for injuries sustained by Constance Danielsen, for \$450 for property damage, and for \$15 costs, a total of \$18,465. That judgment became final before this action was commenced.

After both sides had rested, a conference was had between the trial judge and counsel. The judge stated that "all counsel have indicated complete agreement on all of the instructions." The judge further stated that he had modified some of them and asked counsel to examine them. Counsel did so and said they had "all agreed that they are proper and may be given to the jury subject to the Court's approval." The court asked counsel wheth-

er they would stipulate "that all the instructions, other than those stipulated to yesterday, that had been proposed by respective counsel were withdrawn by the proposing counsel." Each counsel so stipulated. The court gave this instruction:

"The instructions I am giving you have been prepared and agreed to between the Court and counsel for all of the parties as fairly representing the issues of the case, and in order to simplify and assist you in arriving at a fair and just verdict.

"For the purposes of determining a verdict in this case it is agreed between all parties in this case that verdicts will be either for Valdez, as plaintiff, or Taylor Automobile Company, as defendant, so that the following instructions are not to be considered by you as prejudicial to the defendant or the plaintiff because of the fact that the Danielsens are not mentioned herein by name.

"I instruct you that if you believe the plaintiff's evidence in this case you may then find for the plaintiff on one of two theories, but not on both, as follows:

"1. The first theory is based on contract. If you find that there was a contract for insurance between the plaintiff and defendant you will then bring in a verdict for plaintiff for \$8,450.00. I further instruct you that in order for you to find that a valid and binding contract of insurance was entered into between the plaintiff, Valdez, and the defendant, Taylor Automobile Company, that you must first determine that the essential elements of a contract existed at the time; these are: 1. Parties capable of contracting, 2. Consent, 3. A lawful object and 4. A sufficient cause or consideration.

"2. The second theory is based on fraud, deceit, negligence or estoppel, and if you find that plaintiff has proved any one of these, you will then return a verdict for plaintiff for \$18,465.00." The terms fraud, deceit, negligence, and estoppel were then defined for the jury.

Since the verdict was for \$18,465, it is patent that it was not predicated on a finding that there was a contract of insurance between plaintiff and defendant,

and that it was based on a finding of either fraud, deceit, negligence, or estoppel. Defendant first contends the evidence was insufficient to support the verdict on either of these grounds. As to a finding of fraud, it is argued that plaintiff did not justifiably rely on the representations; that he did not read the purchase order, the sales contract, or the policy; that if he had, he would have known immediately he was not receiving liability insurance.

[1] Plaintiff was 23 years of age, with the education of a 15 year old child; he went as far as the tenth grade and can read and write English. Drobnis graduated from high school, junior college, and had several years of law school. He represented to and promised plaintiff that he would procure "full coverage" for him, insurance that would protect him if he ever had an accident. A fair inference is that Drobnis knew what "full coverage" meant—defendant was an insurance broker, he was the credit manager and "closer," the man who filled out the forms and closed the deal after a salesman had sold the prospect; and the purchase order and the conditional contract forms had the abbreviations "B. I. & P. D. Ins." for bodily injury and property damage on them with space for the premium. Plaintiff relied on the representation and promise. It may reasonably be inferred that Drobnis had no intention at the time of the sale of fulfilling the representation or of keeping the promise. The evidence made a case of fraud and deceit.

[2-4] The fact that plaintiff did not read the papers does not preclude a finding that he justifiably relied on the representation and the promise. In *Raulet v. Northwestern Nat. Ins. Co.*, 157 Cal. 213, at page 230, 107 P. 292, at page 298, it is said: "It must be presumed, ordinarily, that persons are familiar with the terms of written contracts to which they are parties, and in the absence of fraud they are justly bound by the provisions therein, but the rule should not be strictly applied to insurance policies. It is a matter almost of common knowledge that a very small percentage of policyholders are actually

cognizant of the provisions of their policies and many of them are ignorant of the names of the companies issuing the said policies. The policies are prepared by the experts of the companies, they are highly technical in their phraseology, they are complicated and voluminous—the one before us covering thirteen pages of the transcript—and in their numerous conditions and stipulations furnishing what sometimes may be veritable traps for the unwary. The insured usually confides implicitly in the agent securing the insurance, * *.” In *Security-First Nat. Bank of Los Angeles v. Earp*, 19 Cal.2d 774, 122 P.2d 900, the trial court found that the defendants signed an instrument without reading it, in reliance on the representation of the plaintiff’s employee. The plaintiff appealed, claiming that defendants’ failure to read the instrument precluded them from setting up misrepresentation of the contents as a defense. The court held, 19 Cal.2d at page 777, 122 P.2d at page 902: “His negligence in failing to read the contract does not bar his right to relief [Citations] if he was justified in relying upon the representations. [Citations.] Contributory negligence is no defense to an intentional wrong.” In *Golden Gate Motor Transp. Co. v. Great American Indem. Co.*, 6 Cal. 2d 439, at page 443, 58 P.2d 374, at page 376, the court stated: “It is next asserted that the plaintiff, having accepted and retained the policy, is charged with knowledge of its terms, is bound by it, and is estopped from asserting that it did not know the terms of the policy. It cites and relies on *Madsen v. Maryland Casualty Co.*, 168 Cal. 204, 142 P. 51, and *Burch v. Hartford Fire Ins. Co.*, 85 Cal.App. 542, 259 P. 1108. Those cases involved statements made by the insured in their written applications. In neither one did it appear that there was no written application and that, after the insured had made a request for full coverage, the insurer delivered a document which it represented covered the demand as made. If defendant contends that the plaintiff may not recover because it did not read the policy, such contention may not be sustained. * * * [6 Cal.2d at page 445, 58 P.2d at page 377.] “It would cer-

tainly have been an act of prudence on his part to read the entire policy, but his neglect to do so cannot excuse the company for the default of the agent in not writing the contract in accordance with the representations made by the insured. The insured had a right to rely upon the agent’s performing his duty of making the contract in conformity with the information given; and the agent’s failure to do so, whether the result of a mistake or of a deliberate fraud, cannot operate to the prejudice of the insured.” ” A wrongdoer cannot shield himself by asking the law to condemn the credulity of the ignorant and unwary.

[5-7] As to a finding of negligent failure to procure full coverage, it is argued that since the jury impliedly found there was no contract to obtain public liability and property damage insurance for plaintiff, defendant had no duty to procure that insurance; and in the absence of a contractual duty, plaintiff cannot recover for defendant’s negligent failure to do so. The argument is fallacious. It is well established that a person may become liable in tort for negligently failing to perform a voluntarily assumed undertaking even in the absence of a contract so to do. A person may not be required to perform a service for another but he may undertake to do so—called a voluntary undertaking. In such a case the person undertaking to perform the service is under a duty to exercise due care in performing the voluntarily assumed duty, and a failure to exercise due care is negligence. Dean Prosser says, “[I]f the defendant enters upon an affirmative course of conduct affecting the interests of another, he is regarded as assuming a duty to act, and will thereafter be liable for negligent acts or omissions,” and “If the defendant receives the plaintiff’s property or papers, and undertakes, without consideration, to obtain insurance, * * * he assumes a duty to use proper care in the performance of the task. * * * In many cases the court has laid stress upon the fact that the plaintiff has relied upon the conduct of the defendant to his damage, and has indicated that this is essential to liability. Notwith-

standing an early New York case to the contrary, there is authority that where the defendant has reason to expect such reliance to the plaintiff's detriment, even a mere gratuitous promise will be enough to create a duty, for the breach of which a tort action will lie." (Prosser on Torts, 190, 195, 196, § 32.) *Stark v. Pioneer Casualty Co.*, 139 Cal.App. 577, 34 P.2d 731, was predicated on the negligence of an insurance company's agent in failing to forward to the company an application and premium for insurance. The court held there was no contractual relation, that the company was bound either to furnish the insurance or to decline to do so within a reasonable time, and that having failed to perform its duty it was liable for the actual damage not exceeding the amount of insurance purchased. See also *Griffin v. County of Colusa*, 44 Cal.App.2d 915, 923, 113 P.2d 270; *Wice v. Schilling*, 124 Cal. App.2d 735, 746, 269 P.2d 231; *Smith v. Minnesota Mut. Life Ins. Co.*, 86 Cal.App. 2d 581, 195 P.2d 457; *Evan L. Reed Mfg. Co. v. Wurts*, 187 Ill.App. 378; 4 *Appelman, Insurance Law and Practice*, 115, § 2261; annotation 32 A.L.R.2d 487; 38 Am. Jur. 659, § 17. And see *Linnastruth v. Mutual Benefit, etc., Ass'n*, 22 Cal.2d 216, 219, 137 P.2d 833, in which it is said that the facts in the *Stark* case were sufficient to constitute negligence or estoppel.

The pivotal question is the measure of damages. If defendant had procured public liability and property damage insurance, plaintiff would have had insurance in the amounts of \$5,000 bodily injury liability for one person, \$10,000 bodily injury liability for all persons in one occurrence, and at least \$1,000 property damage. See *Veh. Code*, § 415. The liability of the insurer under the *Danielsen* judgment would have been limited to \$5,000 for the injuries sustained by *Walter Danielsen*, \$3,000 for the injuries sustained by *Constance Danielsen*, \$450 for property damage, and \$15 costs—total \$8,465. Defendant says the measure of liability for failure to procure insurance is the amount which would have been due under the policy less the amount of premiums which would have been paid, and that the judgment should be reduced to \$8,-

465. Plaintiff counters that defendant stipulated that in the event the jury found there was no contract, and if they found there was fraud, deceit, negligence, or estoppel, they should return a verdict for plaintiff for \$18,465; that pursuant to the stipulation the court so instructed the jury; and that defendant will not be heard to renege on his stipulation on review. He counters further that in any event the amount of the judgment the *Danielsens* obtained against him is the measure of liability for the tort. Defendant replies that a stipulation as to jury instructions "is solely an agreement that the legal principles stated in the instructions are correct," and that a binding stipulation may not be made as to questions of law.

Defendant did more than stipulate that the legal principles stated in the instruction were correct. It stipulated that in the event the jury found liability for tort the judgment for plaintiff should be \$18,465. The effect of the instruction was to direct a verdict for plaintiff for \$18,465, in the event the jury found tort liability. The question is whether this court is bound by the stipulation. *San Francisco Lumber Co. v. Bibb*, 139 Cal. 325, 73 P. 864, 865, was an action on a contractor's bond. The court stated the bond was void "unless we are limited by a stipulation entered into by counsel in an agreed statement of facts in the lower court, that the sole question for determination should be whether the failure of the plaintiff, as materialman, to file a lien, relieved the sureties on the bond." It was held, 139 Cal. at page 326, 73 P. at page 865: "Counsel, under section 1138 of the Code of Civil Procedure, may agree as to the facts, but they cannot control this court by stipulation as to the sole or any question of law to be determined under them. When a particular legal conclusion follows from a given state of facts, no stipulation of counsel can prevent the court from so declaring it. In this case the bond is void, and hence it is immaterial whether the failure of the materialman to file a lien did or did not relieve the sureties, as they were never obligated under it." *Owen v. Herzihoff*, 2 Cal.App. 622, 84 P. 274, 275, held that a stipulation that a "lease had expired

by its terms,'” being a stipulation as to the erroneous interpretation of the legal effect of the contract, should be disregarded. *People v. Singh*, 121 Cal.App 107, 8 P.2d 898, says that a reviewing court is not bound by an erroneous stipulation as to a conclusion of law which is not a stipulation of fact. In *McCormick v. Woodmen of the World*, 57 Cal.App. 568, 207 P. 943, among the conditions subject to which a benefit certificate was issued to and accepted by McCormick, was “one which provided that the absence or disappearance of a member holding the certificate from his last-known place of residence for any length of time should not be sufficient evidence of his death, and that no right should accrue under such a certificate to a beneficiary or beneficiaries, nor any benefits be paid until proof had been made of the death of said member, while in good standing” only. There was no proof that McCormick was dead. The proof was that he had been absent and neither seen nor heard from for more than seven years, and was therefore presumed to be dead. Code Civ.Proc., § 1963(26). The court held that the provision in the certificate was violative of section 1963, subdivision 26, and hence would not be given effect.

Swift & Co. v. Hocking Valley R. Co., 243 U.S. 281, 37 S.Ct. 287, 61 L.Ed. 722, was an action against Swift for demurrage charges on railroad cars which remained unloaded for more than the 48 hours free time on a switch used in connection with its warehouse. The parties stipulated that the track on which the cars in question were placed was the private track of Swift. The record disclosed on admitted facts contrary to the stipulation that the track in question was not a “private track.” The court said, 243 U.S. 289, 37 S.Ct. 289, 61 L.Ed. 725: “If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be con-

trolled by agreement of counsel on a subsidiary question of law. See cases cited in the margin.¹ If the stipulation is to be treated as an attempt to agree ‘for the purpose only of reviewing the judgment’ below, that what are the facts shall be assumed not to be facts, a moot or fictitious case is presented. ‘The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. * * * No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.’ [People of the State of] *California v. San Pablo & T. R. Co.*, 149 U.S. 308, 314, 13 S.Ct. 876, 37 L.Ed. 747, 748. See *Mills v. Green*, 159 U.S. 651, 654, 16 S.Ct. 132, 40 L.Ed. 293, 294. The fact that effect was given to the stipulation by the appellate courts of Ohio does not conclude this court. See *Tyler v. Judges of Ct. of Registration*, 179 U.S. 405, 410, 21 S.Ct. 206, 45 L.Ed. 252, 254. We treat the stipulation, therefore, as a nullity.” See also *Little v. Giles*, 118 U.S. 596, 7 S.Ct. 32, 30 L.Ed. 269; *Sanford’s Estate v. Commissioner of Internal Revenue*, 308 U.S. 39, 51, 60 S.Ct. 51, 59, 84 L.Ed. 20, 26; *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373, 376, 61 S.Ct. 593, 595, 85 L.Ed. 897, 899; *Jensen v. Northwestern Underwriters’ Ass’n*, 35 N.D. 223, 159 N.W. 611, 613; annotation 92 A.L.R. 663.

[8] The stipulation that the jury be instructed that if they found a tort the verdict should be for \$18,465 was not a stipulation of fact. It was a stipulation as to the legal effect of the facts—a conclusion of law. And as we shall see it was an erroneous conclusion from the facts and as such is not binding on this court. We pass to a consideration of the correct measure of damages for the tort under the particular facts of the case.

One who willfully deceives another with

1. The cases referred to are: *San Francisco Lumber Co. v. Bibb*, 139 Cal. 325, 73 P. 864; *Owen v. Herzhoff*, 2 Cal. App. 622, 84 P. 274; *Aubuchon v. Bender*, 44 Mo. 560; *Prescott v. Brooks*, 62 N.D. 771, 94 N.W. 88, 94; *Holms*

v. Johnston, 59 Tenn. 155. See also *Breeze v. Haley*, 11 Colo. 351, 362, 18 P. 551; *Lyon v. Robert Garrett Lumber Co.*, 77 Kan. 823, 827, 92 P. 589; *Wells v. Covenant Mut. Ben. Ass’n*, 126 Mo. 630, 639, 29 S.W. 607.

intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers. Civ.Code, § 1709. Generally the measure of damages for a tort "is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." Civ.Code, § 3333. For the purpose of estimating damages, the value of an instrument in writing is presumed to be equal to that of the property to which it entitles its owner. Civ.Code, § 3356. Damages must, in all cases, be reasonable; and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages contrary to substantial justice, no more than reasonable damages can be recovered. Civ.Code, § 3359.

[9-13] A plaintiff is required, as a general rule, to have sustained an actual detriment from the particular injury of which he complains before he can be compensated for its infliction. 14 Cal.Jur.2d 646, § 17. See cases collected in West's Civil Code Annotated, § 1709, p. 472. A person who wrongfully omits to perform a particular act required of him is liable in damages for all of the consequences which, in the natural course of events, may ordinarily ensue therefrom. *Wells v. Lloyd IV*, 6 Cal.2d 70, 83, 56 P.2d 517. A proximate causal connection must exist between the damage sustained by the plaintiff and the defendant's wrongful omission, and the detriment inflicted on the plaintiff must be the legal and natural result of the defendant's failure to act. *Chidester v. Consolidated People's Ditch Co.*, 53 Cal. 56, 57; *Wells v. Lloyd IV*, supra, 6 Cal.2d 83, 56 P.2d 517. Where, from the nature and circumstances of the case, a rule may be discovered by which adequate compensation may be accurately measured, such a rule should be applied in actions of tort. A plaintiff in a tort action is not, in being awarded damages, to be placed in a better position than he would have been had the wrong not been done. 25 C.J.S., Damages, § 80, p. 588.

Thomas v. American Workmen, 197 S.C. 178, 14 S.E.2d 886, 136 A.L.R. 1, was an action for fraud and deceit in the issuance of an insurance policy. The agent represent-

ed to the plaintiff that the sick benefit provision of the policy would cover sickness of any character which she might suffer; and that such sick benefits, amounting to \$12 a week, would become operative and payable from the first day of illness. The policy issued provided for the payment of \$6 a week for sick benefits, excepted certain disabling illnesses, and excluded the first week's sickness from the benefit provision. The plaintiff had been ill and disabled for 2 weeks. The jury returned a verdict for \$100. On motion for a new trial the court reduced the amount to \$24. Affirming, the court said, 197 S.C. 183, 14 S.E.2d 888, 136 A.L.R. 5: "As a general rule, one injured by the commission of fraud is entitled to recover such damages in a tort action as will compensate him for the loss or injury actually sustained, and place him in the same position that he would have occupied had he not been defrauded. 24 Am.Jur., Section 217, Page 47. The recovery is restricted in all cases to such damages as were the natural and proximate consequences of the fraud, and such as can be clearly defined and ascertained, including those which were actually or presumptively within the contemplation of the parties when the fraud was committed. 24 Am.Jur., Section 218, Page 48; 27 C.J., Section 228, Page 83. The evidence in this case shows, as heretofore stated, that the plaintiff was confined to her bed from a serious illness for a period of two weeks, which was certified to by her attending physician. If she had obtained the policy she contracted for she would have been paid \$24, covering the period of two weeks. And this is the amount of actual loss she has sustained. Such damages under the evidence were the natural and proximate consequences of the fraud. In our opinion, the trial Judge took the correct view of the law, and committed no error."

What is the actual detriment sustained by plaintiff as a proximate result of defendant's tort? The question is answered by asking: What would the policy have been worth to plaintiff if it had been as Drobnis represented and promised it would be? The amount is capable of precise mathematical

calculation. It would have been \$8,465, no more. Insurance which would have given plaintiff protection of \$5,000 for injury to one person, \$10,000 for all persons in one occurrence, and at least \$1,000 for property damage would have fulfilled Drobnis' representation. It could not reasonably be understood as a promise of coverage in an unlimited amount. The damage suffered by plaintiff as a result of the tort of defendant being fixed and certain, it was error to instruct the jury that, in the event it found tort liability, it should return a verdict for plaintiff for \$18,465.

The judgment is modified by reducing the amount thereof to \$8,465. As thus modified, it is affirmed.

SHINN, P. J., concurs.

WOOD, J., concurs in the judgment.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



130 Cal.App.2d 131

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Philip Cedric MacFADDEN, Defendant
and Appellant.

Cr. 979.

District Court of Appeal, Fourth District,
California.

Jan. 5, 1955.

Hearing Denied March 9, 1955.

Proceeding on convicted defendant's motion to vacate judgment. The Superior Court, Riverside County, Russell S. Waite, J., denied application, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that contentions that information was not specific, that evidence was insufficient to support conviction, that trial court was without jurisdiction since no evidence had been presented as defense, that record falsely stated that court had

instructed defendant as to his rights, that defendant had been denied right to speak out in protest, that trial court had no power to try defendant without proceeding against other party involved in offense, that two trial judges could not act at different stages of proceeding, that sentence was improper, and that defendant had been improperly persuaded to enter plea of guilty could have been raised on appeal, and writ of error coram nobis would not issue therefor.

Order affirmed.

1. Criminal Law ☞997(2, 6)

A writ of error coram nobis never issues to correct an error of law, nor to redress irregularity occurring at trial that could have been corrected on motion for new trial or by appeal, but it issues to correct an error of fact, existing at time of trial, but unknown at time to trial court through no fault of petitioner, and which fact, had it been known, would have resulted in a different judgment, or would have prevented rendition of the challenged judgment.

2. Criminal Law ☞997(2)

Contentions that information was not specific, that evidence was insufficient to support conviction, that trial court was without jurisdiction since no evidence had been presented as defense, that record falsely stated that court had instructed defendant as to his rights, that defendant had been denied right to speak out in protest, that trial court had no power to try defendant without proceeding against other party involved in offense, that two trial judges could not act at different stages of proceeding, that sentence was improper and that defendant had been improperly persuaded to enter plea of guilty could have been raised on appeal, and writ of error coram nobis would not issue therefor. Pen.Code, § 288a.

3. Criminal Law ☞997(15)

In proceeding on petition for writ of error coram nobis, conflicting affidavits sustained implied findings adverse to defendant, including finding that he had not been improperly persuaded by public defender to enter a plea of guilty. Pen.Code, § 288a.

4. Criminal Law §997(15)

Contentions of convicted defendant, whose motion to vacate judgment had been denied, that there had been inexcusable delay in hearing his petition for writ of error coram nobis, that he had encountered unreasonable delay in receiving certain records asked for, that he had not been properly represented by public defender on application for writ, that his first petition for writ had been improperly denied and that clerk's minutes in proceeding for writ were erroneous were unsupported by record, and without merit.

5. Criminal Law §998**Prohibition** §9

Purported petition for writ of prohibition which convicted defendant presented in connection with his appeal from denial of motion for coram nobis and which sought "to prevent documents of fraud to appear in any court as passing for true", and defendant's 24 separate motions that original judgment "be vacated and set aside, or reversed", would be denied.

Philip Cedric MacFadden, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying a motion to vacate the judgment, in effect an application for a writ of error coram nobis.

The defendant was charged with a violation of section 288a of the Penal Code, alleged to have been committed on or about September 18, 1951. He was represented by the public defender, and pleaded guilty on October 11, 1951. In connection with sexual psychopath proceedings he was placed for a time in Norwalk State Hospital for observation, report and recommendation. The hospital reported to the court that in the opinion of the hospital staff the defendant would not benefit by treatment in a state hospital, and it was recommended that he be placed in a penal institution. On

February 15, 1952, judgment was pronounced sentencing him to imprisonment in the state prison for the term prescribed by law. No motion for a new trial was made and no appeal was taken from the judgment.

A purported petition for "Writ of Error" was filed by the appellant in May, 1954, which was denied on May 21, 1954. On June 7, 1954, a motion to vacate the judgment was filed. The matter was set for hearing for August 20, 1954, and the court appointed the public defender to represent the defendant. The matter was submitted, on the pleadings and the affidavits and counteraffidavits which had been filed, and the motion was denied on August 27, 1954. The defendant filed notice of appeal from the judgment entered on February "18", 1952; from "the denial of a writ of error rendered" on May 21, 1954; and from "a second final judgment also rendered * * on August 20, 1954 upon the same Writ of Error (Coram Nobis)."

It is somewhat difficult to segregate and identify definite contentions from the mass of irrelevant and immaterial matter which the appellant has presented and asked the court to consider on this appeal. To the best of our understanding he contends, with respect to the original trial and judgment, that the information was invalid in that it was not specific as to date and place because it alleged that the offense was committed "on or about September 18, 1951, in the County of Riverside"; that the evidence was not sufficient to support the judgment; that the court was without jurisdiction to sentence him to prison since no evidence was presented as a defense to the charge; that the record falsely states that the court instructed him as to his rights at the time of the arraignment; that he was denied the right to speak out in protest at the time he was sentenced; that the court had no power to try the defendant without proceeding at the same time against the other party to the incident in question; that two different judges could not act at different stages of the proceedings; that he was improperly sentenced, being merely sentenced "for the term prescribed by law" without the judge stating that he found the defendant guilty

of the offense charged; and that he was improperly persuaded by the public defender to enter a plea of guilty.

[1-3] Most of these matters are entirely unsupported by the record and, aside from other considerations, could have been raised on a motion for a new trial or by an appeal. It is well settled that:

"The writ of error *coram nobis* never issues to correct an error of law, nor to redress an irregularity occurring at the trial that could be corrected on motion for new trial or by appeal. It is issued to correct an error of fact, existing at the time of trial but unknown to the trial court through no fault of the petitioner, and which fact, had it been known, would have resulted in a different judgment, or would have prevented the rendition of the challenged judgment." *People v. Martinez*, 88 Cal.App.2d 767, 199 P.2d 375, 378; *People v. Kirk*, 76 Cal.App.2d 496, 173 P.2d 367.

Not only could these matters have been raised on appeal but the only ones about which there could have been any question, including the contention that the appellant was improperly persuaded by the public defender to enter a plea of guilty, were submitted upon conflicting affidavits which amply sustain the implied findings thereon.

[4] It seems to be further contended, with respect to what occurred after the motion to vacate the judgment was filed, that there was an inexcusable delay in hearing the petition for a writ of error *coram nobis*; that the appellant encountered an unreasonable delay in receiving certain records he asked for after the order of August 27, 1954, was entered; that he was not properly or efficiently represented by the public defender on his application for a writ of error *coram nobis*; that his first petition for writ of error in May, 1954, was improperly denied since he had not properly asked for anything; and that the clerk's minutes are erroneous in that they refer to the appellant's motion as "a motion to vacate judgment" when in fact it was a motion to set aside the judgment as being void on its face. These contentions are unsupported

by the record, are without merit, and no prejudice appears.

[5] In connection with this appeal the appellant has presented a purported petition for a writ of prohibition "to prevent documents of fraud to appear in any court as passing for true", and has presented 24 separate motions that the original judgment "be vacated and set aside, or reversed". For obvious reasons this petition and these motions are denied.

The purported appeals from the judgment entered on February 18, 1952, and from the denial of a writ of error entered on May 21, 1954, are dismissed. The order denying the application for a writ of error *coram nobis* is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



130 Cal.App.2d 43

Warren G. HUSKEY, Plaintiff and Appellant,
v.

Manuel A. GARCIA, J. W. Baldwin, Forrest
V. Gill, and Harry L. Longshaw,
Defendants and Respondents.

Civ. 20166.

District Court of Appeal, Second District,
Division 3, California.

Dec. 30, 1954.

Action, to recover for injuries suffered by plaintiff, when automobile which he was driving collided, at intersection, with a following truck and oncoming automobile. The Superior Court of Los Angeles County, Fred Miller, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that evidence supported findings of trial court that plaintiff operated his automobile negligently so as to cause it to cross center line of highway and to strike other automobile head-on, causing plaintiff's au-

tomobile to be struck in rear by following truck and that plaintiff's negligence was proximate cause of both collisions.

Judgment affirmed.

1. Automobiles ⇨245(15)

In action to recover for injuries suffered by plaintiff when truck which he was driving was involved in collision, at intersection, with a following truck and an oncoming automobile, evidence, on issues of whether driver of following truck was negligent in running into plaintiff's automobile, in following too closely, and in failing to avoid collision when plaintiff's stop light went on, presented questions of fact.

2. Automobiles ⇨245(14, 39)

In action to recover for injuries suffered by plaintiff when truck which he was driving was involved in collision, at intersection, with a following truck and an oncoming automobile, evidence, on issues of whether driver of oncoming automobile was negligent in making left turn in front of plaintiff, in failing to give proper signal for left turn and in failing to see plaintiff's truck before accident, presented questions of fact.

3. Automobiles ⇨245(78)

In action to recover for injuries suffered by plaintiff when truck which he was driving was involved in collision, at intersection, with a following truck and oncoming automobile, evidence on issues of whether plaintiff's speed was excessive, whether he stopped suddenly, and whether he gave signal of intention to slow down, presented questions of fact.

4. Automobiles ⇨244(42, 58)

In action to recover for injuries suffered by plaintiff, when automobile which he was driving collided, at intersection, with oncoming automobile and with following truck, evidence supported findings of trial court that plaintiff operated his automobile negligently so as to cause it to cross center line of highway and to strike other automobile head-on on wrong side, causing plaintiff's automobile to be struck in rear by truck and that plaintiff's negligence was proximate cause of both collisions

Russell H. Pray, William C. Price, and Smead F. Kelley, Long Beach, for appellant.

Parker, Stanbury, Reese & McGee, Richard E. Reese, Los Angeles, for respondents Garcia and Baldwin.

James V. Brewer, Los Angeles, for respondents Gill and Longshaw.

PARKER WOOD, Justice.

Action for damages for personal injuries allegedly sustained by plaintiff in a collision of three automobiles. In a nonjury trial judgment was for defendants. Plaintiff appeals from the judgment.

Appellant contends that the evidence was insufficient to support the judgment.

The collision occurred on March 28, 1951, about 11:30 a. m., at the intersection of Pacific Coast Highway and Gardena Avenue in Long Beach. Pacific Coast Highway extends east and west and has six traffic lanes—three lanes for east bound traffic and three lanes for westbound traffic. Plaintiff was driving a Pontiac automobile in a westerly direction on Pacific Coast Highway, in the westbound lane next to the center line. Defendant Garcia was driving a Chevrolet truck in a westerly direction, in the same lane in which plaintiff was driving, and about 30 feet behind plaintiff's automobile. Defendant Gill was driving a Chevrolet automobile in an easterly direction on Pacific Coast Highway in the eastbound lane next to the center line. Gill intended to make a left turn onto Gardena Avenue.

Plaintiff testified that during the last half block as he approached the intersection he was traveling from 20 to 25 miles an hour. When he was about 80 feet east of the intersection he saw Gill's automobile which was about 80 feet west of the intersection. It slowed down and he (plaintiff) thought it might make a left turn in front of him. He gave a "slow-down" signal by putting his left arm out the window and down, and he slowed down. When the front of his (plaintiff's) automobile was about half way over the east side (entrance) of the intersection (the pedestrian crosswalk) Gill's automobile swung in front of him and then

stopped—the two front wheels of Gill's automobile were north of the center line of Pacific. Then plaintiff, while traveling about 5 miles an hour, applied his brakes fairly hard and tried to stop, and then there was an impact. Everything happened so quickly that he did not know what happened. He does not know which collision was first—whether it was the collision between his car and the truck or between his car and Gill's car. His brakes were good. Prior to the accident his automobile did not swerve and the tires did not slide. He did not see the truck until after the accident, when it was back of plaintiff's automobile.

A witness, called by plaintiff, testified that on the day of the accident she was on the sidewalk near said intersection. She heard the squeak of brakes, and then she saw a truck, a Pontiac automobile, and a Chevrolet automobile. The Pontiac was traveling between 10 and 15 miles an hour and its front bumper was even with the east curblane of Gardena and next to the double line of Pacific. The Chevrolet was about even with the west curblane of Gardena and it was going very slowly. The truck was traveling about 30 miles an hour, was partly in the lane next to the double line of Pacific and partly in the next lane (north), and about 3 feet from plaintiff's automobile. The truck struck plaintiff's automobile and pushed it across the double line of Pacific and into the Chevrolet automobile—the left front of plaintiff's automobile struck the front of the Chevrolet. The Chevrolet was moving when it was struck. (She also testified that the Chevrolet was not moving.) The collision between plaintiff's automobile and the truck occurred before those automobiles reached the intersection, and the other collision occurred beyond the west curblane of Gardena. After the impact between the truck and plaintiff's automobile, the truck went forward about a car length and into the lane to the right of the lane where the impact had occurred.

Defendant Garcia testified that when he was behind plaintiff in the block east of Gardena he was traveling about 30 miles an hour and plaintiff was traveling about the same speed. As plaintiff's automobile approached the intersection it was about

25 feet ahead of him. As it was entering the intersection he saw the rear light of the automobile go on. He knew plaintiff was going to stop and he (Garcia) applied his brakes and turned to the right, and then the left front of his truck collided with plaintiff's automobile. At the time of the collision plaintiff's automobile was approximately in the middle of the intersection. Garcia had no warning that plaintiff was going to stop until the rear light of plaintiff's car came on as plaintiff was entering the intersection. Plaintiff made "a very sudden stop." When he saw the light he (Garcia) applied his brakes. After the collision Gill's car was a foot or two feet over the center line of Pacific.

Defendant Gill testified that prior to the accident, he was traveling about 25 miles an hour. As he came into the intersection he saw westbound traffic, he slowed down and gave a signal for a stop by putting his hand out and down. He then came to a stop. His automobile was about in the center of Gardena. He first saw plaintiff's car when it was about 100 feet from him (Gill). It was traveling about 25 miles an hour. It slowed down and when it was about 25 feet from his (Gill's) automobile it started to veer toward him, it came across the center line and struck his automobile. At the time of the impact, plaintiff's automobile was traveling about 15 miles an hour. Immediately thereafter plaintiff's automobile was struck in the rear by the truck—the collision between plaintiff's automobile and the truck was after the collision between the two automobiles. He also testified that when he came to a stop (prior to the accident) plaintiff's automobile was about 25 feet from him.

The court found that defendant Gill brought his automobile to a stop within the intersection; that defendants Garcia and Gill did not negligently operate their vehicles so as to cause them to collide with the automobile which plaintiff was operating; that plaintiff negligently operated his automobile so as to cause it to cross the center line of Pacific Coast Highway and strike the automobile of Gill in a head-on collision on the wrong side of the highway

for plaintiff, and as a result thereof plaintiff's automobile was struck in the rear by the truck being driven by Garcia; that the collisions, with the automobile operated by Gill and with the truck operated by Garcia, were due directly and proximately to the negligence of plaintiff and not due in any respect to any negligence of defendants Garcia and Gill.

[1,2] Appellant asserts that the evidence shows that Garcia and Gill were guilty of negligence as a matter of law. As to Garcia, appellant argues that such negligence consists of acts committed by Garcia as follows: running into the rear of the automobile ahead of him; following too closely; traveling at excessive speed; failing to avoid the collision when plaintiff's stop light went on; failing to see plaintiff's automobile as it gradually slowed down. As to Gill, appellant argues that such negligence (as a matter of law) consists of acts committed by Gill as follows: making left turn in front of plaintiff; failing to give proper signal for left turn; failing to see the truck before the accident. Different inferences could be drawn from the evidence pertaining to the various specifications of negligence referred to in plaintiff's argument. The evidence as to negligence of Garcia and Gill presented questions of fact for the determination of the trial court. As above shown, the court found that Garcia and Gill were not negligent. The contention that the defendants were guilty of negligence as a matter of law is not sustainable.

[3,4] Appellant asserts that there was no evidence of any negligence on the part of plaintiff. He argues that his speed was not excessive or unreasonable; he saw the Gill automobile approaching and anticipated its action; he did not make a quick stop, but slowed down gradually; he gave a signal of his intention of slowing down. Different inferences could be drawn from the evidence pertaining to the subject matter of those arguments. As above shown, the court found that plaintiff negligently operated his automobile so as to cause it to cross the center line of Pacific Coast Highway (onto the wrong side of

the highway) and strike Gill's automobile, and as a result plaintiff's automobile was struck in the rear by Garcia's truck; and that the collisions were due proximately to the negligence of plaintiff. There was evidence (testimony of Garcia) that plaintiff made a very sudden stop; that he gave no warning that he was going to stop until the rear (stop) light of plaintiff's automobile went on as plaintiff was entering the intersection. With reference to Gill, there was evidence that Gill slowed down, gave a signal for a stop, and stopped when plaintiff's automobile was about 25 feet from him; and that plaintiff's automobile veered toward him, crossed the center line and struck Gill's automobile. The question as to negligence of plaintiff was one of fact for the trial court. The evidence was sufficient to support the findings of the court.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



CHAPMAN COLLEGE, a California corporation, Appellant,
v.

Russell H. WAGENER et al., Respondents.*
Civ. 20227.

District Court of Appeal, Second District,
Division 2, California.
Jan. 4, 1955.

Purchaser brought action against vendor to reform contract for purchase of realty, and the vendor filed a cross-complaint seeking to have the contract rescinded. The Superior Court, Los Angeles County, A. A. Scott, J., entered judgment of rescission, and purchaser appealed. The District Court of Appeal, Moore, P. J., 277 P. 2d 488, reversed the judgment with directions. The vendor made a motion for rehearing. The District Court of Appeal held

* Opinion vacated 291 P.2d 445.

that where contract for sale of realty was carefully considered and was clear in material respects, vendor was not entitled to have contract rescinded merely because of disputes as to whether payments should be applied to interest or to principal.

Motion for rehearing denied.

Vendor and Purchaser Ⓒ89

Where contract for sale of realty was carefully considered and was clear in material respects, vendor was not entitled to have contract rescinded merely because of disputes as to whether payments should be applied to interest or to principal.

Bromley, Ritter & Lindersmith, Los Angeles, for appellant.

R. D. Sweeney and J. E. Simpson, Los Angeles, for respondent.

PER CURIAM.

This action was tried and decided upon the sole issue that the minds of the parties never met on the proposition that payments by the College should first be credited on interest, the balance upon principal. The finding that the notes which were made pursuant to a contract were not executed as a result of mutual mistake and should not be reformed is utterly inconsistent with the finding that no contract was in fact made. The latter finding was specific and that it was intended as the basis of the decision made by the trial court is evidenced by its "memorandum opinion." If there was no contract, as the court found, how can it be said that the terms set forth in the writing executed by the parties may now be invoked to establish that there was a contract?

If there was no contract, all the declarations and asseverations contained in the voluminous findings with reference to appellant's action for reformation are without substance. The simple answer to that count of the complaint is the finding that

"no contract was made." Therefore the court will not besmear the record by declaring facts to show that appellant is not entitled to a reformation. The entire writing, included in the findings with reference to reformation of the contract, is meaningless except in so far as it be cited to beloud the finding that there was no contract.

The writing executed by the parties contained a formula by which appellant would pay for the 934 acres of land at a price specified, to be paid, partially in cash and and the balance by notes secured by trust deeds on the property. That original writing provided that the note and trust deeds should provide that "all payments thereon shall first be credited on interest, the balance on principal." When the notes and trust deeds were delivered by appellant and accepted by respondents, they did not contain the language of the original writing. However, they were all parts of the same transaction. Civ. Code, sec. 1642; *Lynch v. Bank of America, etc.*, 2 Cal.App.2d 214, 37 P.2d 716; *Spotton v. Dyer*, 42 Cal.App. 585, 184 P. 23. And whether or not reformation was had under count 1, appellant was entitled to an interpretation of the contract by the trial court, and to have its rights under the contract declared. Moreover, the court should have determined whether or not the omission of the language of the contract to the effect that all payments to be made on the notes and trust deeds should first be credited on interest and the balance on principal made any difference in the substantive rights of the parties.

If contracts may be so lightly considered after they have been entered into with full knowledge, upon legal advice, and have been acted upon for several years; if they can be rescinded and annulled at the whim of a party simply because there is a dispute as to the proper interpretation, then there is little safety for contracting parties under the law.

The motion for a rehearing is denied.

CALIFORNIA LETTUCE GROWERS, Inc.,
a corporation, Plaintiff and Respondent,

v.

UNION SUGAR COMPANY, a corporation,
Doe Company, a corporation, Roe Com-
pany, a copartnership, et al., Defendants
and Appellants.*

Civ. 20213.

District Court of Appeal, Second District,
Division 1, California.

Dec. 23, 1954.

Rehearing Denied Jan. 11, 1955.

Hearing Granted Feb. 16, 1955.

Seller's action against buyer to recover price for sugar beets sold and delivered, wherein buyer conceded indebtedness for beets received, but sought allowance for five counterclaims. The Superior Court of Santa Barbara County, Atwell Westwick, J., rendered summary judgment for sellers, and buyer appealed. The District Court of Appeal, Mosk, J. pro tem., held, inter alia, that contract for sale of beets which provided that price would be determined on basis of net return to buyer from sale of sugar, and under which buyer could sell at any price and under any conditions, be responsible only for sums actually realized from the sale, make deductions in accordance with its system of accounting, and conclusively verify its methods and conclusions by accountants of its own choice, lacked mutuality, and, as prior course of dealing between the parties, provided no basis for ascertaining price in construing subsequent contract between the parties which made no provision whatever for price, terms, manner or time of payment.

Judgment affirmed.

1. Sales Ⓒ54

Where brief contract signed by both parties provided only that second party agreed to grow, on land in certain area, and deliver to first party 239 acres of beets during 1949, covenant on part of first party to purchase and receive commodity would be implied.

2. Contracts Ⓒ9(1)

The law opposes the destruction of contracts because of uncertainty, and if possible will construe agreement so as to

carry into effect the reasonable intention of the parties, if ascertainable.

3. Contracts Ⓒ9(1)

Although the description of the subject matter of an agreement may be indefinite, the contract is enforceable if the subject matter is capable of being identified and rendered definite and certain by evidence outside the contract.

4. Sales Ⓒ61, 78

Where no price is fixed in a contract for the sale of a commodity, the law, upon a delivery and acceptance of the thing sold, implies an understanding between the parties that a reasonable price is to be paid, and in such a case the contract will be deemed to be executed.

5. Sales Ⓒ1(3)

In a contract for a sale of a commodity, where the price of the commodity called for but not delivered is to be subsequently ascertained and fixed by the valuation of others, by future agreement of the parties, or by future determination in any manner, the contract is incomplete and unenforceable until the price is agreed upon.

6. Contracts Ⓒ10(4)

Sales Ⓒ77(1)

Contract for sale of sugar beets which provided that price would be determined on basis of net return to buyer from sale of sugar, and under which buyer could sell at any price and under any conditions, be responsible only for sums actually realized from the sale, make deductions in accordance with its system of accounting, and conclusively verify its methods and conclusions by accountants of its own choice, lacked mutuality, and, as prior course of dealing between the parties, provided no basis for ascertaining price in construing subsequent contract between the parties which made no provision whatever for price, terms, manner or time of payment. Civ.Code, § 1729.

7. Contracts Ⓒ56, 57

A promise may be a consideration for a promise, but if, from lack of mutuality, the promise is not binding, it cannot form a consideration.

* Opinion vacated 289 P.2d 785.

8. Sales Ⓒ1(3)

A contract relating the purchase price to an ascertainable market price would be enforceable.

9. Sales Ⓒ1(3)

Parties to a contract are bound by its terms and not by subsequent developments, and a price to be fixed by resale would, it seems, always be determined in futuro, and therefore the contract would remain executory and inoperative.

10. Sales Ⓒ1(3)

Contract which provided only that second party agreed to grow, on land in certain area, and deliver to first party 239 acres of beets during 1949, but which made no provision whatever as to price to be paid seller, could not be enforced by buyer due to lack of essential elements, and this was a defect which was radical in its nature, and which was beyond reach of oral evidence to supply.

11. Landlord and Tenant Ⓒ138

Under 1947 lease renewal obligating lessee to apply minimum of seven tons of manure per acre upon leased land in addition to minimum 14 tons per acre required under 1945 lease, and stating that amount of manure to be applied to any particular area and time of its application were to be at sole discretion of lessee, lessee was not obligated to apply seven tons during term of lease renewal or any other specific time.

12. Landlord and Tenant Ⓒ138

Where 1947 lease renewal required lessee to apply seven tons of manure per acre in addition to 14 tons per acre required under 1945 lease, but did not obligate lessee to apply the seven tons at any specific time, lessor's counterclaim against lessee for damages, which alleged failure of lessee to apply manure to leased land in accordance with lease renewal, but which did not allege failure of lessee to apply total of 21 tons, did not state facts sufficient to constitute valid cause.

13. Assumpsit, Action of Ⓒ5

Where the causes of action of a complaint are based on the same facts, the cause consisting of a common count sur-

vives or falls upon the strength of the other counts.

14. Interest Ⓒ19(2)

Interest will be allowed where damages are capable of ascertainment by calculation, or where they may be determined by reference to well-established market values, but interest is not allowable where the damages depend upon no fixed standard and cannot be made certain except by accord, verdict or decree. Civ.Code, § 3287.

15. Interest Ⓒ22(1)

In seller's action against buyer, wherein amended complaint alleged in first count in assumpsit reasonable value of sugar beets sold and delivered in sum of \$45,000, and acknowledged receipt of \$2,355.09, and in second and third counts, breach of contract and damages therefor in sum of \$29,655.37, less acknowledged receipt, and where answer and counterclaim admitted liability for \$29,655.37, less acknowledged receipt and less certain setoffs, seller was entitled to interest on his judgment, notwithstanding that three of buyer's counterclaims, for which seller confessed obligation, were unliquidated claims. Civ. Code, § 3287.

16. Interest Ⓒ19(1)

Where the claim is ascertainable, the addition of interest thereto will not be denied by the setting up of unliquidated claims in defense, but under the latter circumstances, the plaintiff is given interest on the full amount, and the defendant's unliquidated demand is treated as a discount and not as a payment. Civ.Code, § 3287.

Richard E. Guggenlime, Eugene S. Clifford, Heller, Ehrman, White & McAuliffe, San Francisco, Twitchell & Rice, Santa Maria, for appellants.

Schauer, Ryon & McMahon, by Robert W McIntyre, Santa Barbara, for respondent.

MOSK, Justice pro tem.

This is an appeal by the defendant-appellant, Union Sugar Company, a corpora-

tion, from a summary judgment granted to the plaintiff-respondent, California Lettuce Growers, Inc., a corporation, by the Superior Court of Santa Barbara County after the sustaining of a demurrer to an answer and counterclaims without leave to amend.

The pleadings refer to a series of transactions, generally denominated leasing contracts and growing contracts, between the parties over a period of years. On November 1, 1945, Union Sugar leased to California Lettuce approximately 1000 acres in Santa Barbara and San Luis Obispo counties for a three year term ending October 31, 1948, providing specified rental for the first two years, rental for the third year to be fixed by arbitration in the event the parties failed to agree thereon. By an additional provision the lessee agreed to apply a minimum of fourteen tons of steer manure per acre on the leased land. On the same date, a growing agreement was executed by the parties covering the same three years and providing that California Lettuce would grow and sell to Union Sugar 500 acres of beets in 1946, 500 in 1947 and 400 in 1948. This agreement, however, did not specify the price, terms of payment, place and manner of delivery and contained no express promise on the part of Union Sugar to purchase the beets. In its first counterclaim appellant asserts that "the parties knew and understood that it was the standard practice of defendant to enter into separate supplemental and specific sugar beet contracts with each of its growers for the respective years in which beets were to be grown".

On April 10, 1946, a complete contract for the purchase and sale of the 1946 crop of beets was executed by the parties, and on March 7, 1947, a similar agreement was executed for the 1947 crop year. On March 3, 1948, the parties again executed a contract concerning the growing of beets, but this instrument differed from those executed in 1946 and 1947, as will be discussed hereinafter.

On November 1, 1947, the parties entered into an agreement fixing rental for the 1948 crop under the lease and extending the

lease an additional year to cover the crop period of 1948, leaving the rent to be paid for the latter period to subsequent determination.

On November 1, 1948, the parties entered into a further agreement concerning the rental under the lease and on the same date entered into a growing contract for 1949. This latter instrument, upon which the first counterclaim is based, was silent as to price to be paid for the beets or terms of payment, did not specify the time or place of delivery, and contained no obligation on the part of Union Sugar to accept and pay for the beet crop.

California Lettuce delivered 117 acres of 1949 crop sugar beets to Union Sugar for the price of which it brought suit against Union Sugar. The latter conceded its indebtedness for the beets received, but has maintained California Lettuce should have delivered a full 239 acres of sugar beets, the deficiency allegedly damaging Union Sugar in the sum of \$7,412.45. In addition, Union Sugar contended that California Lettuce was indebted to it in the sum of \$14,529.94 for failure to apply additional manure as required by the agreement of November 1, 1947, for the sum of \$1,395.21 for certain manure sold and delivered, \$21.50 for certain pumping plant charges, and \$115.74 on account of holding certain leased acreage. These deductions left a balance of \$2,355.09, which Union Sugar tendered in full settlement of its obligations. California Lettuce accepted it merely on account.

The original complaint filed by California Lettuce on January 11, 1950, contained four counts, two in assumpsit and two for breach of contract, seeking a judgment in the sum of \$27,300.78. Union Sugar filed an answer and counterclaims, to which demurrers were sustained thrice.

California Lettuce thereafter amended its complaint, alleging in the first count in assumpsit the reasonable value of sugar beets sold and delivered in the sum of \$45,000 and it acknowledged receipt of \$2,355.09. In its second and third causes of action, California Lettuce alleged breach of contract and damages therefor in the sum of

\$29,655.37, less \$2,355.09, paid, leaving a balance due of \$27,300.78 (sic).

To the amended complaint, Union Sugar filed an answer and counterclaim, admitting liability for \$29,655.37 less the \$2,355.09 paid on account and less certain setoffs claimed in five counterclaims.

California Lettuce demurred to the answer and first and second counterclaims, admitting the amounts claimed in the third, fourth and fifth counterclaims. The demurrer was sustained this time without leave to amend. On motion, summary judgment was granted on the pleadings in favor of California Lettuce in the sum of \$25,768.34, together with interest thereon at the rate of seven percent from December 13, 1949.

On this appeal, Union Sugar contends that the first and second counterclaims state facts sufficient to constitute a valid setoff against the claims contained in the first amended complaint, and that the finding that the answer does not state facts sufficient to constitute a defense to the amended complaint is contrary to law. In addition, Union Sugar challenges the finding that the indebtedness was fixed by its account to California Lettuce dated December 13, 1949, and finally it maintains that in any event the award of interest is improper.

Cutting through the maze of pleading gymnastics the crux of this controversy revolves primarily about the validity of the first counterclaim, and that in turn depends upon the legal sufficiency of the agreement of November 1, 1948. This brief contract provides that California Lettuce "agrees to personally grow, on suitable land in the Santa Maria Valley, and deliver to First Party two hundred and thirty-nine (239) acres of beets during the year 1949."

[1] It was first contended by respondent that the agreement was unenforceable because it imposed no obligation on Union Sugar to purchase the beets which respondent was obligated to grow and deliver. We are not impressed with this argument. Such a rule has been recognized in some jurisdictions, *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.*, 8 Cir., 114 F. 77, 57 L.R.A. 696; *American Cotton Oil*

Co. v. Kirk, 7 Cir., 68 F. 791; *Joliet Bottling Co. v. Joliet Citizens' Brewing Co.*, 254 Ill. 215, 98 N.E. 263; *Hoffman v. Maffioli*, 104 Wis. 630, 80 N.W. 1032, 47 L.R.A. 427; *Velie Motor Car Co. v. Kopmeier Motor Car Co.*, 7 Cir., 194 F. 324, but not in California. Where a written contract is signed by both parties requiring one to sell and deliver to the other a specified commodity, there is an implied covenant on the part of the other to purchase and receive the commodity. *King-Keystone Oil Co. v. San Francisco Brick Co.*, 148 Cal. 87, 82 P. 849; *Preble v. Abrahams*, 88 Cal. 245, 26 P. 99.

More significant here, however, is the omission from the contract of any reference to price.

[2, 3] The law does not favor, but on the contrary leans against the destruction of contracts because of uncertainty, and if at all possible will construe agreements so as to carry into effect the reasonable intention of the parties if it can be ascertained. The description of the subject matter of an agreement may be indefinite, but if it is capable of being identified and rendered definite and certain by evidence *aliunde* the contract is enforceable. *McIllmoil v. Frawley Motor Co.*, 190 Cal. 546, 549, 213 P. 971; *Sutliff v. Seidenberg*, *Stiefel & Co.*, 132 Cal. 63, 64 P. 131, 469; *Mebius & Drescher Co. v. Mills*, 150 Cal. 229, 88 P. 917.

[4, 5] Where no price is fixed in a contract for the payment of a commodity, the law, upon a delivery and acceptance of the thing sold, implies an understanding between the parties that a reasonable price is to be paid, and in such a case the contract will be deemed to be executed. However, where the price of the commodity called for but not delivered is to be subsequently ascertained and fixed by the valuation of others, by future agreement of the parties, or by future determination in any manner, the contract of sale is incomplete and unenforceable until the price is agreed upon. *Jules Levy & Bro. v. A. Mautz & Co.*, 16 Cal.App. 666, 117 P. 936; *Stone Drill Corp. v. Stooddy Company*, 4 Cal.App.2d 367, 40 P.2d 945. As stated in *Avalon Products*,

Inc., v. Lentini, 98 Cal.App.2d 177, at page 180, 219 P.2d 485, at page 487: " * * * the general rule is that a provision in a contract which leaves open the terms of payment for future negotiation renders the contract incomplete and uncertain in one of its material features and for that reason unenforceable in equity. *Morris v. Ballard*, 56 App.D.C. 383, 16 F.2d 175, 49 A.L.R. 1464 and cases cited. In California the rule is the same and no action will lie to enforce the performance of a contract or to recover damages for its breach unless it is complete and certain."

[6] It is clear that this contract made no provision whatever for price, terms, manner or time of payment. But, contends appellant, the price may be ascertained by the course of dealing between the parties. Civ.Code, § 1729. It was understood between the parties, insists appellant, that the price would be determined in accordance with the custom of the parties, the same terms as were uniformly made available by Union Sugar to all sugar beet growers from whom it purchased beets.

If previous contracts between the parties had contained consistent provisions for or reference to the price to be paid for beets there might be a determinable course of dealing between the parties to which we could properly look for contractual guidance. Here we have attached to the pleadings all of the prior agreements executed by the parties. The agreements of April 10, 1946, and March 7, 1947, include specific price provisions in terms of dollars per ton in accordance with the sugar content of beets to be delivered. But the agreement of March 3, 1948, adopted a completely new price structure and if we may properly refer to prior contracts between the parties we would of necessity be obliged to examine that latest preceding document with particularity. No more than a cursory examination of this instrument is necessary to demonstrate its unilateral and illusory price fixing features.

The provision for payment in the contract of March 3, 1948, was as follows: "Company (Union Sugar) will pay Grower (California Lettuce) for beets delivered by

Grower and Accepted by Company, at the times and in the manner hereinafter provided, a price per ton computed in accordance with the Schedule of Beet Payments, set forth below, on the basis of net return of Company as hereinafter defined." Thereafter the contract states "The 'net return of Company' as used herein means the average net selling price actually realized by Company per 100 lbs. for 1948 crop sugar sold and delivered during the period August 1, 1948, to July 31, 1949, and shall be computed in accordance with the established system of accounting of Company by deducting from the gross selling price actually realized by Company for such sugar all such charges and expenditures as are regularly and customarily deducted by, and as determined by Company." The agreement further provided for deduction by the Company of "the excess cost of packaging over cost of packaging in basis (sic) 100-pound bag," and various taxes. The average net selling price was to be "verified" by accountants "chosen by the Company, which verification shall be conclusive."

Stripped of excess verbiage, the contract provided Union Sugar was to determine, unilaterally, the price to be paid California Lettuce. It could sell at any price and under any conditions, be responsible only for sums actually realized from the sale, make deductions in accordance with its system of accounting, and conclusively verify its methods and conclusions by accountants of its own choice. By no rationalization may this be called mutuality.

[7] Appellant has urged that in the contract there are mutual promises. It is true that a promise may be a consideration for a promise. But this applies only to an enforceable promise. If, from lack of mutuality, the promise is not binding, it cannot form a consideration. *Wickham & Burton Coal Co. v. Farmers' Lumber Co.*, 189 Iowa 1183, 179 N.W. 417, 14 A.L.R. 1293.

No California cases directly reviewing a comparable contract have been called to our attention. However, in *Puryear-Meyer Grocer Co. v. Cardwell Bank*, Mo.App., 4 S.W.2d 489, there was an instrument re-

quiring the price to be determined by the amount received on resale of the commodity involved. This was held to be void and judgment was granted on the pleadings. A provision setting the price at the resale sum realized plus a "nice" profit was deemed unenforceable in *Gaines & Sea v. R. J. Reynolds Tobacco Co.*, 163 Ky. 716, 174 S.W. 482. Also see discussion in *Brooks v. Federal Security Co.*, 58 App. D.C. 56, 24 F.2d 884, 57 A.L.R. 747.

The contract involved, and the contentions made herein, are similar to those discussed in *Weston Paper Mfg. Co. v. Downing Box Co.*, 7 Cir., 293 F. 725. Said the court, 293 F. at page 727: "We see nothing in this contract which takes from the seller the absolute right to fix the price in the future. Certainly defendant had no voice in fixing this price. Nor did any third party have any immediate influence upon plaintiff in determining the price. True, plaintiff may, in acting, have been governed by a desire to hold future business, or have been prompted by other laudable motives. But plaintiff could have arbitrarily changed the price each quarter, and from such arbitrary fixation defendant had no appeal. Upon the ground of uncertainty, and also for want of consideration, we conclude the agreement as drawn was unenforceable." But, argued the seller in that case, some of the goods were actually accepted by the purchaser. Under those circumstances the "goods shipped under contracts void because of uncertainty as to price, yet accepted by the purchaser when delivered, must be paid for, * * *" but this "part performance, however, does not validate the entire agreement." To the same effect is *Wickham & Burton Coal Co. v. Farmers' Lumber Co.*, supra.

In *Brooks v. Federal Surety Co.*, 58 App. D.C. 56, 24 F.2d 884, 885, 57 A.L.R. 745, "The parties to the present contract did not themselves agree upon the price of the coal sought to be sold, but they agreed that the price should be the same price (less 10 per cent.) as that for which plaintiffs should sell the coal." Said the court, "The plaintiffs would be entitled to accept any price for it satisfactory to themselves, and in effect the transaction would be the same

as if the mining company had agreed to sell and deliver the coal to plaintiffs, leaving it to them alone to determine the price to be paid for it. Such an agreement lacks mutuality, and cannot be enforced."

A somewhat comparable contract was held invalid and unenforceable in *Hass v. Alpert*, 111 Cal.App. 26, at page 29, 295 P. 66. In that instance it was contended that the contract had been partially executed through payment of a part of the purchase price and for that reason the instrument became valid and binding. The court, however, referring to the *Levy* case, supra, held that "Where, however, the price of the commodity called for but not delivered is to be subsequently ascertained and fixed by the valuation of others or by the agreement of the parties, the contract of sale is incomplete, and nonenforceable until the price is so fixed or agreed upon."

As urged here, in *Canadian Nat. Ry. Co. v. George M. Jones Co.*, 6 Cir., 27 F.2d 240, 241, it was said that the parties understood all sellers in the area would receive comparable payment. In fact, the contract specifically provided the price should be "the same as paid seller by other railroads on contract for mine run coal from the Hocking district at the time this contract becomes effective." The court held, at page 242, "* * * the clearly intended method and means for fixing price failed, the provision as to price became ineffective and inoperative, and the contract became unenforceable by reason of the indefiniteness of this controlling element and the necessity for further agreement thereon."

There are numerous other examples of purported price formulae held to lack mutuality and enforceability: "the average rates", *City of Des Moines v. Des Moines Waterworks Co.*, 95 Iowa 348, 64 N.W. 269, 271; "the customary and usual price", *Childs v. City of Columbia*, 87 S.C. 566, 70 S.E. 296, 297, 34 L.R.A., N.S., 542; "the best price obtainable", *Schreiner v. Shanahan*, 105 Neb. 525, 181 N.W. 536, 537; a division of profits "upon a very liberal basis", *Butler v. Kemmerer*, 218 Pa. 242, 67 A. 332, 333; a promise to bequeath "as

much as to any relation on earth", *Graham v. Graham's Executors*, 34 Pa. 475; a fixed salary plus "a part of profits that should mean from twenty-five dollars to fifty dollars per month extra", *Hubbard v. Turner Department Store Co.*, 220 Mo.App. 95, 278 S.W. 1060, 1061; "part of the money", *Burney v. Jones*, 140 Ga. 758, 79 S.E. 840; "a satisfactory amount", *Mackintosh v. Kimball*, 101 App.Div. 494, 92 N.Y.S. 132, 133; "fair share" of the profits, *Varney v. Ditmars*, 217 N.Y. 223, 111 N.E. 822; a commission on profits, the method of computing "to be agreed upon later", *Petze v. Morse Dry Dock & Repair Co.*, 125 App. Div. 267, 109 N.Y.S. 328, 329; "25 per cent of the net profits * * * after all the expenses of operating the department have been deducted", *Faulkner v. Des Moines Drug Co.*, 117 Iowa 120, 90 N.W. 585, 586; "a contingent commission of five percent", *Van Slyke v. Broadway Ins. Co.*, 115 Cal. 644, 47 P. 689, 690, 928.

[8,9] We do not mean to hold or infer that a contract may not relate the purchase price to an ascertainable market price. An agreement of such nature would be enforceable. *Moore v. Shell Oil Co.*, 139 Or. 72, 6 P.2d 216; *Dixie Industrial Co. v. Benson*, 202 Ala. 149, 79 So. 615. "The general view", says Williston (Rev.Ed. § 41, p. 119), "is that where the price of goods is to be fixed in relation to the official quotation of a designated market, or to the price set by a dominant seller of the particular kind of goods on a certain day or on delivery, the provision controls if there is such a quotation or price set, but in the absence of such a quotation or set price the contract is inoperative to the extent that it remains executory." A price to be fixed by re-sale would, it seems, always be determined *in futuro*, and therefore the contract would remain executory and inoperative. Parties to a contract are bound by its terms and not by subsequent developments. *Turman Oil Co. v. Sapulpa Refining Co.*, 124 Okl. 150, 254 P. 84.

Appellant has cited a number of cases holding contracts enforceable that based the purchase price on "cost of production", *Pacific Portland Cement Co. v. Westvaco*

Chlorine Products Corp., D.C., 77 F.Supp. 406, 407; "net list price", *Buggs v. Ford Motor Co.*, 7 Cir., 113 F.2d 618, 620; "average net high price", *Hunt Foods v. O'Disho, D.C.*, 98 F.Supp. 267, 269; "manufacturer's list prices", *Ken-Rad Corporation v. R. C. Bohannon, Inc.*, 6 Cir., 80 F. 2d 251, 253; "tank wagon price", *Shell Oil Co. of California v. Wright*, 167 Wash. 197, 9 P.2d 106, 109; "list prices", *Moon Motor Car Co. v. Moon Motor Car Co.*, 2 Cir., 29 F.2d 3, and comparable phrases. These contracts are distinguishable from the one involved herein, however, for in each the price was ascertainable with certainty on the date of delivery of the commodity.

[10] We have been discussing the preceding contract of March 3, 1948, and its pricing features. While they lacked mutuality, the subsequent agreement of November 1, 1948, involved herein, has even less claim to validity, since it is utterly silent as to price. As stated in the case of *United Press v. New York Press Co.*, 164 N.Y. 406, 58 N.E. 527, 53 L.R.A. 288, "If this were a case where the contract of the parties was merely ambiguous in its terms, it might be permissible to explain them by evidence of their acts, and thus to show a practical construction; but the difficulty with this instrument lies deeper. It lacked support in one of its essential elements,—in the absence of a statement of the price to be paid. That was a defect which was radical in its nature, and which was beyond the reach of oral evidence to supply".

[11,12] We pass now to its second counterclaim in which Union Sugar sued for damages in the amount of \$14,529.94, resulting from the alleged failure of California Lettuce to apply manure to the leased land according to the agreement of November 1, 1947. In the three-year lease of November 1, 1945, California Lettuce obligated itself to apply fourteen tons of steer manure per acre on the lands leased. In the November 1, 1947 agreement, California Lettuce undertook to apply "a minimum of seven tons of steer manure per acre upon the leasehold premises in addition to the

minimum fourteen tons per acre required in the existing lease, * * *."

Union Sugar attempts to require California Lettuce to apply the manure between November 1, 1948, and October 31, 1949, this being the period for which the lease extension was to apply. The agreement does not so provide. On the contrary it states that "the amount of manure to be applied to any particular area and the time of its application to be at the sole discretion of the lessee."

The trial court apparently construed the agreement of November 1, 1947, merely to require the addition of seven to the fourteen tons of manure to be applied pursuant to the previous contract. In none of its pleadings has Union Sugar alleged failure of California Lettuce to apply a total of twenty-one tons. Since the time of application was to be at the sole discretion of California Lettuce, we agree with the conclusion of the trial court that there was no binding obligation for application of seven tons between November 1, 1948, and October 31, 1948, or any other specific dates. The second counterclaim therefor did not state facts sufficient to constitute a valid cause. It thus becomes unnecessary to discuss the additional question raised as to whether the counterclaim set forth a proper measure of damages.

Finally we come to the propriety of the assessment of interest at seven per cent from December 13, 1949, in the amount of \$6,942.49. Interest is to be added to a judgment when the prevailing party is entitled to recover damages certain, or capable of being made certain by calculation, as of a particular day. Civ.Code, § 3287.

In this instance respondent's amended complaint contained a first cause of action in assumpsit, alleging the reasonable value of sugar beets sold and delivered to be \$45,000. This, urges appellant, constitutes an unliquidated and non-interest bearing claim, despite counts two and three which called for a calculated sum.

[13] Where the causes of action are based on the same facts, the law is clear that the common count survives or falls upon the strength of the other counts.

Hays v. Temple, 23 Cal.App.2d 690, 73 P.2d 1248; Spencer v. Crocker First Nat. Bank, 86 Cal.App.2d 397, 194 P.2d 775; Fruns v. Albertsworth, 71 Cal.App.2d 318, 162 P.2d 666. It is no answer to point out that the foregoing authorities were cases involving pleading. For it must be borne in mind that the instant case never progressed beyond the pleading stage. It was determined entirely on demurrers and motions.

[14] Interest will be allowed where damages are capable of ascertainment by calculation, or where they may be determined by reference to well-established market values. Interest is not allowable where the damages depend upon no fixed standard and cannot be made certain except by accord, verdict or decree. Lineman v. Schmid, 32 Cal.2d 204, 211, 195 P.2d 408, 4 A.L.R.2d 1380. The reason for such denial of interest is that the person liable does not know what sum he owes, and therefore can be in no default for not paying. Cox v. McLaughlin, 76 Cal. 60, 67, 18 P. 100. When, therefore, the exact sum of the debtor's indebtedness is known to him, the reason suggested for the denial of interest does not exist. Courteney v. Standard Box Co., 16 Cal.App. 600, 615, 117 P. 778.

[15] There can be no doubt in this instance that the precise amount of the indebtedness was well known to appellant. Not only was it reflected in appellant's books and in a statement submitted to respondent, but it was admitted in the answer. Thus the reason for denying interest does not exist.

But, insists appellant, the third, fourth and fifth counterclaims, to which respondent confessed his obligation only when seeking summary judgment, were unliquidated claims. Being so undetermined, appellant maintains it could not know what deductions were allowable from the sums due under the amended complaint.

[16] However, the authorities uniformly hold that where the claim is ascertainable, the addition of interest thereto will not be denied by the setting up of unliquidated claims in defense. Lineman v. Schmid, supra, 32 Cal.2d at page 212, 195

P.2d at page 413. The rule is that under those circumstances the plaintiff is given interest on the full amount and the defendants' unliquidated demand is treated as a discount and not as a payment. *Hansen v. Covell*, 218 Cal. 622, 629, 24 P.2d 772, 89 A.L.R. 670; *McCowen v. Pew*, 18 Cal.App. 482, 123 P. 354.

After consideration of the pleadings, and the points and authorities ably presented on appeal, we have concluded the trial court properly terminated the proceedings.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing granted; SCHAUER, J., not participating.



129 Cal.App.2d 758

Albert DE MIRJIAN, George DeMirjlan and Zabelle DeMirjlan, individually, and as co-partners doing business under the fictitious name and style of California Art Company, Plaintiffs and Appellants,

v.

IDEAL HEATING CORPORATION, a corporation, Anthony V. Lupella, Mission Appliance Corporation (sued herein as Doe I), Doe II, Doe III and Doe IV, Defendants, Ideal Heating Corporation, a corporation, Respondent.
Civ. 20282.

District Court of Appeal, Second District,
Division 3, California.

Dec. 23, 1954.

Rehearing Denied Jan. 20, 1955.

Hearing Denied Feb. 16, 1955.

Action for property damage resulting from fire allegedly caused by negligence of defendant's employee. The Superior Court of Los Angeles County, Henry M. Willis, J., entered judgment on directed verdict for one of the defendants and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that evidence raised questions for jury as to whether employee was acting in scope of employment and whether he was negligent and whether he had deviated and whether defendant was negligent in main-

taining inflammable spatter thinner near washroom where employee was going for a smoke after filling his cigarette lighter with thinner.

Reversed.

1. Appeal and Error ⇨1097(1)

A failure to find on given issue of fact in prior trial which resulted in reversal does not establish law of case where at second trial there is satisfactory finding on that point.

2. Courts ⇨99(1)

Doctrine of law of case does not extend to remarks or opinions on questions that are not necessarily before court or involved in determination of cause.

3. Appeal and Error ⇨1180(1)

Effect of unqualified reversal is remand of case for new trial on all issues.

4. Appeal and Error ⇨1097(1)

Where all that was decided on former appeal was that findings did not support judgment, and statements in opinion on prior appeal which were mere passing remarks and were not necessary to decision and were at best obiter dicta were not binding as law of case and did not bar court on second appeal from deciding on its merits the question of whether evidence was sufficient to support proper findings.

5. Master and Servant ⇨302(1), 304

An employer is responsible for negligent act of employee done within course of employment and for wrongful act of employee committed in and as part of transaction of business of employer. Civ. Code, § 2338.

6. Master and Servant ⇨304

The determination of what conduct of employee is within course of employment within rule that employer is responsible for negligent act of employee in course of employment depends on facts and circumstances of particular case.

7. Master and Servant ⇨304

Generally, whatever is done by employee in virtue of his employment and in furtherance of its ends is an act done within course of employment within rule that employer is responsible for negligent act of

employee in course of employment, and in determining whether employee's conduct is within course of employment it is proper to inquire whether he was at the time engaged in serving employer and it is not necessary that employee should have authority to do particular act which resulted in injury.

8. Master and Servant ☞302(6)

Acts necessary to comfort, convenience, health and welfare of employee while at work, though strictly personal to himself and not acts of service, do not take employee outside course of his employment within rule that employer is responsible for negligent act of employee in course of employment.

9. Master and Servant ☞302(6)

Cessation of work for eating, drinking, warming himself, and similar necessities are necessary incidents of employment and injuries occasioned by them are accidents resulting from the employment, as respects employer's liability for such injuries.

10. Master and Servant ☞305

A mere deviation by employee from strict course of his duty does not release his employer from liability for injuries inflicted by employee, and employee does not cease to be acting in course of his employment because of incidental personal act or by slight deflections for personal or private purpose, if his main purpose is still to carry on the business of employer, and to release employer from liability the deviation must be so material or substantial as to amount to an entire departure.

11. Master and Servant ☞305

An employee may be acting in course of his employment even though act done be a violation of some rule or instruction of employer, as respects employer's liability for injuries from employee's act.

12. Master and Servant ☞332(2)

As respects employer's liability for injury from employee's act, whether employee was acting in course of employment at time of the accident is generally a question of fact to be determined in light of circumstances of particular case and whether employee's deviation from course of duty was so material or so substantial as to

constitute a complete departure is usually a question of fact.

13. Master and Servant ☞332(1, 2)

In action for property damage resulting from fire allegedly caused by negligence of defendant's employee, evidence raised questions for jury as to whether employee was acting in scope of employment and whether he was negligent and whether he had deviated and whether defendant was negligent in maintaining inflammable spatter thinner near washroom where employee was going for a smoke after filling his cigarette lighter with thinner.

Lane & McGinnis, Felix H. McGinnis, McBain & Morgan, and Irving E. Tarson, Los Angeles, for appellants.

John W. Preston, Bordon & Bordon, John W. Preston, Jr., and Parker, Stanbury & Reese, Los Angeles, for respondent.

VALLEE, Justice.

Plaintiffs appeal from a judgment in favor of defendant Ideal Heating Corporation, referred to as defendant, entered on a directed verdict. The action is for property damage resulting from a fire alleged to have been caused by the negligence of Anthony Lupella, an employee of defendant. The facts are not in dispute.

On April 12, 1946, plaintiffs owned a one-story double building in Los Angeles. One half of the building was leased to and occupied by defendant which was engaged in the manufacture of floor and wall furnaces and heaters. The other half was occupied by plaintiffs who were engaged in the manufacture of lamps. Defendant had about 25 employees. At 2:30 p. m. on that date the fire was started, resulting in total damages to plaintiffs in the stipulated sum of \$122,081.

At the time of the fire and for several months prior thereto, Lupella had been an employee of defendant. Defendant had given orders prohibiting smoking on the floor of the shop, but had permitted its employees to smoke in the washroom. It was Lupella's practice to go to the washroom four or five times a day to smoke. The day

before the fire while working in defendant's paint booth he had taken the fluid out of his cigarette lighter and had painted the lighter. Defendant, to Lupella's knowledge, maintained spatter thinner, a highly volatile, inflammable, and dangerous substance, in a 50 gallon drum next to the paint booth and adjacent to an aisle used for access to the washroom—in a portion of the shop where smoking was prohibited. The drum was at an angle of about 40 or 45 degrees. There was a spigot in the drum for releasing the thinner. It was not the spring-closing type of outlet to which you have to apply pressure on the handle to allow the outlet to remain open and when the pressure is released the outlet is automatically closed. There was a "drip can" about 12 inches in diameter under the spigot of the thinner drum. There were no signs adjacent to the drum. There was a fire extinguisher near it. There were at least two more fire extinguishers on the floor; the record does not clearly disclose their location. The thinner was used by the painters more or less continuously. Some paint was kept behind the paint booth.

About 2:30 p. m. on the day of the fire, Lupella left his work station and proceeded to the washroom to use its facilities and to smoke. Having no matches and wishing to smoke while he was in the washroom, he stopped at the thinner drum to fill his lighter with fluid. There were about 20 or 25 gallons of thinner in the drum. Lupella testified: "[W]e were not allowed to smoke on the floor, so every time I wanted to smoke I went up to the washroom. The day before the fire I had my cigarette lighter painted, and I took the juice out of it. Well, I wanted to go for a smoke, and I wanted to put some juice in the lighter so I can smoke a cigarette, because I didn't have any matches, so what I did was I went to the thinner drum, and I opened up the spigot a little, just dripping; so I turned the lighter upside down and took the cap off; and then I accidentally pressed the button, and it sparked, and it ignited the thinner, so I got hysterical and I dropped the lighter in the pan underneath the spigot and it started to blaze, and I yelled, 'Fire.'

"So Mr. Pardee, the shop foreman, he came over with a fire extinguisher, and he asked me to shut the spigot off. Well, when I tried to put out the fire, my clothes caught on fire and I got burned, slightly burned on my hand and my legs, and I burned my clothes; and he asked me to hit the spigot, and I couldn't move it with my hand because it was on fire, so I tried to hit it with my foot. When I hit it with my foot, I knocked the spigot off, and then it started flowing more, and it blazed the fire up to the crates, and the crates caught fire, and I ran for a fire extinguisher, and there was no controlling the fire, so they called the fire engines, and Mr. Pardee told me to leave the shop."

After Lupella left the building, an explosion occurred. He had used spatter thinner from the drum before as fluid for his cigarette lighter. He "knew thinner would be best for the lighter." He knew the thinner was a good fuel for his cigarette lighter because he had used it when he was in the Air Force. He remained in the employ of defendant about two months after the fire, when he voluntarily quit his employment.

Defendant's vice-president testified the thinner was maintained in a drum which was not a safety container and that it had been so maintained for about three years prior to the fire; that it was the duty of all employees to safeguard and preserve the premises; that Lupella's express duties were working on the punch press, a notching machine, in the paint booth, and to do such things as he was instructed to do from time to time.

After plaintiffs rested their case, defendant, without introducing any evidence, moved for a directed verdict on two grounds: 1. Although evidence submitted by plaintiffs was undisputed and without conflict, the facts did not entitle plaintiffs to recover damages from defendant. 2. Upon an appeal from a former judgment in the same "entitled cause, and upon the same or substantially the same facts adduced at the present trial of said cause," the reviewing court "held that said facts were insufficient to support any judgment in favor of the

plaintiffs"; that the decision has become final and constitutes the law of the case, "and the plaintiffs are estopped from questioning its correctness and from further prosecuting this action against the defendant." The motion was granted on both grounds. The court directed the jury to return a verdict for defendant. Plaintiffs appeal from the judgment entered on the verdict.

Plaintiffs contend the trial court erred in granting defendant's motion for a directed verdict on either ground. The two grounds will be considered in reverse order from that in which they were made.

The second ground is based on the theory that the decision in *DeMirjian v. Ideal Heating Corp.*, 112 Cal.App.2d 251, 246 P.2d 51, constitutes the law of the case and estops plaintiffs from further prosecuting the action. The contention raised on appeal from the former judgment, which was for plaintiffs, was, 112 Cal.App.2d at page 253, 246 P.2d at page 52, "that the findings of the trial court set forth above do not support a judgment against it [defendant Ideal]." The court held, 112 Cal.App.2d at pages 253-254, 246 P.2d at page 52: "This proposition is sound and must be sustained. * * * [T]here is a total absence of any finding that defendant Lupella was acting within the scope of his employment or authority at the time he committed the negligent act which was the proximate cause of the damage suffered by plaintiffs. * * * [U]nder the findings of fact of the court in the instant case defendant corporation was not liable for the negligent act of its codefendant, and the trial court erred in entering judgment in favor of plaintiff. * * * Judgment reversed."

[1] The only question presented and necessary for determination on the former appeal and the only question determined was that the findings of fact of the trial court were deficient in one particular and that therefore they did not support the judgment. It was not held that the evidence did not support the findings. All that was decided was that the findings did not support the judgment. A failure to find on a given issue of fact in a prior trial

which resulted in a reversal does not establish the law of the case where at the second trial there is a satisfactory finding on that point. *Hibernia Savings and Loan Soc. v. Farnham*, 153 Cal. 578, 583, 96 P. 9.

[2-4] The doctrine of the law of the case does not extend to remarks or opinions on questions that are not necessarily before the court or involved in the determination of the cause. *Millsap v. Balfour*, 158 Cal. 711, 714, 112 P. 450. The statements relied on by defendant in the opinion on the prior appeal concerning the responsibility of defendant to third persons for the negligence of its agent, are mere passing remarks, not necessary to the decision, at best *obiter dicta*. They are not binding as the law of the case and do not bar us from now deciding the question on its merits. *Hammond v. McDonald*, 49 Cal. App.2d 671, 677, 122 P.2d 332. The effect of the unqualified reversal of the case on appeal was to remand it for a new trial on all the issues presented by the pleadings. *Odlum v. Duffy*, 35 Cal.2d 562, 564, 219 P.2d 785; *Riedy v. Bidwell*, 93 Cal.App. 202, 205, 269 P. 682; *Heinfelt v. Arth*, 4 Cal. App.2d 381, 383, 41 P.2d 191; 4 Cal.Jur. 2d 551, § 666. Inasmuch as the court on the former appeal did not consider or attempt to determine whether the evidence was sufficient to sustain proper findings, the doctrine of the law of the case does not apply. It was error for the court to direct a verdict for defendant on the second ground.

The next question is whether it can be said, as a matter of law, that Lupella was not acting within the course of his employment at the time he committed the negligent act which was the proximate cause of the damage suffered by plaintiff. Stated in different fashion: Would a verdict for plaintiff have been supported by the evidence?

[5] Under the doctrine of respondeat superior, an employer is liable for injury to the property of another proximately resulting from the negligent act of his employee done within the course of his employment. An employer is responsible not only for the negligent act of his employee

done within the course of his employment, but also for the wrongful act of his employee committed in and as a part of the transaction of the business of the employer. Civ.Code, § 2338; *Johnson v. Monson*, 183 Cal. 149, 152, 190 P. 635; *Otis Elevator Co. v. First Nat. Bank*, 163 Cal. 31, 39, 124 P. 704, 41 L.R.A., N.S., 529.

[6, 7] The definitive limits of the phrase "in the course of employment" are uncertain. The determination of what conduct of an employee is within the course of his employment is largely dependent on the facts and circumstances of the particular case. As a general rule whatever is done by the employee in virtue of his employment and in furtherance of its ends is deemed by the law to be an act done within the course of his employment; and in determining whether the employee's conduct was within the course of his employment, it is proper to inquire whether he was at the time engaged in serving his employer. It is not necessary that the employee should have authority to do the particular act which resulted in the injury complained of. 57 C.J.S., Master and Servant, § 570d(2), p. 303.

[8, 9] Acts necessary to the comfort, convenience, health, and welfare of the employee while at work, though strictly personal to himself and not acts of service, do not take him outside the course of his employment. Cessation of work for eating, drinking, warming himself, and similar necessities are necessary incidents of employment. In these and other conceivable instances the employee ministers unto himself, but in a sense these acts contribute to the furtherance of his work. "That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. Such dangers as attend them, therefore, are incident dangers. At the same time injuries occasioned by them are accidents resulting from the employment." *Archibald v. Ott*, 77 W. Va. 448, 87 S.E. 791, 793, L.R.A.1916D, 1013; *Adams v. American President Lines*, 23 Cal.2d 681, 685, 146 P.2d 1; *Elliott v. Industrial Accident Commission*, 21 Cal.2d 281, 131 P.2d 521, 144 A.L.R. 358; *Brunk v.*

Hamilton-Brown Shoe Co., 334 Mo. 517, 66 S.W.2d 903; 57 C.J.S., Master and Servant, § 570d(3), p. 308.

[10, 11] A mere deviation by an employee from the strict course of his duty does not release his employer from liability. An employee does not cease to be acting within the course of his employment because of an incidental personal act, or by slight deflections for a personal or private purpose, if his main purpose is still to carry on the business of his employer. Such deviations which do not amount to a turning aside completely from the employer's business, so as to be inconsistent with its pursuit, are often reasonably expected and the employer's assent may be fairly assumed. In many instances they are the mingling of a personal purpose with the pursuit of the employer's business. In order to release an employer from liability, the deviation must be so material or substantial as to amount to an entire departure. *Westberg v. Wilde*, 14 Cal.2d 360, 372-373, 94 P.2d 590. "[W]here the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly nor indirectly could he have been serving his employer." *Lockheed Aircraft Corp. v. Industrial Accident Comm.*, 28 Cal.2d 756, 758-759, 172 P.2d 1, 3. An employee may be acting in the course of his employment even though the act done be a violation of some rule or instruction of the employer. See *Associated Indemnity Corp. v. Industrial Accident Comm.*, 18 Cal. 2d 40, 47, 112 P.2d 615; and cases collected, 23 A.L.R. 1161, 26 A.L.R. 166, 58 A.L.R. 197, 83 A.L.R. 1211, 119 A.L.R. 1409. An employee takes with him his human frailties as well as his virtues when he goes to work. See *Pacific Employers Ins. Co. v. Industrial Accident Comm.*, 26 Cal.2d 286, 158 P.2d 9, 159 A.L.R. 313.

Dolinar v. Pedone, 63 Cal.App.2d 169, at page 175, 146 P.2d 237, at page 240, says that "mere deviation by an employee from a strict course of duty does not release the

master from liability. In order to have such an effect the deviation must be shown substantially to amount to an entire departure."

Hiroshima v. Pacific Gas & Electric Co., 18 Cal.App.2d 24, 63 P.2d 340, held that the defendant's employee was acting in the course of his employment where, while in the act of writing a receipt for a check given by the plaintiff in payment of a bill for electricity, he began a quarrel with the plaintiff and immediately followed it up by an assault on the plaintiff. In that case the court said that acting within the general scope of his employment means while on duty. *Hiroshima* has been quoted or referred to with approval in the cases set out in the margin.¹

In *Carr v. Wm. C. Crowell Co.*, 28 Cal. 2d 652, 171 P.2d 5, an employee of a general contractor threw a hammer at an employee of a subcontractor, striking him on the head and seriously injuring him. He sued the general contractor and his employee. The trial court granted a motion for a directed verdict as to the general contractor. The plaintiff appealed. On appeal the general contractor contended that his employee was not acting in the course of his employment when he injured the plaintiff, on the ground that the throwing of the hammer did not further the employer's interests as an employer and that his employee could not have intended by his conduct to further such interests. Reversing, the court declared, 28 Cal.2d at page 654, 171 P.2d at page 7: "It is sufficient, however, if the injury resulted from a dispute arising out of the employment. Under the provisions of section 2338 of the Civil Code a principal is liable for 'wrongful acts' of his agent committed 'in

and as a part of' the principal's business. 'It is not necessary that the assault should have been made "as a means, or for the purpose of performing the work he (the employee) was employed to do.'" * * * The employer's responsibility for the tortious conduct of his employee 'extends far beyond his actual or possible control over the conduct of the servant. It rests on the broader ground that every man who prefers to manage his affairs through others remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others' while acting in the scope of their employment. [Citations.] Such injuries are one of the risks of the enterprise. [Citations.] In the present case, defendant's enterprise required an association of employees with third parties, attended by the risk that someone might be injured. 'The risks of such associations and conditions were risks of the employment.' [Citation.] Such associations 'include the faults and derelictions of human beings as well as their virtues and obediences. Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as emotional makeup. In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flareup. Work could not go on if men became automatons repressed in every natural expression. * * * These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are

1. *Fields v. Sanders*, 29 Cal.2d 834, 838, 180 P.2d 684, 172 A.L.R. 525; *Carr v. Wm. C. Crowell Co.*, 28 Cal.2d 652, 654, 171 P.2d 5; *Maron v. Swig*, 115 Cal.App. 2d 87, 90, 251 P.2d 770; *Connell v. Clark*, 88 Cal.App.2d 941, 944, 200 P. 2d 26; *Haworth v. Elliott*, 67 Cal.App.2d 77, 81, 153 P.2d 804; *Andrews v. Seidner*, 49 Cal.App.2d 427, 430, 121 P.2d 863; *Transcontinental & Western Air v. Bank of America*, 46 Cal.App.2d 708, 713, 116 P.2d 791; *Stansell v. Safeway Stores,*

Inc., 44 Cal.App.2d 822, 824, 113 P.2d 264; *Lane v. Safeway Stores, Inc.*, 33 Cal.App.2d 169, 174, 91 P.2d 160; *Cain v. Marquez*, 31 Cal.App.2d 430, 434, 88 P.2d 200; *Madsen v. Cawthorne*, 30 Cal.App.2d 124, 126, 85 P.2d 909; *Jameson v. Gavett*, 22 Cal.App.2d 646, 651, 71 P.2d 937; *Martin v. Leatham*, 22 Cal. App.2d 442, 445, 71 P.2d 336; and *Bonetti v. Double Play Tavern*, 126 Cal. App.2d Supp. 848, 274 P.2d 751.

inherent in the working environment.' " In support of the last statement the court cited among other cases, *Hartford Accident & Ind. Co. v. Cardillo*, 72 App.D.C. 52, 112 F.2d 11, 15, a case involving an issue under the Longshoremen's & Harbor Workers' Compensation Act, and *Pacific Employers Ins. Co. v. Industrial Accident Comm.*, 26 Cal.2d 286, 291, 158 P.2d 9, 159 A.L.R. 313, a case which arose under the Workmen's Compensation Law.

Fields v. Sanders, 29 Cal.2d 834, 180 P. 2d 684, 172 A.L.R. 525, was an action against an employee and his employer for damages for an assault committed on the plaintiff by the employee, following an altercation as to whether the employer's truck, driven by the employee, had struck the plaintiff's automobile. The employee hit the plaintiff with a wrench. The court held, as a matter of law, that the employee was acting in the course of his employment, saying in part, 29 Cal.2d at page 842, 180 P.2d at page 690: "Nor is it of any consequence that 'the employer here could not expect that the wrench would be used (by Sanders) as a club' to beat plaintiff." See also the following cases in which it was held that the employee was acting in the course of his employment: *Haworth v. Elliott*, 67 Cal.App.2d 77, 153 P.2d 804, party injured when he was ejected by defendant's bartender; *Andrews v. Seidner*, 49 Cal.App.2d 427, 121 P.2d 863, party assaulted because he refused to pay for some drinks; *Stansell v. Safeway Stores, Inc.*, 44 Cal.App.2d 822, 113 P.2d 264, customer assaulted by store manager; *Kruse v. White Brothers*, 81 Cal.App. 86, 253 P. 178, deviated from the direct route to take girl friend home; *United States v. Wibye*, 9 Cir., 191 F.2d 181, digressed from normal route so he could see his mother.

Defendant cites *Feeney v. Standard Oil Co.*, 58 Cal.App. 587, 209 P. 85, and *Yore v. Pacific Gas & Electric Co.*, 99 Cal.App. 81, 277 P. 878, for the rule that smoking by an employee is not within the course of his employment. The dicta in the *Feeney* case, and the *Yore* case which relied principally on the dicta in the *Feeney* case, were overruled in *George v. Bekins Van &*

Storage Co., 33 Cal.2d 834, 205 P.2d 1037. See 57 C.J.S., Master and Servant, § 575b, p. 334, and cases cited.

As indicated in *Carr v. Wm. C. Crowell Co.*, supra, 28 Cal.2d 652, 171 P.2d 5, cases arising under the Workmen's Compensation Law are of assistance in determining the limits of the phrase "in the course of employment." Speaking of the phrase "in the course of employment" in workmen's compensation acts, Dean Prosser says, "The considerations which determine the 'course of employment' are much the same as in the case of the vicarious liability of the employer for the torts of his servant." (Prosser on Torts, 529, § 69.)

In *Whiting-Mead Commercial Co. v. Industrial Accident Commission*, 178 Cal. 505, 173 P. 1105, 1106, 5 A.L.R. 1518, the court declared that the use of tobacco should be placed on the "list of ministrations to the comfort of the employed" and that an "employer must expect the employed to resort to the use of tobacco as a necessary adjunct to the discharge of his employment." In that case, a workman during the course of his employment ran a nail into the palm of his right hand and had the wound bandaged. He continued to work. Twice during the day the bandage was soaked with turpentine by an agent of the company in an endeavor to alleviate the pain. Soon after the second application the employee temporarily ceased his labor and struck a match for the purpose of lighting a cigarette. The saturated bandage was ignited by the match and the hand was seriously burned. The court held the injury arose in the course of the employment. *Whiting-Mead* has been cited with approval in many cases. *Adams v. American President Lines*, 23 Cal.2d 681, 685, 146 P.2d 1; *Pacific Employers Ins. Co. v. Industrial Accident Commission*, 26 Cal.2d 286, 293, 158 P.2d 9, 159 A.L.R. 313; *Goodrich v. Industrial Accident Commission*, 22 Cal.2d 604, 608, 140 P.2d 405; *Elliott v. Industrial Accident Commission*, 21 Cal.2d 281, 282, 131 P.2d 521, 144 A.L.R. 358; see also annotations: 5 A.L.R. 1521. An employee was held acting in the course of his employment when matches carried in his pocket ignited from collision with a parti-

tion in the employer's washroom. *Steel Sales Corp. v. Industrial Commission*, 293 Ill. 435, 127 N.E. 698, 14 A.L.R. 274.

In *State Compensation Ins. Fund v. Industrial Accident Commission*, 38 Cal.2d 659, 242 P.2d 311, an employee, who was the aggressor, was injured in a fight with his foreman while they were at work. The court stated, 38 Cal.2d at page 661, 242 P.2d at page 312, "There is no doubt that the injury occurred in the course of the employment, for that has reference ordinarily to time and place. Hull [the aggressor] has satisfied both aspects", and cited with approval and quoted at length from *Carr v. Wm. C. Crowell Co.*, supra, 28 Cal.2d 652, 171 P.2d 5, and cited *Fields v. Sanders*, supra, 29 Cal.2d 834, 180 P.2d 684, 172 A.L.R. 525, with approval.

The employee was held to have been acting in the course of his employment under the conditions described in the following cases: flight instructor took his daughter on an "orientation ride," *Phoenix Indemnity Co. v. Industrial Accident Commission*, 31 Cal.2d 856, 193 P.2d 745; deviated from his usual route to look for a restaurant, *Lockheed Aircraft Corp. v. Industrial Accident Commission*, 28 Cal.2d 756, 172 P.2d 1; malpractice of insurance carrier's physician after employee injured while at work, *Heaton v. Kerlan*, 27 Cal.2d 716, 166 P.2d 857; stopped to bathe in employer's irrigation reservoir, *Pacific Indem. Co. v. Industrial Accident Commission*, 26 Cal.2d 509, 159 P.2d 625; driving home to tell his wife he would be working that night and to phone from there about a tool, *Goodrich v. Industrial Accident Commission*, 22 Cal.2d 604, 140 P.2d 405; upon returning to place of work, caught her heel in the hem of her dress on alighting from automobile, fell and broke her wrist, *California Casualty Indemnity Exchange v. Industrial Accident Commission*, 21 Cal.2d 751, 135 P.2d 158; going into hallway to obtain fresh air, *F. W. Woolworth Co. v. Industrial Accident Commission*, 17 Cal.2d 634, 111 P.2d 313; told to go to another plant, stopped for coffee at a coffee shop, went back to obtain an overcoat, struck by automobile on way, *Leffert v. Industrial Accident Commission*, 219 Cal. 710, 28 P.2d 911; messenger went

home to procure his raincoat, and on his way back to the office was injured, *Western Pac. R. R. Co. v. Industrial Accident Commission*, 193 Cal. 413, 224 P. 754; resting in the shade from the sun on way to another part of employer's premises, *Brooklyn Mining Co. v. Industrial Accident Commission*, 172 Cal. 774, 159 P. 162; assaulted another automobile driver, *Pritchard v. Gilbert*, 107 Cal.App.2d 1, 236 P.2d 412; drank carbon tetrachloride from a bottle believing it contained whiskey at a party on the day before Christmas, *Satchell v. Industrial Accident Commission*, 94 Cal.App.2d 473, 210 P.2d 867; to prove that a solvent was not inflammable, soaked a rag with it and set fire thereto, *Joshua Hendy Iron Works v. Industrial Accident Commission*, 74 Cal.App.2d 191, 168 P.2d 203; bartender assaulted a customer while ejecting him, *Gardner v. Industrial Accident Commission*, 73 Cal. App.2d 361, 166 P.2d 362; after checking out from his work, he fell when he turned away from the window in picking up a government bond purchased by means of a wage-withholding plan, *Bethlehem Steel Corporation v. Industrial Accident Commission*, 70 Cal.App.2d 382, 161 P.2d 59; domestic servant injured herself when she fell from a stool in the process of sewing a hem on her dress, *Employers' etc. Corp. v. Industrial Accident Commission*, 37 Cal. App.2d 567, 99 P.2d 1089; drove a prospective customer to see some property and stopped for lunch after prescribed hours, *Griffin v. Industrial Accident Commission*, 19 Cal.App.2d 727, 66 P.2d 176; after lighting a cigarette, dropped a match on spilled gasoline, *Torosian v. Industrial Accident Commission*, 11 Cal.App.2d 204, 53 P.2d 384; went to obtain water to revive a fellow employee who had fainted, *County of Los Angeles v. Industrial Accident Commission*, 89 Cal.App. 736, 265 P. 362; going to another part of employer's premises to visit a fellow worker, *Twin Peaks Canning Co. v. Industrial Commission*, 57 Utah 589, 196 P. 853, 20 A.L.R. 872.

[12] Whether an employee was acting in the course of his employment at the time of the accident is generally a question of fact to be determined in light of the circumstances of the particular case. *Lockheed*

Aircraft Corp. v. Industrial Accident Commission, 28 Cal.2d 756, 758, 172 P.2d 1; *Loper v. Morrison*, 23 Cal.2d 600, 607, 145 P.2d 1; *California Casualty Indemnity Exchange v. Industrial Accident Commission*, 21 Cal.2d 751, 760, 135 P.2d 158; *Industrial Indemnity Co. v. Industrial Accident Commission*, 108 Cal.App.2d 632, 635, 239 P.2d 477; *McChristian v. Popkin*, 75 Cal.App.2d 249, 255, 171 P.2d 85; *Cain v. Marquez*, 31 Cal.App.2d 430, 434, 88 P.2d 200; *Torosian v. Industrial Accident Commission*, supra, 11 Cal.App.2d 204, 207, 53 P.2d 384; *Gammmon v. Wales*, 115 Cal.App. 133, 137, 300 P. 988; *Kruse v. White Brothers*, 81 Cal.App. 86, 94, 253 P. 178. Whether an employee's deviation from his course of duty was so material or substantial as to constitute a complete departure is usually a question of fact. *Dolinar v. Pedone*, 63 Cal.App.2d 169, 175, 146 P.2d 237.

[13] Lupella left his assigned work to go to the washroom to use its facilities and to smoke, acts necessary to his health and comfort and incidental to and within the course of his employment. He stopped to fill his cigarette lighter with spatter thinner, a highly volatile and inflammable substance maintained and used by defendant and left by it in a drum adjacent to an aisle used for going to the washroom. Lupella intended to use the thinner as fluid for his lighter so he could smoke in the washroom. Although his deviation or deflection from going directly to the washroom was for a personal reason it was committed so he could later enjoy the comfort of smoking in the washroom, where it was permitted. His main purpose was to pursue an act which was necessarily contemplated by defendant and which therefore was within his course of employment.

Defendant's business required the usage of spatter thinner, a highly explosive and inflammable substance, and it was attended by the risk that smoking on the part of an employee would set fire to the thinner and the paints. Whether it was a reasonable act and in the course of Lupella's employment for him to attempt to fill his cigarette lighter from the filler drum was a question of fact. It was for the jury to say whether the devi-

ation was so material or substantial as to constitute a complete departure from defendant's business. It could have found that there was a mingling of a personal purpose with the pursuit of defendant's business. Lupella had not necessarily assumed a status distinct from that of an employee and for the time being had put off his general status as an employee. He was not, as a matter of law, doing something outside the sphere of his employment. We are of the opinion that an inference can reasonably be drawn from the evidence that Lupella's act was done in the course of his employment. Whether such inference should be drawn was a question for the jury.

Plaintiffs urge that the jury could have reasonably found that defendant was negligent in maintaining the highly volatile, inflammable, and dangerous thinner in a container which was not a safety container, with a spigot which did not close automatically, and in an unguarded position adjacent to an aisle, readily accessible to all persons in the premises including Lupella. We are constrained to agree. "The rule, as we understand it, applicable to such cases, is that where the original negligence of a defendant is followed by an independent act of a third person which results in a direct injury to a plaintiff, the negligence of such defendant may, nevertheless, constitute the proximate cause thereof if, in the ordinary and natural course of events, the defendant should have known the intervening act was likely to happen; but if the intervening act constituting the immediate cause of the injury was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, then, since the chain of causation is broken, he owes no duty to the plaintiff to anticipate such further acts, and the original negligence cannot be said to be the proximate cause of the final injury." *Sawyer v. Southern California Gas Co.*, 206 Cal. 366, 374, 274 P. 544, 547. *Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 157 P.2d 372, 158 A.L.R. 872, is in point. In *Mosley* an employee of the defendant piled milk crates on a

parking near the sidewalk and left them unguarded and unattended for at least a month. The plaintiff, in driving a mowing machine, collided with crates which were hidden by weeds between the sidewalk and the property line. Affirming a judgment for the plaintiff, the court said that whether a person of ordinary prudence should have foreseen or anticipated that someone might be injured by the action of the employee was one of fact for the trier of fact, and, 26 Cal.2d at page 219, 157 P.2d at page 375, "If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby." Rest. Torts, § 449. It has been held that the rules on the subject in the Restatement of Torts, sections 442-453, are applicable in this state." See also *McEvoy v. American Pool Corp.*, 32 Cal.2d 295, 298-299, 195 P.2d 783; *Merrill v. Los Angeles Gas & Electric Co.*, 158 Cal. 499, 504, 111 P. 534, 31 L.R.A.,N.S., 559; *Carroll v. Central Counties Gas Co.*, 74 Cal.App. 303, 307-308, 240 P. 53. In *Sawyer v. Southern California Gas Co.*, supra, 206 Cal. 366, at page 376, 274 P. 544, at page 548, the court stated: "The probability of an accident happening through the acts of a third person in the manner in which it did happen, in the circumstances of the case, presented an issue of fact that may well have been submitted to the jury." See also *Osborn v. City of Whittier*, 103 Cal.App.2d 609, 616, 230 P.2d 132.

Whether defendant exercised ordinary care in maintaining the highly volatile, inflammable, and dangerous thinner in the manner in which it did was a question for the jury. It cannot be said, as a matter of law, that defendant should not have anticipated that Lupella or some other person might negligently deal with the thinner and cause a fire.

We conclude that the record contains evidence of sufficient substantiality to support a verdict in favor of plaintiffs, and that the trial court erred in granting the motion for a directed verdict.

Reversed.

PARKER WOOD, J., concurs.

SHINN, Presiding Justice.

I concur in the judgment: I agree that on the former appeal the court did not *hold* upon the facts found that Lupella was not acting within the scope of his employment. The trial court had found that Lupella's act of filling the lighter "was not connected with the duties which said Lupella was then delegated to perform for defendant Ideal." It was this finding, I suppose, that the court said would be inconsistent with a finding that Lupella was acting within the scope of his employment. In view of the court's finding the judgment was clearly erroneous. I do not see that on the appeal the court decided anything else. There was an implication in the general reversal that the trial court could find that Lupella was acting within the scope of his employment.

I agree that the questions whether Lupella was acting within the scope of his employment and whether he was negligent should have been submitted to the jury. I do not agree that there was evidence that defendant was negligent with respect to the drum of paint thinner. Filling a lighter from a spigot with an automatic shut-off would have been as likely to cause a fire as filling it from the kind that was used. It was capable of being shut off and I cannot believe defendant had any reason to anticipate that someone would kick it and break it off or that any accident would happen of the general nature of the one that did happen because of the type of spigot that was on the drum or the way the thinner was being stored and used. There was no danger except in the use of the thinner by the workmen.

Pelrson M. HALL, Petitioner,
v.
SUPERIOR COURT of the State of California, In and for the COUNTY OF LOS ANGELES, Respondent.*

Gertrude M. Hall, Real Party in Interest
and Respondent.
Civ. 20681.

District Court of Appeal, Second District,
Division 2, California.
Dec. 21, 1954.

Rehearing Denied Jan. 10, 1955.

Hearing Granted Feb. 16, 1955.

Petition for writ of mandamus to require court to determine amount of permanent support and maintenance petitioner was obligated to pay under interlocutory divorce decree and to restrain court from proceeding to hear order to show cause for temporary alimony and attorney's fees. The District Court of Appeal, McComb, J., held that where Supreme Court's decision, on appeal from interlocutory divorce decree, left nothing to be done by trial court except to fix amount of permanent alimony, trial court's refusal to hear petitioner's motion to set permanent alimony was error and petitioner was entitled to writ of mandate.

Writ issued.

Fox, J., dissented.

1. Divorce ⇨186

Where Supreme Court's decision, on appeal from interlocutory divorce decree, left nothing to be done by trial court except to fix amount of permanent alimony, there was no issue to be tried, husband was not required to proceed under Rule of Superior Courts for setting civil cases for trial, and his motion to fix permanent alimony was proper and was not prejudicial to wife. Superior Court Rules, rule 6(a).

2. Trial ⇨9(1)

Reasons for Rule for Superior Courts providing for setting civil cases for trial were to give parties time to demand jury trial and prepare for trial. Superior Court Rules, rule 6(a); Civ. Code, § 3510.

* Opinion vacated 289 P.2d 431.

3. Action ⇨9

Courts are not to be used for the purpose of harassing parties to litigation or adding to the cost of obtaining a final adjudication of the rights of the parties.

4. Divorce ⇨6½

Public interest as well as that of the parties is best subserved by a prompt and final determination of marital controversies.

5. Divorce ⇨186

Mandamus ⇨42

Where Supreme Court had, on appeal from interlocutory divorce decree, left nothing for trial court to do but to fix amount of permanent alimony in accordance with rules announced by Supreme Court, predicated upon evidence already received, trial court's refusal to hear husband's motion to set permanent alimony was error and husband was entitled to writ of mandate.

6. Divorce ⇨186

Prohibition ⇨5(3)

Where Supreme Court's decision, on appeal from interlocutory divorce decree, left nothing to be done by trial court except to fix amount of permanent alimony, trial court's hearing of order to show cause for temporary alimony would be an idle act, and petitioner was entitled to writ of prohibition to restrain the hearing. Civ. Code, § 3532.

Irving M. Walker, James C. Sheppard and Sheppard, Mullin, Richter & Balthis, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

William J. Currer, Jr., Los Angeles, for Gertrude M. Hall.

McCOMB, Justice.

This is an application for a writ of mandate to (a) require respondent to determine the amount of permanent support and maintenance that plaintiff in the case of Hall v. Hall, 42 Cal.2d 435, 267 P.2d 249, is entitled to and (b) restrain respondent from pro-

ceeding to hear an order to show cause for temporary alimony and attorneys' fees.

The essential and undisputed facts are:

(1) Plaintiff in the above entitled action was awarded an interlocutory decree of divorce which ordered defendant to pay (a) alimony, and (b) attorneys' fees. There was also an order for costs of printing a brief on appeal and \$200 attorneys' fees in connection therewith.

(2) Defendant appealed from the portions of the decree awarding (a) alimony and (b) attorneys' fees, and (c) from the order for costs of printing the briefs on appeal and the allowance of the attorneys' fee of \$200.

(3) On March 4, 1954, the Supreme Court affirmed the portion of the interlocutory decree appealed from referred to under subdivision (b) and the order mentioned under (c), *supra*, and reversed the portion under subdivision (a), saying in part: "Insofar as the judgment awards Mrs. Hall \$350 per month for support and maintenance, it is reversed; in all other respects it is affirmed." (Hall v. Hall, 42 Cal.2d 435, 442, 267 P.2d 249.)

(4) The remittitur was issued April 7, 1954.

(5) On August 31, 1954, plaintiff Gertrude Hall obtained an order to show cause from respondent court directed to petitioner to show cause why he should not be required to pay plaintiff "reasonable sums for her support during the pendency of this action," which was accompanied by a notice of motion for attorneys' fees, costs and expenses.

(6) On September 7, 1954, defendant gave written notice that he would make a motion on the 15th day of September 1954, for the court to fix the amount of permanent alimony and support money due plaintiff. This notice of motion together with plaintiff's order to show cause were regularly continued until September 27, 1954. At the time of the hearing the trial court denied defendant's motion and proceeded to hear plaintiff's order to show cause and motion.

Respondent contends that the trial court's ruling was correct for the reason that petitioner (defendant in the divorce action) failed to comply with rule 6(a), Rules for Superior Courts (33 Cal.2d 4), which reads as follows: "(a) [*Necessity and service of memorandum*] No civil case shall be set for trial until it is at issue and unless a party thereto has served and filed a memorandum as provided herein; provided, however, if a case is set on stipulation, the memorandum need not be served but shall be filed with the stipulation."

It is conceded that the procedure outlined in said rule was not followed by petitioner but in lieu thereof that he has attempted to secure a determination of the issue of the amount of permanent alimony to be awarded to plaintiff in the divorce action by way of making a motion for the court to fix the amount.

[1] Respondent's contention is devoid of merit. First, it is doubtful whether rule 6(a), *supra*, is applicable to the facts in the instant case because such rule provides that "no civil case shall be *set for trial* until it is at issue and unless a party thereto has served and filed a memorandum as provided herein; * * *." (Italics added.) In the present matter there was nothing to be tried. The evidence had all been received and the Supreme Court's decision left nothing to be done by the trial court except to fix the amount of the permanent alimony. In other words, there was no issue of fact left to be tried nor evidence to be received. Both of these things had been done and all that remained was for the trial court to reconsider the record of the original trial, to draw conclusions as to the amount of support money to be paid upon the evidence previously received in accordance with the instructions of the Supreme Court, and to enter that amount in the interlocutory decree.

[2] Second, if we assume that the wording of Rule 6(a), *supra*, is technically applicable to the present case, we are confronted with the established maxim of law "When the reason of a rule ceases, so should the rule itself." (Civil Code, sec-

tion 3510; see *In re Estate of Hite*, 155 Cal. 436, 446, 101 P. 443, 21 L.R.A.,N.S., 953; *Webber v. Webber*, 33 Cal.2d 153, 164, 199 P.2d 934; *Flores v. Brown*, 39 Cal.2d 622, 632, 248 P.2d 922; *Laske v. Lampasona*, 89 Cal.App.2d 284, 288 et seq., 200 P.2d 871; *People v. Statley*, 91 Cal.App. 2d Supp. 943, 947, 206 P.2d 76.)

This brings us to a consideration of the reasons for the procedure outlined in Rule 6(a), *supra*. First, it is to give the opposing party the opportunity if entitled to a jury trial to demand it; second, it is to give the opposing party time to prepare for a trial of the issues which are presented for determination. In the instant case neither party was entitled to a jury trial, so the first reason for the rule is not present. Likewise, the evidence has been taken as to the amount of alimony needed by the plaintiff and the ability of the defendant (petitioner herein) to pay it. These are the only issues left in the case. The Supreme Court in its decision held specifically that the award had been too high, pointing out the reasons therefor, and sent the case back for the trial court to fix a proper amount. It is evident that there was no issue of fact to be tried inasmuch as the evidence had already been taken. All that was necessary was for the trial court to fix the amount in accordance with the rules announced by the Supreme Court, predicated upon the evidence already received and in the record. Hence, the second reason for Rule 6(a), *supra*, is not present in the instant matter. No other reasons exist for Rule 6(a).

[3] It is obvious that plaintiff, Gertrude Hall, is not in any way biased or prejudiced or deprived of any right by the procedure proposed by petitioner. On the contrary, viewing it from her standpoint, it was to her advantage to have the amount of her permanent support and maintenance fixed promptly. This could be done at a relatively early date by following the procedure adopted by petitioner, while if the procedure outlined in Rule 6(a), *supra*, were to be followed it would be approximately a year before the matter would be settled. Therefore it follows that the only

reason for insisting upon a technical compliance with Rule 6(a) would be for the purpose of harassing petitioner and in order that additional costs and attorneys' fees could be incurred by plaintiff, Gertrude Hall, and her attorney. The courts are not to be used for the purpose of harassing parties to litigation or adding to the cost of obtaining a final adjudication of the rights of the parties.

[4] As pointed out in the forward looking case of *De Burgh v. De Burgh*, 39 Cal. 2d 858, 863, 250 P.2d 598, the public has an interest in the institution of marriage. It is obvious that the public's interest as well as that of the parties is best subserved by a prompt and final determination of marital controversies, the fixing of the marital status of the parties, their property rights and the amount of any permanent alimony or support money that may be awarded.

Delay leads only to uncertainty, financial embarrassment of the parties, economic and social injustice involving not only the immediate parties but their children, relatives and friends.

[5] It is a matter of common knowledge among the legal profession that at times the delay in bringing to a final determination unfortunate situations similar to those existing in this case have verged on a public scandal and have tended to bring the administration of justice into disrepute. We therefore hold that the procedure adopted by petitioner for the determination of the amount of permanent alimony and support was proper and that a writ of mandate should issue accordingly.

Finally, the law neither does nor requires idle acts. (Civil Code, section 3532.) In *Robinson v. Puls*, 28 Cal.2d 664, 667 [3], 171 P.2d 430, 432, Chief Justice Gibson says: "The law does not require the performance of an idle act. Civ.Code, § 3532." In *Wade v. Markwell & Co.*, 118 Cal.App.2d 410, 430, 258 P.2d 497, 508, Mr. Justice Fox says: "These statements which, however, were not true, explain plaintiff's failure to send her son to pick up her coat and excused her of the neces-

sity of making a tender of an amount sufficient to cover the loan, interest and charges because the law does not require the doing of an idle act. Civ.Code, secs. 3532 and 1511, subd. 3." (See also *Enfield v. Huffman Motor Co.*, 117 Cal.App.2d 800, 807 [4], 257 P.2d 458.)

[6] Applying the foregoing rules to the facts of the present case, it is obvious that since the trial court should fix the amount of permanent support it would be an idle act for it to try the order to show cause for temporary alimony and attorneys' fees. Therefore, the writ of prohibition which is sought should be granted.

Let the writs issue as prayed.

MOORE, Presiding Justice.

I concur with Justice McComb. Plaintiff brought her suit and on order to show cause, while her action for divorce was pending, asked that an allowance be awarded as alimony for her support until divorced. An order was made accordingly. That order adjudicated the question of alimony until the adjudication of the demand for divorce. Civ.Code, secs. 137.2, 137.3. She was promptly adjudged to be entitled to a divorce and the Supreme Court affirmed the judgment. Further to accord plaintiff all her demands, the court fixed the amount of her permanent support money at \$350 per month. The high court gave its approval to all parts of the divorce decree except the "amount" of permanent support money. That she was entitled to permanent support was therefore finally adjudicated. The "amount" was the only fact yet to be found from the very record made on which the judgment was based. It is thus seen that the processes of the superior court have been exhausted in making awards to plaintiff.

After she was granted a decree, her right to alimony, i. e., support pendente lite, no longer existed. She had used it up. While the judgment was "interlocutory" no other judicial act of the court was necessary to make it final. There was no other issuable fact. The clerk could enter the "final" after a year had elapsed. The matter of

support went into the interlocutory decree thereby supplanting the order for "alimony." Now, because that part of the decree fixing "permanent support" at \$350 per month was reversed, the award of permanent support was not disturbed. The needs of plaintiff and the ability of defendant to pay were proved at the trial and the conclusion that "permanent support" should be paid to plaintiff remains undisturbed.

Respondent Court is in error in holding that permanent support remains to be litigated. There is no fact in controversy; no proof to be adduced; only the agitation of the judicial intellect and the announcement of the result, to wit, the "amount" of money to be paid monthly to plaintiff as permanent support. She is not then in the same position with reference to her decree as she would be, if the Supreme Court had reversed it for lack of proof on the subject of support or had erroneously rejected lawful evidence. That would have put the case back for a retrial of the issue on legitimate evidence.

Now, if we concede that the order for alimony was not merged in the decree for permanent support, then the first order is alive again and is *res judicata* of the very matter plaintiff seeks now to establish, to wit, a right to alimony pendente lite. But she is then confronted with the proposition that there is no *lis pendens*,—no unsettled controversy with reference to temporary alimony.

As to petitioner's demand that his motion to have the "amount" of permanent support fixed by respondent court, that motion should be tried at once. While delay has been unnecessarily caused such delay is no due to the willingness of the court to act. But whatever be the cause justice will not be promoted by further delay. After a heated controversy and final action by the Supreme Court it is the more commendable practice to bring a case at such status to a final termination. No good reason appears why the determination of the "amount" of petitioner's monetary obligation to his former spouse should not be promptly fixed and the judgment modified accordingly. The repetition of motions and

appearances and continuances and arguments and demands will soon take a simple divorce action into the class of Jarndyce and Jarndyce.¹ The court below should promptly determine the single fact resubmitted to it for reconsideration.

FOX, Justice (dissents).

In her divorce action plaintiff was awarded an interlocutory decree, alimony and counsel fees. Defendant "appealed from that part" of the interlocutory decree "which ordered him to pay alimony and the fees of Mrs. Hall's attorneys." See *Hall v. Hall*, 42 Cal.2d 435, 436, 267 P.2d 249, 250. On appeal Judge Hall attacked the award of \$350 per month for Mrs. Hall's support and maintenance as being excessive and an abuse of discretion under the circumstances. The Supreme Court agreed with him saying, "the needs of the respective parties do not justify the amount of alimony here allowed to the wife." The court thereupon disposed of this portion of the appeal in the following language: "Insofar as the judgment awards Mrs. Hall \$350 per month for support and maintenance, it is reversed; in all other respects it is affirmed." *Hall v. Hall*, supra, 42 Cal.2d at page 442, 267 P.2d at page 253. The remittitur was issued on April 7, 1954. It is thus apparent that the amount of support and maintenance to which plaintiff is entitled was one of the important issues in this litigation, and that that question is back in the trial court for its consideration and decision.

On April 8, 1954, a final decree of divorce was entered which, however, has been since vacated and set aside. Thereafter, on August 31, 1954, plaintiff obtained an order from respondent court directed to petitioner to show cause why he should not be required to pay plaintiff "reasonable sums for her support and maintenance during the pendency of this action." This order was

based on an affidavit of plaintiff wherein she stated, *inter alia*, that she had received nothing from plaintiff for support since April, 1954, and that she is "destitute and without funds." These papers were accompanied by a notice of motion for attorney's fees, costs and expenses.

Defendant objected to the hearing of the order to show cause and motion for attorney's fees and costs. He countered with a motion, duly noticed, for an order fixing the amount, if any, to be paid plaintiff for her permanent support and maintenance. The trial court denied defendant's motion and proceeded to hear plaintiff's order to show cause re support pendente lite and her motion for attorney's fees and costs.

Defendant as petitioner here seeks a writ of mandate to compel the respondent court to hear his motion. He also seeks to prohibit the respondent court from proceeding with the hearing on plaintiff's order to show cause and her motion for counsel fees and costs. Petitioner is not entitled to relief in either respect.

The simple answer to petitioner's request that respondent court be ordered to hear his motion is that such court has already heard and denied it.² Thereafter petitioner made a motion to have the court reconsider its ruling and to vacate the same. Respondent court denied petitioner's motion to reconsider.³ It is thus apparent that respondent court has in effect ruled on petitioner's motion on two separate occasions.

What petitioner is basically praying for is an order from this court commanding respondent court to establish, through a hearing on the mere motion he has there made, the amount of permanent support and maintenance to which plaintiff is entitled. However, the trial court was justified in refusing to proceed in accordance with the summary procedure adopted by petitioner. The amount of support to

1. The long-delayed proceeding in *Bleak House* by Charles Dickens.

2. On page 29 of his petition it is stated that "said respondent court, on September 29, 1954, denied the motion of your petitioner * * *."

3. On page 32 of his petition, petitioner states, "Said Motion to reconsider was denied by the respondent court on October 15, 1954 * * *."

which plaintiff was entitled was an important issue in the earlier trial and was one of the principal questions on the appeal. The form of the reversal of the Supreme Court had the effect of remanding the cause for a new trial on the issue of alimony. *Central Sav. Bank of Oakland v. Lake*, 201 Cal. 438, 443, 257 P. 521; *Erlin v. National Union Fire Ins. Co.*, 7 Cal.2d 547, 549, 61 P.2d 756; *Atchison, T. & S. F. Ry. Co. v. Superior Court*, 12 Cal.2d 549, 554, 86 P.2d 85. The appropriate procedure after the case was remanded was plain and simple. Since the case cannot be disposed of until this remaining issue is determined, a date should have been fixed for such trial by proceeding under Rule 6, Judicial Council Rules for Superior Courts, and filing and serving a memorandum for setting. See *Central Sav. Bank of Oakland v. Lake*, supra, 201 Cal. 442, 257 P. 521. This procedure was not followed, but in lieu thereof petitioner has attempted to secure a determination of this issue by way of motion. Plaintiff interposed her objections to this summary procedure before the court to which the matter was referred. The court was, therefore, not required to proceed under petitioner's motion and was justified in denying same, since the authorized procedure, which was fully available to petitioner, was being ignored. There is thus no merit in petitioner's contentions (1) that the respondent court is delinquent in its alleged failure to comply with the remittitur of the Supreme Court, and (2) that a mandate should issue to compel the court to proceed in line with his motion. The court has at all times acted within the framework of the rules governing the Superior Court. The writ prayed for would serve only to circumvent those rules.

The anxiety expressed by the majority that resort to the established procedures would engender long delay and constitute an idle act is more fancied than real. This is first manifest by the fact that petitioner himself, for five months, made no effort to have the matter heard. Furthermore, once the matter is set in the prescribed manner, petitioner may move to advance the cause on the trial court calendar. This would

achieve both adherence to the prescribed rules of court and orderly expedition of the cause without sacrificing the right of either party to be properly prepared for the further proceeding on the question of permanent alimony. Obviously, following the duly adopted procedural rules of the trial court is not an idle act, but rather a commendable practice. Clearly, the ruling here was one of procedure, and discretionary in character. "An abuse of discretion by the trial judge in making procedural rulings will never be presumed, but must appear affirmatively from the record." *Meyer v. State Board of Equalization*, 42 Cal.2d 376, 387, 267 P.2d 257, 264. No abuse whatever of the court's legal discretion appears from the facts. Hence petitioner is not entitled to the writ sought.

Petitioner suggests that plaintiff has waived objection to proceeding under his notice of motion by his "failure to object to it, or the setting of it, and the failure to move to strike it." This position is untenable. Actually, all that was before the court prior to its assignment to Department 2 was a notice that petitioner would make a motion for an order determining his liability for support and maintenance, and the amount thereof, if any. No such motion was in fact made until the hearing started in Department 2. When such motion was then addressed to the court, plaintiff objected to such proposed procedure. Thus there was no waiver, for plaintiff raised an appropriate objection as soon as the motion was made. She was under no duty to move to strike the notice of motion or to make other formal objection thereto in the absence of statutory procedure therefor. She was at liberty to await the formal presentation of the motion in open court and then make her objection to its being granted. This is precisely what she did.

Petitioner points out that plaintiff took no steps for some four or five months to have this case set for retrial. Such delay does not, however, appear to have prejudiced petitioner's position in any respect. As has been stated, he had the same right and opportunity to have the case set for retrial as did the plaintiff. He is therefore

in no position to complain of her failure to take such steps.

We turn next to the question of the court's jurisdiction to hear Mrs. Hall's application for alimony pendente lite, costs and attorney's fees. By the express terms of the Civil Code the court may, during the pendency of an action for divorce, order the husband to pay any amount necessary to enable the wife to support herself or the children, as well as to pay such amount as may be reasonably necessary for the cost of maintaining or defending the action and for attorney's fees. Civ.Code, secs. 137.2, 137.3. An action is pending "from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." Code Civ.Proc., sec. 1049. It was well settled that under former Civil Code section 137, of which sections 137.2 and 137.3 are a recodification, the phrase therein employed, "when an action for divorce is pending", embraced many diverse proceedings growing out of the divorce action, including even those arising after entry of the final decree. *Lerner v. Superior Court*, 38 Cal.2d 676, 685, 242 P.2d 321, 326, and cases there cited. It is obvious that, since a retrial of the alimony issue, as an outgrowth of the divorce action, is still required, the action remains pending within the meaning of Civil Code sections 137.2 and 137.3. Cf. *Bernard v. Bernard*, 79 Cal.App.2d 353, 358, 179 P.2d 625.

It is clear that where a judgment is unqualifiedly reversed and the case remanded for a new trial, the parties are placed in the same position below "as if the cause had never been tried, with the exception that the opinion of the court on appeal must be followed so far as applicable." *Central Sav. Bank of Oakland v. Lake*, 201 Cal. 438, 443, 257 P. 521, 523; *Odium v. Duffy*, 35 Cal.2d 562, 565, 219 P.2d 785. When only a part of a judgment is appealed from, and the reversal necessitates a new trial of an issue considered on appeal, with respect to that issue the parties likewise are restored to the position that they had before the reversal order was made and

with the same rights they originally had. See *Odium v. Duffy*, supra; *Whalen v. Smith*, 163 Cal. 360, 363, 125 P. 904.

At the time she filed her action for divorce, Mrs. Hall was entitled to the statutory allowances authorized by Civil Code sections 137.2 and 137.3 upon a proper showing therefor. It is true, of course, that ordinarily an award of alimony pendente lite is terminated by the entry of the interlocutory decree unless the question of permanent alimony is reserved for later consideration by the court. *Wilson v. Superior Court*, 31 Cal.2d 458, 462-463, 189 P.2d 266. When, however, an appeal is taken from that portion of the decree awarding alimony, and the appellate tribunal reverses for a redetermination of that issue, a new situation is created. The award made below is expunged from the decree and the matter is set at large to await a readjudication of the issue by the trial court. With respect to her right to support, attorney's fees and costs pending the retrial of the proceeding for permanent support, Mrs. Hall occupies no worse position than she had at the outset of the action. The final decree having been set aside, the parties retaining their status as husband and wife, the cause still "pending" within the meaning of sections 137.2 and 137.3 of the Civil Code, and the matter of permanent alimony having been remitted for reconsideration by the trial court, the court is vested with jurisdiction to hear an application for the statutory allowances until the question of permanent support still at issue has been disposed of. *Nelson v. Nelson*, 7 Cal.2d 449, 453, 60 P.2d 982; *Granis v. Superior Court*, 143 Cal. 630, 632-633, 77 P. 647. Cf. *Bernard v. Bernard*, supra, 79 Cal.App.2d at page 358, 179 P.2d 625. To hold otherwise would render nugatory the fundamental purposes of the statute, which is to provide a spouse with (1) such sum as may be necessary for support during the pendency of a divorce action, and (2) the means to secure adequate representation in, and defray the costs of, such suit. *Whelan v. Whelan*, 87 Cal.App.2d 690, 197 P.2d 361; *Heller v. Heller*, 88 Cal.App.2d

603, 199 P.2d 44. Like any spouse during the pendency of a divorce action in which, for good cause and sufficient reason, the issue of permanent alimony remains to be litigated, plaintiff is entitled to apply for temporary alimony for her maintenance until the matter is tried, and for counsel fees and costs so that she may adequately plead her cause at such trial. *Lerner v. Superior Court*, supra; *Bernard v. Bernard*, supra.

The effect of the majority decision is to prevent plaintiff from receiving interim support during such time as may be required to obtain a final disposition of this matter. The inequity of this position is apparent when it is recalled that it has been judicially determined that plaintiff is entitled to support, with only the amount thereof still at issue.

I would discharge the alternative writ.

130 Cal.App.2d 186

Margaret G. STEWART, Plaintiff, cross-defendant and appellant,

v.

Henry A. STEWART II, Defendant, cross-complainant and respondent.

Civ. 5026.

District Court of Appeal, Fourth District,
California.

Jan. 12, 1955.

Hearing Denied March 9, 1955.

Proceedings involving custody of children of divorced parents. From an order of the Superior Court of Orange County denying change of a previous custodial order, John Shea, J., the plaintiff appeals. The District Court of Appeal, Griffin, J., held that the Trial Court was not bound by any stipulation of the parties as to the admissibility of evidence bearing on the questions of fitness of the mother even though the stipulation was carried into the interlocutory decree of divorce and that the evidence did not show an abuse of discretion by the Trial Court in refusing to modify the former custodial order.

Affirmed.

1. Divorce Ⓒ312.7

Where custodial order respecting children of divorced parents recited that issue of fitness of parents should be tried out in the usual way and findings made on the subject, but the final order was a straight reversal without directions, there were no limitations placed upon the trial court if it found upon sufficient evidence that the mother was unfit to further inquire into the fitness of the other parties involved, and to determine what was for the best interest of the children, particularly where the application of the father for custody was heard at the same time in the same proceedings.

2. Parent and Child Ⓒ2(1)

Parents have a right to contract with each other as to the custody and control of their offspring and to stipulate away their respective parental rights and such contracts are binding upon them.

3. Divorce Ⓒ297

A contract between divorced parents as to the custody and control of their offspring should not be permitted to interfere with or impede the wide discretionary power given to courts in the disposition of the custody of the children in accord with their best interests or independently of the desire of a parent.

4. Divorce Ⓒ297

Where the question of the fitness of the mother seeking custody of minor children after divorce as against paternal aunt and uncle involved her fitness at the time of the hearing, on that question as well as the question of the best interest of the children, the trial court was not bound by any stipulation of the parties as to the admissibility of evidence bearing on those questions even though such stipulation was carried into the interlocutory decree of divorce.

5. Divorce Ⓒ303(3)

In proceeding involving custody of children of divorced parents, where the right attempted to be reserved by stipulation of the parties to produce evidence on issue of fitness in the future was the right which court already possessed and as to the court the stipulation of the parties was ineffectual, neither party may claim error in the reception of such evidence.

6. Divorce Ⓒ298(4)

In proceeding respecting custody of children of divorced parents, as between the mother and paternal aunt and uncle, the mother was not entitled to select a date when she claimed her former unfitness changed over to fitness, but such was the question for the trial court to determine under all the circumstances.

7. Parent and Child Ⓒ2(4)

Question of whether parent is a fit or proper person to have custody of a minor child refers to his or her fitness at the time of the hearing, and is not necessarily controlled by conduct many years prior thereto, but evidence of prior acts of misconduct may be admissible, if it has a direct bearing on the issue of present unfitness, but such evidence should be limited to that issue alone.

8. Divorce Ⓒ303(3)

In proceeding respecting custody of children of divorced parents as between the mother and paternal aunt and uncle, the mother's moral character, stability, acts, conduct, and disposition were relevant matters to be considered by the trial court.

9. Appeal and Error Ⓒ989, 1010(1), 1011(1)

An Appellate Court is required to consider only the evidence most strongly favoring the respondent and it may not reverse a judgment if there is any substantial evidence contradicted or uncontradicted, which together with the reasonable inferences to be drawn therefrom will support the judgment.

10. Divorce Ⓒ303(3), 312.6(6)

An application for modification of an award of custody of children of divorced parents is addressed to the sound legal discretion of the trial court, and an order granting or denying such a modification, will be affirmed when there is no showing of any abuse of discretion.

11. Divorce Ⓒ303(3)

Evidence did not show abuse of discretion by the trial court in refusing to modify an order respecting custody of children of divorced parents so as to award custody to the mother where the children had previously been given to the children's paternal aunt and her husband.

Will H. Winston, Long Beach, for appellant.

Leonard Di Miceli, San Pedro, for respondent.

GRIFFIN, Justice.

A former custodial order in this same action was before the Supreme Court in *Stewart v. Stewart*, 41 Cal.2d 447, 260 P.2d 44, and the surrounding facts are there set forth. That appeal involved an order denying the application of the plaintiff in this action, the mother of a 9-year-old girl and an 11-year-old boy, for change of custody of the two children which had previously been given to the children's paternal aunt and her husband, Mr. and Mrs. Haven. In that proceeding, the trial court did not find

that the mother was unfit to have custody of the children. The boy is now approximately 14 and the girl approximately 11 years of age. The original determination of custody by the trial court was in accord with the agreement of the parents themselves to place custody in strangers, with certain limitations. The agreement anticipated that there might be, in the future, a contest concerning the fitness of the one asserting a right to their custody. The Supreme Court reversed the order and in its opinion stated that the issue of fitness should be tried out in the usual way with evidence and findings on the subject and that in the absence of sufficient evidence and a finding of unfitness on the part of the parent seeking custody the law of preference should take its course.

Subsequently, on December 7, 1953, another hearing was had in the trial court before another judge, upon the same application of plaintiff for change of custody to her and upon an application of defendant father for custody in case the paternal aunt and uncle were denied custody. Counsel for plaintiff attempted to limit the reception of evidence as to the present fitness of the mother and objected to any evidence pertaining to her past conduct. The court took the opposite view and considered the entire matter anew and received in evidence the original agreement between the plaintiff and defendant in the divorce action which was made a part of the interlocutory decree. It recited that it was stipulated by the parties:

"* * * that no order shall be made herein at this time with reference to the fitness of either of the parties involving the care, custody and control of the minor children of the parties hereto, but that at any time in the future, should the question of custody of the said minors arise, evidence can be introduced by any interested party at the time of the hearing as to any acts or things, past or future, which might bear upon the question of the fitness of the party desiring such custody."

Proceeding upon this theory the trial judge, in the instant proceeding, received, over objections, a limited portion of such evi-

dence. It is to be remembered that the defendant father was granted the divorce in the first instance upon his cross-complaint. It became final on February 9, 1950. On June 24, 1950, plaintiff remarried. She obtained a modification of the custodial order giving her the right to visit the children every other Sunday and to take them from the Havens' home during certain hours. She exercised these rights until May, 1953. From June, 1953, to December 7, 1953, her visitations were less frequent. Plaintiff testified that since her remarriage she has been living in a 3-bedroom home; that she was then working but desired to have the children in her home and if she obtains them she would quit her employment. She alleges that since the previous custodial orders were made, conditions and circumstances surrounding the parties have materially changed; that she is now happily married to Mr. Herleman; that they are fit and proper persons to have the care, custody and control of the children; and that she desires to have them. She alleged that difficulty had been experienced with the Havens over her visitation rights, and that this was not conducive to the best interests of the children. The Havens denied generally these claims and alleged that they were fit and proper persons to have custody of the children; that the mother was not a fit and proper person; that it would not be for the best interests of the children to change the custody; and that any such change would result in serious emotional disturbances to the children. The children's father alleged that he had remarried on June 19, 1952, to a widow with two children, aged 10 and 8 years; that he had established a happy home and that the children here involved preferred to live with him if they could not remain with the Havens. He sought custody of them only in case any change was to be made.

In view of the apparent necessity of branding the mother as an unfit person before custody of her children may be awarded to a third party, regardless of the best interests and welfare of the children, as indicated in *Stewart v. Stewart*, 41 Cal.2d 447, 260 P.2d 44, and *In re Guardianship of Smith*, 42 Cal.2d 91, 265 P.2d 888, 37 A.L.R.

2d 867, it becomes necessary, although not desirable, to relate, to some extent, the evidence on that subject which would support the trial court's finding that the mother was unfit, and which would support the order refusing to modify the previous order of custody. We have read the entire transcript of the testimony produced and the evidence considered. On the hearing on December 7, 1953, defendant Stewart, a Commander in the United States Navy, testified he married plaintiff in 1937, and that their two children, whose custody is here in dispute, were born during their marriage; that he brought his wife to California and that they lived in various places in this state during their marriage; that while they were husband and wife, he and his brother and one Case made an investigation in December, 1948, with respect to plaintiff's activities; that they went to Trabuco Oaks, after obtaining certain information, and found defendant's wife, plaintiff herein, in bed with a man who was a stranger to him and both were in a nude state; that plaintiff wanted to know what was going on, and she used "free language along with it"; that he told the stranger that this had been going on for some time and the stranger said he was sorry he did not know he was "getting into a situation like this". Defendant's testimony was corroborated by two other persons. Plaintiff did not deny this happening. Defendant also testified that on one occasion previous to their separation she entertained a male visitor in their home who was not "amicable" to defendant and defendant retired for the night; that in the fall of 1939 or the early part of 1940, defendant brought home a sailor boy and allowed him to use the spare bedroom for a few nights; that the next thing he knew plaintiff moved out and went with the sailor to live with him for several days; that plaintiff told defendant she just wanted to make up her mind as to whom she wanted to continue with as a wife; that he went to that house, took plaintiff's belongings, and brought them back to his house and that plaintiff returned to live with defendant; that in 1939 or 1940, plaintiff had a miscarriage and was taken to the hospital for attention; that on another occasion in 1941,

defendant observed plaintiff embrace and kiss a lieutenant colonel who, plaintiff contends, was a close friend of both plaintiff and defendant; that on one occasion in 1946, he came home unexpectedly one evening and found baby sitters with the children and endeavored to find out where his wife was; that about 3 a. m. he heard a car drive up; that he went out and found plaintiff embracing another colonel and she was "so engrossed with the business at hand" that they paid no attention to defendant; that defendant told her to come in the house and she said: "Do you think this is it?"; that he remarked: "No, I don't"; that he was "going to try and make this thing work * * * maybe you will grow up some day". He then testified that he found out it was impossible to make it work and accordingly the divorce action was filed and later heard on February 1, 1949. The testimony of defendant is corroborated in many respects, and in fact much of it is admitted by the plaintiff. One of plaintiff's neighbors, as well as defendant's mother, testified that they lived next door to the Stewarts in 1948, 1949 or 1950; that in the evenings, quite often, when defendant was away, a great number of men came to the neighbor's house looking for Mrs. Stewart's residence; that in 1948, one of the lieutenant colonels above mentioned was married and that Mrs. Stewart was crying about this fact and seemed to be greatly upset about it because they were such close friends; that plaintiff neglected her home and the children, and when she left them with the neighbors they would feed and bathe them because they were hungry and dirty, and that the home of plaintiff was untidy; that plaintiff would leave the children with the neighbors in the morning and would not return until late in the evening; that men friends visited plaintiff; that on occasions plaintiff would be gone several days at a time with a man and return with him, and that the defendant's mother would take care of the children; that the automobile of one lieutenant colonel would be at the plaintiff's home all night on occasions. One other neighbor said plaintiff told her, about the time the divorce action was filed,

that she, plaintiff, would fight for the custody of the children and if obtained she would take them away as far as she could so defendant would not see them; that the children were inadequately clothed and improperly fed, and since they have been with the Havens they have been in excellent hands and well behaved.

Mrs. Haven testified that the children seemed to be afraid of plaintiff and that the girl displayed emotional upsets and was sick at her stomach and nauseated when she was told that she might have to go back to her mother.

Considerable testimony was given in respect to the fitness of the Havens and of defendant to have custody of the children. There is practically no evidence to the contrary and the finding of the trial court that the Havens were such fit and proper persons is fully supported by the evidence.

The minor son testified that before the parties were separated and when defendant was away from home, a man came to the house at night; that he did not know if he stayed all night but in the morning the man would still be there; that this happened "every once in a while"; that the lieutenant colonel stayed all night on occasions; and that he would rather be with his father if he could not stay with the Havens; that when with plaintiff and her present husband on visiting days his stepfather became very angry at him and his sister if they spilled crumbs in the car; that plaintiff told them if she obtained custody of them they would not see the Havens again; and that he believed she also included their father. The daughter corroborated this testimony to some extent and said plaintiff's husband used swear words in front of her and that her mother did too, "but not much". Plaintiff admitted giving birth to a claimed illegitimate child in January, 1950, and stated that she placed it out for adoption because she did not want anything to interfere with her having the custody of the children here involved. She denied that the lieutenant colonel stayed at her home overnight, denied being intimate with a man found in bed with her, and denied being intimate with the sailor boy or with anyone else.

The county probation officer investigated the case at the first hearing and reported that from 1946 to 1948 conditions were quite unsatisfactory and accordingly he did not recommend that the children be given over to the mother. It appears that on February 14, 1952, at the last hearing, he filed a supplemental report and therein stated that plaintiff and her present husband appear to be proper people to have custody of the Stewart children; that he knew plaintiff had given birth to an illegitimate child in 1950, and knew that she denied this fact under oath on a hearing on an order to show cause in October, 1950, but that this change of testimony under oath did not change his opinion of her present fitness; and that plaintiff's present home and the surroundings were quite satisfactory. He equally complimented the home of the Havens.

Plaintiff produced her personnel supervisor, as well as the superintendent of the Naval shipyard where she is employed, and they testified she always conducted herself there as a lady since they had known her, which was during the past 2½ years. One testified he had visited in plaintiff's home and that it was of a nice type. The priest of the Episcopal Church where plaintiff attends was called as an expert on domestic counselling. He testified that plaintiff came to his church and that he visited in her home on occasions; that he was unfamiliar with her past actions although the birth of the illegitimate child would bear a great deal on the question of whether plaintiff was a fit and proper person, but that he believed she has repented herself of her evil; that what "happened in previous times is of consequence, perhaps, to the law, but not to the moral aspect of the church"; and that there is no substitute for the "mother person".

[1] The first contention of plaintiff on this appeal is that in the light of the prior decision, *Stewart v. Stewart*, supra, the only issue that should have been tried by the trial court was the issue of her fitness, and that the instant proceeding should not have been tried *de novo*. We see no merit to this. The decision did recite that the issue of fitness should be tried out in the usual

way and findings made on the subject. However, the final order was a straight reversal of the order involved on the appeal, without directions. Accordingly, there was no limitation placed upon the trial court if it found, upon sufficient evidence, that plaintiff was unfit, to further inquire into the fitness of the other parties involved and to determine what was for the best interests of the children, particularly where the application of the father for custody was heard at the same time in the same proceedings. In *re Estate of Pusey*, 177 Cal. 367, 170 P. 846; *Odlum v. Duffy*, 35 Cal.2d 562, 219 P.2d 785.

The main point is the contention that a mother, in a custodial proceeding, is not bound by her former stipulation permitting inquiry into her past conduct upon the issue of her fitness, even though such stipulation is incorporated into an interlocutory decree of divorce.

[2-5] Parents have a right to contract with each other as to the custody and control of their offspring, and to stipulate away their respective parental rights. Such contracts are binding upon them. *Sargent v. Sargent*, 106 Cal. 541, 546, 39 P. 931. However, we are inclined to the conclusion that such a contract should not be permitted to interfere with or impede, in a proper case, that wide discretionary power given to courts in the disposition of the custody of children, in accord with their best interests, or independently of the desire of a parent. *Anderson v. Anderson*, 56 Cal.App. 87, 204 P. 426. Since the question of the fitness of the mother parent seeking custody of minor children, as against strangers, involved her fitness at the time of the hearing on that question, as well as the question of the best interests of the children, the trial court was not bound by any stipulation of the parties as to the admissibility of evidence bearing on those questions, even though such stipulation is carried into the interlocutory decree of divorce. Since the court was not bound by the stipulation, and since the right attempted to be reserved by the stipulation (i. e., to produce such evidence in the future) was a right which the court already possessed and as to the court the stipulation of the parties was ineffec-

tual, neither party may claim error in the reception of such evidence. *Anderson v. Anderson*, supra.

[6-9] The next important question is the propriety of the receipt, over objections, of evidence of the past conduct of plaintiff. It is plaintiff's contention that the only question presented was whether or not she was a fit and proper person to have the custody of the children *at the time of the hearing*; that the admission of such evidence was limited to her fitness since her remarriage to Mr. Herleman in June, 1950; that since there was no evidence of her unfitness during that period, and since all the evidence showed her complete fitness since then, as between the mother and a stranger, plaintiff was, as a matter of law, entitled to the custody of the children. We do not believe that the plaintiff was the one who was entitled to select the date when she claims her former unfitness changed over to fitness. This was a question for the trial court to determine under all the circumstances related. It is true that the question of whether a parent is a fit or proper person to have the custody of a minor child refers to his or her fitness at the time of the hearing, and is not necessarily controlled by conduct many years prior thereto. However, evidence of prior acts of misconduct may be admissible if it may be said to have a direct bearing on the issue of present unfitness, but such evidence should be limited to this issue alone. *Wilkinson v. Wilkinson*, 105 Cal.App.2d 392, 233 P.2d 639. The trial court endeavored to limit the evidence of plaintiff's conduct to a time subsequent to the birth of the children and while they were in her care and control, or during the time when plaintiff was given visitation rights with them. Several cases may be cited where the past conduct of one of the parents extended back several years and in which evidence of similar acts to those here charged were held to be properly admitted as bearing on the question of the parent's fitness. Plaintiff's moral character, stability, acts, conduct, and disposition were relevant matters to be considered by the trial court. *In re Guardianship of Coughlin*, 129 Cal.App.2d 290, 276 P.2d 841; *In re Coughlin's Guardianship*, 101 Cal.App.2d

727, 226 P.2d 46. A mere recitation of the facts presented, including the past acts of misconduct of the plaintiff, clearly indicate that they may well have had a direct bearing on the present fitness of the plaintiff, and whether custody placed with her would promote the best mental, moral, temporal, and spiritual interests, growth and welfare of the children here involved. While the evidence might have supported a finding that plaintiff had reformed and therefore was a fit and proper person to have custody at the time of the hearing, such is not the finding of the trial court. Its finding to the contrary has sufficient evidentiary support. An appellate court is required to consider only the evidence most strongly favoring the respondent, and it may not reverse a judgment if there is any substantial evidence, contradicted or uncontradicted, which, together with the reasonable inferences to be drawn therefrom, will support the judgment. *DeYoung v. DeYoung*, 27 Cal.2d 521, 165 P.2d 457; *Prouty v. Prouty*, 16 Cal.2d 190, 105 P.2d 295; *Gudelj v. Gudelj*, 41 Cal.2d 202, 259 P.2d 656.

In *Crater v. Crater*, 135 Cal. 633, 67 P. 1049, it was held that the court, in modifying the decree as to the custody of the children, proceeds upon new facts, *considered in connection with facts formerly established*, including the change of circumstances, the conduct of the parties, the morals of the parents, their financial condition, subsequent marriage, the age of the children, and the devotion of either parent to the best interests and good of the children, which is the controlling force in directing their custody.

[10, 11] An application for modification of an award of custody is addressed to the sound legal discretion of the trial court and an order granting or denying such a modification will be affirmed when there is no showing of any abuse of discretion. *Fay v. Fay*, 12 Cal.2d 279, 83 P.2d 716. No abuse of discretion here appears. This sufficiently disposes of the questions raised by the plaintiff on this appeal.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

130 Cal.App.2d 116

L. Ray RHODES and Mary Elizabeth Rhodes, Plaintiffs and Appellants,

v.

SAN MATEO INVESTMENT CO., a corporation, Defendant and Respondent.

Civ. 16077.

District Court of Appeal, First District,
Division 2, California.

Jan. 5, 1955.

Action, by landowners, against abutting downhill landowner which had made excavations on its property which resulted in slides creeping up slope toward plaintiffs' land, for injunction and damages. The Superior Court, County of San Mateo, Edmund Scott, J., entered judgment granting injunction but denying damages, and plaintiffs appealed. The District Court of Appeal, Dooling, J., held that since slides had not reached plaintiffs' land and nuisance was not permanent but could be abated, plaintiffs were not entitled to have judgment both abating nuisance and awarding loss of market value of property.

Judgment affirmed.

1. Nuisance \S 41

Where nuisance is not permanent and may be abated, plaintiff cannot have judgment abating nuisance and also judgment for loss in market value caused by nuisance.

2. Nuisance \S 50(1)

In action, by landowners, against abutting downhill landowner whose excavations had caused slides to creep toward plaintiffs' land, for injunction and damages, wherein injunction requiring defendant to stabilize hillside and to prevent slides from encroaching upon plaintiffs' land was granted, and it was possible that soil would be permanently stabilized so as to prevent further sloughing and sliding, plaintiffs were not entitled to damages for depreciation in market value in addition to permanent injunction.

3. Nuisance \S 48

Failure of plaintiffs, in their action against abutting downhill landowner whose

excavations had caused slides to creep up slope toward plaintiffs' land to plead for damages on theory of personal inconvenience suffered by reason of fear and worry precluded award on such basis.

4. Nuisance \S 50(4)

In landowners' action, against abutting downhill landowner whose excavations had caused slides to creep towards plaintiffs' land, for injunction to stabilize hillside and to prevent slides from encroaching upon plaintiffs' land, and for damages, wherein injunction issued, plaintiffs were not entitled to damages for depreciation in value of property which they claimed would exist for at least five years because of buyer's fear of future slides.

5. Nuisance \S 38

Where injunction issued to require defendant to stabilize its hillside property so that slides caused by their excavations would not encroach upon plaintiffs' uphill land, if defendant failed to stabilize land, as ordered, defendant would be liable for any future damage to plaintiffs' property by failure to obey injunction.

Hugh F. Mullin, Jr., San Mateo, for appellants.

Cosgriff, Carr, McClellan & Ingersoll, Burlingame, for respondent.

DOOLING, Justice.

Plaintiffs and appellants are the owners of a lot of land improved with the home in which they live. This lot adjoins property belonging to defendant and respondent. The land is on a hillside and the property of appellants lies at a higher elevation than that of respondent. Respondent made excavations on its property which have resulted in slides creeping up the slope towards appellants' land. At the time of the trial this slide area was moving closer to appellants' property but had not actually encroached upon it and no physical damage had occurred to appellants' land.

Appellants sued for an injunction and damages. The trial court after hearing evidence granted a nonsuit on the question of damages and issued a permanent injunction

ordering respondent to stabilize the hillside so as to prevent slides from encroaching upon or damaging appellants' property.

[1] Appellants attack the order granting a nonsuit as to damages and certain rulings of the court excluding proffered evidence on that subject. The only allegation of damages alleged in the complaint is a decrease in the market value of appellants' property. This being so the case is ruled by *Spaulding v. Cameron*, 38 Cal.2d 265, 239 P.2d 625. That case holds that where a nuisance is not permanent and may be abated a plaintiff cannot have a judgment abating the nuisance and also a judgment for the loss in market value of the property caused by the nuisance, since: "Plaintiff would obtain a double recovery if she could recover for the depreciation in value and also have the cause of that depreciation removed." 38 Cal.2d at page 269, 239 P.2d at page 629.

[2] Here the court expressly found that "it is possible, practicable and feasible for the earth or soil in said Lot 55 (respondent's land) to be permanently stabilized so as to prevent any further sloughing or sliding thereof, and to prevent any possible * * * damage to plaintiffs' property * * *." It has ordered this done by its judgment and hence under the rule of *Spaulding v. Cameron*, supra, damages for depreciation in market value could not be allowed. It was therefore not error to exclude evidence of such damage, and the grounds of such exclusion as stated by the court are immaterial.

[3] Appellants point to evidence of personal inconvenience suffered by reason of their fear and worry caused by the threatened damage to their property. They did not plead this as an element of their damage and hence cannot complain that the court did not award them damages based thereon.

[4] They also offered to prove that even if respondent's land is permanently stabilized there will be a depreciation in the value of their property for at least five years because of buyer's fear of future slides. This would not be an allowable item of damage. If the land is in fact stabilized

the mere psychological effect on prospective buyers of a lawful use by respondent of its own property, which in fact threatens no damage to appellants' land, could not be the basis for an award of damages.

[5] If on the other hand, respondent fails to stabilize its land, as ordered by the judgment, it will be liable for any future damage that appellants' property may suffer by its failure to obey the court's injunction. *H. J. Heinz Co. v. Superior Court*, 42 Cal. 2d 164, 174-175, 266 P.2d 5; *Kirby v. San Francisco Sav. & Loan Soc.*, 95 Cal.App. 757, 273 P. 609.

Judgment affirmed

NOURSE, P. J., and KAUFMAN, J.,
concur.



130 Cal.App.2d 119

SAN JOAQUIN VALLEY TOMATO GROWERS ASSOCIATION, a corporation, M. V. Acosta and A. Dumplit, Plaintiffs and Respondents,

v.

The HERSCHEL CANNING CO., also known as Hershel California Fruit Products Co., a corporation, Madonna Foods, Inc., a corporation, Defendants and Appellants.

Civ. 8472.

District Court of Appeal, Third District,
California.

Jan. 5, 1955.

Action to recover for buyers' breach of contract for purchase of tomatoes. Defendants moved for order staying action until arbitration had been had. The Superior Court, Merced County, R. R. Sischo, J., denied defendants' motion, and after hearing on merits, entered judgments for plaintiffs. Defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence established that arbitration clause had not been included in contracts.

Judgments affirmed.

1. Appeal and Error ⇨179(1)

Even though defendant, in its answer, in action to recover for breach of contracts for purchase of tomatoes, failed to assert arbitration clause as being part of contract, it was not precluded on appeal from asserting error resulting from trial court's denial of motion for stay of action on merits because of such arbitration clause. Code Civ.Proc. § 1284.

2. Corporations ⇨432(12)

In action to recover for buyers' breach of contract for purchase of tomatoes, evidence on issue of whether arbitration clause had been included in such contract, supported trial court's finding that secretary of selling corporation had had no general or special authority to execute such contract.

3. Contracts ⇨322(3)

In action to recover for buyers' breach of contracts for purchase of tomatoes, wherein defendants moved for order staying action until arbitration had been had, evidence established that arbitration clause had not been included in contracts.

John W. Broad and John A. Busterud, San Francisco, for appellants.

L. A. Gordon, Los Angeles, and Treadwell & Kane, Merced, for respondents.

VAN DYKE, Presiding Justice.

Respondent San Joaquin Valley Tomato Growers Association, a corporation, hereinafter called "Growers", M. V. Acosta and A. Dumpit joined as plaintiffs in an action brought to recover damages alleged to have been caused by breach of three several contracts for the purchase of tomatoes. Defendants, appellants here, moved the court for an order staying the action until arbitration had been had. Respondents claimed there were no agreements for arbitration and this issue was heard upon affidavits and oral testimony. The court, sustaining them, denied the motion for stay. Thereafter the cause was tried on the merits. Several judgments were rendered in favor of plaintiffs and the defendants appealed. The sole issue presented on appeal

is whether or not the trial court erred in refusing to stay the action until after arbitration.

We shall first consider the trial court's conclusion that the contract between Herschel and the Growers did not provide for arbitration. Leo Giobetti was a buyer for Herschel. He negotiated with Growers for the purchase of tomatoes. He carried with him a pad of Cannery League contract forms to be prepared in triplicate. The face of the form provides quite briefly that the seller sells and buyer buys all tomatoes growing or to be grown upon specified land; that the tomatoes shall be delivered in picking boxes to the buyer at a named point of delivery, shall be of a designated variety and shall be bought at a stipulated price. The back of the form is completely filled with fine print, containing 18 paragraphs and dealing in detail with picking, delivery, grading, inspections, rejections, method of cultivation, harvesting and the like. Paragraph 11 obligates the buyer to furnish picking boxes for use by the seller in harvesting and in delivering the crop. A box rental of one cent per box for each time of use is provided for. By paragraph 17 the parties agree that any controversy involving a question of fact arising between the parties shall be determined by arbitration. During the preliminary negotiations with Growers Giobetti prepared a contract upon the league form, but in doing so he drew diagonal lines from corner to corner on the back of the form; wrote the word "Void" thereon; and signed his name. However, this form so prepared was not in fact used. Instead, the attorney for Growers prepared a written form of contract which was executed. It was dated June 14, 1951, and was executed for Growers by A. Dacanay, President, and S. R. Miguel, Secretary. For Herschel it was executed by Giobetti, described below the signature line as "Buyer". As executed, it contained no arbitration clause. The record is not clear as to whether this written contract executed in duplicate or triplicate was "delivered" prior to the time when on June 21st Growers' attorney transmitted to Giobetti by mail duplicate forms for an amendment to the contract concerned

wholly with the manner of making payments. It appears that Growers was an association of tomato growers and that in executing the contract Growers acted for members. The proposed amendment provided that, instead of paying the whole purchase price to Growers, the buyer should pay the members who grew the crops, reserving for and paying to Growers only \$2 per ton. The prepared form for the amendment provided: "Except as the contract may be amended hereby, the provisions of said contract dated the 14th day of June, 1951, are hereby ratified and confirmed and said contract shall continue to be and shall be in full force and effect." The transmitting letter requested Giobetti to have Growers' Secretary and President sign the proposed amendment for Growers, to get the amendment executed by Herschel and send a signed copy back to the attorney. Giobetti contacted Miguel, Growers' Secretary, and Miguel secured the signature of Dacanay. Thereafter Giobetti, Miguel and a member of Growers met with Mr. Iannacone, who appears to have supervised buying for Herschel. Giobetti testified that he had requested Dacanay, Growers' President, to attend, but that he did not. Miguel and Giobetti had with them the buying contract theretofore executed as above stated, and the proposed form of amendment. At Growers' request, Giobetti had written in on the executed buying contract and below all signatures an additional paragraph as follows: "An industry price increase in the Merced area will be met by the Buyer." Miguel had initialed this proposed addition to the contract. When these documents were presented to Iannacone he refused to consent to this agreement to meet an increased price. Thereupon by agreement among those present this inked-in paragraph was crossed out and marked "Void". Iannacone appears to have had no objection to the proposed change in the manner of making payments, but he did say, according to his testimony, as to which there is no dispute, that he told Miguel and Giobetti that he would not accept the contract in its existing form at all unless it was further amended to provide for arbitration of controversies. There was no dispute in the

testimony but that Miguel expressed his satisfaction with such an amendment, saying it would be fair to both, and thereupon there was typed below the inked-out and rejected provision for possible price increase a provision for arbitration of controversies, copied from the like provision on the back of the Cannery League contract form. When this had been done, Miguel wrote his signature below the typed-in matter and Giobetti added his initials thereto. Iannacone signed the proposed amendment as to payments for Herschel, signing as "Buyer". This document bears the signature of both Miguel, as Secretary, and Dacanay, as President, signing for Growers. One set of documents was kept by Herschel, the others were taken away from the meeting place by Miguel. Growers never told Herschel that it objected to the purported change providing for arbitration until after suit was begun on December 7, 1951. It appears without conflict that the contract documents were taken from the meeting by Miguel and that he produced them for Growers' attorney upon the latter's request. There is no direct evidence as to where the documents were in the meantime. On the hearing of the motion for stay an attempt was made to stipulate concerning this matter, but the record is unsatisfactory as to what was stipulated to. There was refusal to stipulate "that the corporation itself knew anything about the addition that was added to" the contract. Then the following appeared: "Mr. Broad [Attorney for Plaintiffs]: Then the stipulation, I submit, your Honor, should be that during this period from June to December that the other officers of the association did not know the whereabouts of this contract, and it was not produced until the time of the action.

"Mr. Gordon [Attorney for Growers]: Not only the other officers, but the rest of the members, that is a stipulation.

"Mr. Treadwell [Attorney for Growers]: Nor of the contents, as to this arbitration clause. We will stipulate to that extent." There was no reply by Mr. Broad.

The complaint contains three counts, each having to do with a separate cause of action of one of the parties plaintiff. The

Growers' count pleaded the contract in substance, but omitted any mention of the arbitration clause as being a part thereof. It quoted paragraph V of the contract reading as follows: "Buyer will furnish at no cost to Seller picking boxes for the said canning tomatoes and agrees to furnish said boxes on time; and should Seller incur any losses due to the failure of Buyer to furnish said boxes on time then, and in that event, Buyer agrees to reimburse Seller for said losses." It was alleged that Growers had performed its contract obligations, but that on or about October 4, 1951 and thereafter Herschel had failed to deliver picking boxes, thereby causing Growers' crops to be lost, except as to tomatoes theretofore delivered. The damage from this loss was alleged to be upwards of \$46,000. Filing and service of the suit papers was followed by the motion to stay for arbitration. Thereafter, its motion being denied, Herschel answered the complaint and the case was tried on its merits, resulting in the judgment appealed from.

[1] We may dispose now of a contention by respondent Growers that because the answer of Herschel did not assert the arbitration clause as being part of the contract it cannot now successfully urge that the trial court erred in denying its motion for stay. The claim is untenable. Herschel had promptly asserted its right to arbitrate in the manner provided by Section 1284 of the Code of Civil Procedure and its claim of a right to arbitrate had been fully heard and determined adversely to it. It would have been futile and useless repetition to have further asserted its claimed right. The order denying its motion was an intermediate and non-appealable order and it now may rightfully challenge the propriety of that ruling. If Herschel had a right to arbitrate a denial of its motion constituted reversible error and the judgment obtained on trial on merits would have to be reversed. *Tas-T-Nut Co. v. Continental Nut Co.*, 125 Cal.App.2d 351, 270 P.2d 43.

[2] Herschel contends that the arbitration provisions typed on the last page of the contract and signed and initialed by Miguel and Giobetti, as we have recited, became a part of the contract and bound the parties

to arbitrate. They support this claim, first, by arguing that Miguel, the Secretary of Growers, was an executive officer, was a general managing agent, was authorized to execute contracts, and equally authorized to execute the arbitration provisions for Growers. They point to testimony of Giobetti that he had dealt with Miguel before the meeting at Herschel's with Iannacone, had discussed the proposed contract with Miguel and that, in fact, most of his negotiating discussions were with Miguel who, said Giobetti, had more or less acted as a spokesman for Growers. Giobetti further testified that he had these discussions before the contract was typed up by Growers' attorney; that when the amendment had been made as to the manner of payment Miguel had given to Herschel a letter purporting to authorize Herschel to advance \$20 per acre to a number of growers whose crops were covered by the contract. The letter stated: "The above advance shall be deducted before payments are made to the individual growers." The letter was signed, "San Joaquin Valley Tomato Growers, By S. R. Miguel." But the proof herein that Miguel had authority generally as a principal executive officer or as a general managing agent to execute contracts or amendments thereto for growers rises no higher, in view of evidence to the contrary, than to present to the trial court an issue of fact as to whether or not he possessed such authority. Under the by-laws of Growers he could not alone execute contracts for it. It was provided that contracts must bear the signature of both the President and the Secretary. Also the affidavit of Dacanay was to the same effect. And the court had before it the fact that both the contract and the proposed amending document had been executed and prepared for execution by both the President and the Secretary of Growers. The trial court was justified in concluding that Miguel alone as Secretary of Growers had no general authority to execute contracts.

A closer question, however, is presented as to whether or not he had actual authority to bind Growers by executing this particular contract so as to provide for arbitration. These facts support Herschel's con-

tentions that he had. It is shown that Dacanay was the President of Growers and its general managing agent; that he had been requested to go to the meeting with Herschel where an effort was to be made to obtain Herschel's consent to the amendment of the contract as to the manner of payment. He did not go, but at least must be charged with having permitted Miguel to go to that meeting, carrying the contract with him, which bore on its face a proposed change concerned with Herschel's meeting any general price increase, and also bearing with him the proposed amendment as to payment. That meeting was primarily held at Growers' request. It wanted the contract amended. Undoubtedly as to the formal amendment about payments Growers were representing to Herschel that Miguel could deal on that issue. The case is not so clear, however, as to the proposed amendment as to price increase. Material also is the fact that, having been so entrusted with the contract instruments, Miguel presumably kept them in his possession until some six months later when they were given to Growers' attorney. It could be inferred that other officers of Growers knew of the attempted incorporation of the arbitration provisions, and by saying nothing and acting on the contract they acquiesced in and ratified the provisions for arbitration. We think it must be said that had the trial court found that the arbitration clause had been made a part of the contract its finding would have been upheld upon appeal. However, that is not the issue before us. The trial court's order must be sustained unless there is no support therefor in the record and such, we think, is not the situation presented. Giobetti, who certainly acted for Herschel throughout, knew that Growers' attorney had prepared both the contract and the proposed amendment thereto and that they had been executed by both the President and the Secretary. He had prepared a contract on a Cannery League form and, for some reason not clearly disclosed, it was not used and a special contract was prepared. The trial court could conclude from the record that this special contract had been fully executed in the sense of having "been deliv-

ered" and that Miguel's appearance at the meeting with Herschel compelled no inference that he had general power to agree to amendments thereto or any power to do more than complete execution with Herschel of the formal amendment as to payment, a matter of much less moment to the parties than the inclusion of arbitration of provisions. We bear in mind that Iannacone testified he told Miguel that he would reject the contract completely unless it contained arbitration provisions, but this test is not decisive, for the trial court may have considered that this was an attempt by Iannacone to pressure Miguel into acceding to such provisions. It is noteworthy also that, presented with formally-executed documents bearing the President's signature, as well as that of the Secretary, purporting to sign for Growers, Iannacone was content with typing in the arbitration provisions and permitting them to be signed by Miguel as an individual and merely initialed by Giobetti, no explanation being given as to why Iannacone, who executed the payment amendment for Herschel, did not also append Herschel's name by himself to the arbitration provisions. Without discussing the matter further, we hold that on the issue of whether or not Growers were bound by the arbitration provisions, the record presented an issue of fact to the trial court and that its decision that Growers was not so bound finds substantial support in the evidence and in permissible inferences that may be drawn therefrom. It follows that the judgment in favor of Growers must be affirmed.

Respondents Dumpit and Acosta received judgments and the sole issue on appeal is again that of whether or not their contracts contained arbitration provisions. Both contracts were on Cannery League forms and on each the provisions on the back of the form, which provisions included both the obligation of the buyer to furnish boxes and the agreement of the parties to arbitrate controversies, had been so marked by Giobetti as to indicate that all the provisions on the back of the form had been stricken as constituting any part of the contract to buy and sell. We have already described the way in which Giobetti had first prepared

a Cannery League form of contract for Growers and the way in which he had apparently marked out all the matter appearing on the back of the form. The same action had been taken by him in preparing Acosta's contract, which was executed on the league form. He had drawn lines diagonally across the back of the form and thereon had written the word "Void" in large letters, and in equally large letters had signed his name. Dumpit's contract was not placed in evidence, it being explained that neither side could produce an executed instrument. But there was testimony that it had been handled very much as had been Acosta's contract and that it bore indications, such as marking the word "Void" over Giobetti's signature on the back of the document, equally with the form on which Acosta's contract was written that the provisions on the back were all eliminated. Certainly from this record it must be said that the trial court could have so concluded and could have concluded as to both documents that there was no provision therein for arbitration. It is a curious circumstance that when the attorney who acted for all the plaintiffs herein came to drafting a count in the complaint for Acosta and another for Dumpit, charging a failure by the buyer to furnish picking boxes, he was met by the situation that a claim there was no agreement to arbitrate necessitated a concession that the paragraph specifically obligating the buyer to furnish picking boxes had also been voided. Each count, therefore, made no reference to paragraph 11 of the provisions on the back of the form which specifically bound the buyer to furnish picking boxes. The pleader was content on the matter of this vital allegation to turn to the face of the form and allege concerning it: "That the aforesaid contract provides, in part, that 'All said tomatoes to be delivered in picking boxes to Buyer by Seller at Merced, California.'" There was added an allegation that though the buyer furnished picking boxes up to October 4, 1951, it thereafter neglected to furnish any more and furthermore refused to receive said tomatoes. There was no proof whatever of any failure to receive tomatoes tendered for delivery, and the judgments

for Acosta and Dumpit rest, therefore, upon the pleading concerning the obligation to deliver picking boxes to the sellers. However, no issue was made as to the sufficiency of the allegations that there was an obligation on the part of the buyers to furnish picking boxes, the breach of which caused the damage adjudged, and the trial proceeded throughout as though the quoted provision could be construed as constituting a contractual obligation to furnish boxes. We mention this matter because at the argument before this Court it was asserted that plaintiffs Acosta and Dumpit were suing upon an obligation expressed on the back of the contract along with the arbitration provisions. But, as we have shown, the pleader carefully avoided referring to any provision on the back of the contract forms, either the one specifically obligating the buyer to furnish boxes or the one referring to arbitration.

[3] We have stated that the actions of Giobetti with respect to the provisions on the back of the contract forms furnished sufficient evidence of intent to sustain a conclusion by the trial court that none of the provisions on the back of the forms constituted any part of the contract. The court's holding that there was no agreement for arbitration by either Dumpit or Acosta must be upheld. There was very little testimony directed to the subject. Neither Dumpit nor Acosta testified on the hearing of the motion to compel arbitration nor did either of them make any affidavit for the court's use. Giobetti testified that he made the crossed lines on the back of the contract forms and wrote the word "Void" over his signature thereon because of some objections on the part of Dumpit and Acosta concerning the charge for boxes and because the forms contained many provisions concerning grading of the tomatoes not contained in the association's contract. But this testimony does not explain why it was that Giobetti did not merely mark out those provisions instead of purportedly marking out all provisions on the back of the form. On the whole record we find that there was again a factual issue presented to the court as to whether or not there were any agreements for arbitration of the Dumpit and

Acosta controversies and substantial support for the trial court's determination that there were none. It follows, therefore, that the judgments in favor of Dumpit and Acosta must also be affirmed.

The judgments appealed from are all affirmed.

SCHOTTKY and PEEK, JJ., concur.



130 Cal.App.2d 24

Claire F. BOHN, Petitioner and Appellant,
v.

D. D. WATSON, Real Estate Commissioner,
Defendant and Respondent.

Civ. 20257.

District Court of Appeal, Second District,
Division 2, California.

Dec. 30, 1954.

Hearing Denied Feb. 24, 1955.

Suit by real estate broker to compel real estate commissioner to cancel his order revoking broker's license and to reinstate her as a broker. The Superior Court, Los Angeles County, Frank G. Swain, J., denied application, and petitioner appealed. The District Court of Appeal, Fox, J., held that evidence supported trial court's finding that broker had so acted that her reputation would have warranted denial of an application for broker's license, and did warrant revocation.

Judgment affirmed.

1. Appeal and Error ◊996, 1011(1)

A reviewing court will not resolve significant conflicts in evidence or draw inferences contrary to those reasonably drawn by the trial court.

2. Evidence ◊208(2)

Where a judgment has been entered upon a default, the essential allegations of the complaint upon which judgment was entered are competent evidence in another proceeding as judicial admissions.

3. Judgment ◊112

By permitting entry of default, defendant admitted truth of all material allegations in complaint.

4. Fraud ◊58(1)

Proof indicative of fraud may come by inference from circumstances surrounding the transaction and the relationship and interests of the parties thereto.

5. Evidence ◊595

A reasonable inference drawn from circumstantial evidence may be believed as against direct evidence to the contrary.

6. Brokers ◊3

Where complaint, in one cause of action, alleged fraud on part of defendant and her co-defendant, and, in second cause of action, sought recovery from defendant alone on note given as part of the fraudulent transaction, and judgment decreed recovery on both causes of action, the judgment was predicated on fraud and was an adjudication of wrong doing as basis for revocation of broker's license.

7. Bankruptcy ◊391(3)

Any person suing upon a cause of action is bound to anticipate that bankruptcy may intervene, and should draw the pleading upon which his cause of action is based so that it will appear not dischargeable, if he wishes any judgment entered in that particular case to be free from the stay of the bankruptcy court while discharge matter is pending. Bankr.Act, § 17, 11 U.S.C.A. § 35.

8. Election of Remedies ◊5

Judgment ◊112

Party who had two causes of action, a suit on a note and a cause of action growing out of fraud connected with transaction wherein note was given, could pursue both until satisfaction was had, and allegations of fraud were material and essential and were admitted by default and adjudged in the default judgment.

9. Limitation of Actions ◊175

A statute of limitations is a personal privilege which is waived unless asserted at the proper time and in the proper manner, whether a general statute or one relating to a special proceeding.

10. Administrative Law and Procedure
⌚309

The general rule that a statute of limitation is a personal privilege which is waived unless asserted at the proper time and in the proper manner applies to proceeding before an administrative tribunal.

11. Trial ⌚396(6)

Where limitations was not raised as part of issues and was not adjudicated in hearing before real estate commissioner in proceeding to revoke broker's license, trial court's findings, which were made in suit to compel commissioner to cancel his order of revocation and which related to limitations, were immaterial and wholly surplusage.

12. Administrative Law and Procedure
⌚676

Review of administrative proceedings is confined to issues appearing in the record of the administrative body as made out by the party to the proceedings, although additional evidence, in proper case, may be received. Code Civ.Proc. § 1094.5.

13. Administrative Law and Procedure

A party to an administrative hearing may not withhold any defense then available to him or make only a perfunctory showing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court.

14. Limitation of Actions ⌚175

Where real estate broker did not, in administrative proceeding to revoke her license, assert bar of limitations, she waived her right to that defense, and could not assert it in suit to compel real estate commissioner to cancel his order of revocation and to reinstate her. Business and Professions Code, § 10177(f).

15. Stipulations ⌚14(12)

Where defendant stipulated to a judgment on plaintiff's fourth cause of action, wherein fraud was alleged with meticulous detail, allegations of fraud were embraced within stipulation and became a foundation of the judgment predicated thereon.

16. Evidence ⌚209

Stipulation whereby defendant in action in which fraud was charged admitted

that plaintiff's allegations were true was an extrajudicial statement admissible, in proceeding involving revocation of defendant's broker's license, as an admission against interest. Code Civ.Proc. § 1870, subd. 2.

17. Brokers ⌚3

In action by real estate broker to compel real estate commissioner to cancel his order revoking her license and to reinstate her as broker, evidence supported trial court's finding that broker had so acted that her reputation would have warranted denial of her application for broker's license and did warrant revocation. Business and Professions Code, § 10177(f).

18. Brokers ⌚3

Accusation against licensed real estate broker stated facts sufficient to support proceeding to revoke her license. Business and Professions Code, § 10177(f).

19. Appeal and Error ⌚843(2)

Where judgment was amply supported by findings which were sustained by sufficient evidence, questions relative to other findings became immaterial upon appeal and would be disregarded.

20. Appeal and Error ⌚854(2)

A judgment will not be reversed because a conclusion is not legally sound, if the judgment is in fact a proper one.

21. Appeal and Error ⌚1071(5)

That some conclusions of law in a decision are not properly drawn from facts found is no ground for reversing judgment, if ultimate conclusion upon which judgment rests is not erroneous in view of the facts found.

22. Mandamus ⌚187(7)

Record on appeal from judgment denying real estate broker a writ of mandate to compel real estate commissioner to cancel his order revoking her license and to reinstate her as broker did not disclose any latent hostility on part of the triers of facts.

S. V. O. Prichard, Beverly Hills, Oliver O. Clark, for appellant.

Edmund G. Brown, Atty. Gen., Lee B. Stanton, Deputy Atty Gen., for respondent.

FOX, Justice.

This is an appeal from a judgment denying an application for a writ of mandate.

The petitioner (hereinafter designated Bohn) was a licensed real estate broker for more than 20 years. On December 18, 1951, an accusation was filed with the Real Estate Commissioner charging her with a violation of the provisions of sections 10177.5 and 10177(f) of the Business and Professions Code. Two specific charges are set out in the accusation.

One charge alleges that on July 15, 1951, a final judgment by default was entered against Bohn and others by the Superior Court of Los Angeles County in a matter numbered Pasadena C-3615 and entitled "William E. Elliott (an incompetent person) by Edith Lamm (Guardian of his Person and Estate) vs. Claire F. Bohn, et al.," and that this judgment was based upon the grounds of fraud, misrepresentation and deceit with reference to a transaction for which a real estate license was required. The other charge relates to a matter similarly entitled, bearing the number Pasadena C-3352, and alleges that after the filing of said suit, a stipulation permitting plaintiff to take judgment was signed and filed on August 10, 1951; that pursuant to said stipulation, a final judgment was entered therein against Bohn on August 15, 1951; that said judgment is based upon a complaint alleging Bohn's fraud, misrepresentation and deceit in a transaction for which a real estate license was required.

Bohn filed an answer to the accusation admitting that the two judgments referred to therein had been entered against her and that she had signed a stipulation that she had committed fraud in connection with case C-3352 but denying that she was in fact guilty of fraud, misrepresentation or deceit with respect to either transaction. By way of affirmative defense, she alleged that she did not file any answer in case No. C-3615 because of her intent to pay the monies claimed and to spare the expense of litigation to plaintiff therein; and that her consent to the stipulated judgment in case No. C-3352 was motivated by her

desire to assure plaintiff that his collection of the monies sued for would not be barred by any proceeding in bankruptcy. The statute of limitations was not raised by the said answer. No objection was made at any time to the form of the accusation and was thereby waived, Government Code, § 11506(b).

The matter was heard before a hearing officer in two sessions. Testimony was taken from Bohn and from 12 witnesses called in her behalf. The complaint and default judgment in civil case No. 3615 (hereafter sometimes denominated the Albert Motel transaction) was introduced in evidence, together with a 68 page deposition of Bohn taken in connection therewith. There was also received in evidence the complaint, stipulation and judgment in civil action No. 3352 (hereafter sometimes designated as the St. Andrews transaction). After the termination of the hearing, the Real Estate Commissioner found, with respect to the Albert Motel transaction, that a default judgment was entered against Bohn which provided that plaintiff therein recover \$42,974.09 on the first cause of action, which was based on fraud, misrepresentation and deceit, and a concurrent judgment of similar amount, together with interest, costs and attorney's fees on the second cause of action. With respect to the St. Andrews transaction, it was found, in brief, that pursuant to a written stipulation signed by Bohn and her counsel (more fully adverted to in a subsequent division of this opinion) judgment was entered in favor of plaintiff for \$12,418.27 on his fourth cause of action, which was based on Bohn's fraud, deceit and false representations in securing the assignment to her of a note and deed of trust. The commissioner also found that the above judgments were unpaid; that the transactions upon which the above judgments were based were not transactions for which a real estate license was required; and that Bohn acted and conducted herself in a manner which would have warranted the denial of her application for a real estate license. Bohn's license was thereupon ordered re-

voked for violation of section 10177(f) of the Business and Professions Code.*

Bohn petitioned the superior court for a writ of mandate to compel the commissioner to cancel his order revoking her license and to reinstate her as a real estate broker. No reference is made in the petition to any statute of limitations. The cause was submitted upon the record of the proceedings before the commissioner, together with the pleadings and briefs. In her opening brief, Bohn raised for the first time the issue of the three year statute of limitations contained in Business and Professions Code, section 10177 with respect to the Albert Motel transaction. After a review of the administrative record, the trial court sustained the action of the commissioner, upon findings which will hereafter be more particularly discussed.

[1] Since one of Bohn's principal contentions is that there was no substantive evidence to support certain of the material findings and the judgment of the trial court, it will be sufficient to state the evidence which supports the findings and judgment, in accordance with the settled rule that an appellate court will not resolve significant conflicts in the evidence or draw inferences contrary to those reasonably drawn by the trial court. The record shows that in 1946 Bohn became acquainted with William E. Elliott, who was then about 80 years old. Mr. Elliott was introduced to Bohn through a member of the Christian Science Church to which Bohn also belonged and in which Elliott worshiped. Shortly thereafter Bohn acted as Elliott's agent in the purchase of a residence on St. Andrews Place, in Los Angeles, for which Elliott paid \$19,000 in cash. Elliott lived there for about a year and then sold this property, Bohn once again acting as Elliott's broker. The sale was made to a Mrs. Pearl Bernsen (sometimes referred to as Bernstein) also a member of the same Christian Science Church to which Bohn belonged and Elliott at-

tended. The price was \$18,000, with \$4,000 paid in cash, the balance covered by a note secured by a four percent deed of trust payable at \$75 per month. Elliott continued to reside in the St. Andrews home as a roomer for several months, until he found new quarters in the same neighborhood.

The friendship between Bohn and Elliott ripened in the succeeding months. In her deposition, Bohn stated she occasionally called at Elliott's home "to take him to church or a lecture or something." She testified she accompanied him on two occasions to his safe deposit box. The first visit was to deposit therein the trust deed received on the sale of the St. Andrews property; the second so that Bohn might examine some insurance which Elliott feared might have been cancelled. Bohn also stated in her deposition that Elliott repeatedly told her he had made some provision for her in his will without disclosing the extent thereof.

The Albert's Motel Transaction

In about September, 1947, Natalie Chamberlain and her husband, friends of Bohn, were owners of Albert's Motel, a 22 unit property with living quarters for the owner. The Chamberlains were seeking a loan in order to facilitate the consummation of a trade of Albert's Motel for a motel in Monrovia, California, known as Motel 66, owned by Frank Collins and Amy Smee, who afterwards married. Acting as agent for the Chamberlains, Bohn procured a loan of \$40,000 from Elliott, secured by a first deed of trust on Albert's Motel. Bohn received a substantial commission for her services. She testified Elliott had previously told her he had about \$40,000 in liquid assets which he wished to invest and asked her to find a suitable investment. She stated Elliott visited Albert's Motel twice, and looked about for three hours, before making the loan. Thereafter, the Chamberlains conveyed Albert's Motel and some cash to the Calkines in exchange for Motel 66.

* Business and Professions Code, sec. 10177, reads in part:

"The Commissioner may suspend or revoke the license of any real estate licensee, who within three years immedi-

ately preceding, has done any of the following * * *.

(f) Acted or conducted himself in a manner which would have warranted the denial of his application for a real estate license."

Bohn testified that in July, 1948, the Calkinses informed her they desired to sell Albert's Motel. She stated that while she was visiting at the motel with Elliott Mrs. Calkins chanced to remark that Bohn ought to buy the motel herself, but Bohn protested she had no money. Thereupon, Mr. Elliott also urged that she buy the motel and met her objection that she lacked funds with the proposal "Why don't you use my money?" Bohn stated that for several weeks thereafter she resisted Elliott's oft-repeated suggestion that she buy the motel. At last she yielded. Since Elliott himself had no ready cash, Bohn suggested that Elliott subordinate his first deed of trust, on which a balance of about \$37,500 was then due, to a third deed of trust, which would enable her to arrange the financing necessary to make the purchase. She stated Elliott agreed to this plan.

About August, 1948, the sale of the motel from Calkins to Bohn was completed through escrow for \$142,500. Bohn paid the Calkinses about \$40,000 in cash, from money which she derived by a loan. The lender was given a first deed of trust for \$40,000, while the Calkinses took back a second deed of trust for \$65,000 for the balance of their equity. Elliott thereby became the junior encumbrancer, his interest now evidenced by Bohn's promissory note for \$41,059.00, secured by a third deed of trust. This increase of approximately \$3,500 in the amount formerly secured by the first deed of trust represented funds advanced by Elliott to Bohn to enable her to close the escrow. Bohn asserted that when Elliott consented to change his encumbrance from a first to a third deed of trust, she expressed her opinion to him that property had a value of \$160,000.

Bohn held the property from August to December, 1948, at which time she sold the property to Joseph Wolpe and family for \$148,500. The Wolpe family assumed all three mortgages totaling about \$143,000 and paid Bohn the difference in cash. Bohn testified that she did not convey the property directly to the Wolpes, but transferred it first to Natalie Chamberlain, who immediately thereafter transferred it to

the Wolpes. Bohn stated her only reason for first conveying to Mrs. Chamberlain was "it gave her (Mrs. Chamberlain) an opportunity to make a thousand dollars, and I let her have it."

After several other transfers, Albert's Motel was acquired by an owner who became delinquent in his payments. The holder of the second trust deed, one Johnson, communicated to Elliott's guardian that he would have to move to protect his interest. Thereafter, Johnson foreclosed his second deed of trust, wiping out Elliott's third trust deed.

In July, 1949, Edith Lamm was appointed guardian of Elliott's person and estate. On November 27, 1950, Elliott's guardian instituted action C-3615 against Bohn, Natalie Chamberlain and others. The complaint alleged two causes of action growing out of the Albert's Motel transaction. Neither Bohn nor Chamberlain filed an answer and Bohn's default was entered on December 12, 1950. On July 20, 1951, judgment was entered against Bohn and Chamberlain on the first cause of action in the sum of \$42,974.09, and against Bohn alone on the second cause of action for the same amount, plus attorney's fees in the sum of \$1,029.00. This latter judgment was declared to be concurrent with the judgment against Bohn on the first cause of action, to the extent thereof.

So far as they are material to the determination of questions presented by this appeal, we will here recite excerpts from the first cause of action in the complaint, which were carried over into the trial court's findings in the instant matter. It is there alleged, and the trial court found, that Bohn and Mr. and Mrs. Chamberlain were closely associated in a series of real estate transactions during the latter part of 1947 and for about two years thereafter; that Bohn acted as their agent in negotiating a \$40,000 loan from Elliott in September, 1947; that at that time, Elliott had more than \$40,000 in conservative investments, principally government securities; that he was then 81 years old and of failing mental capacity; and that all this was known to Bohn and the Chamberlains; that

Bohn and the Chamberlains conspired to defraud Elliott of his fortune; that Bohn, acting in concert with the Chamberlains, persuaded Elliott to liquidate more than \$20,000 in U. S. government bonds and other securities and to loan Chamberlain \$40,000, secured by a first deed of trust, on Albert's Motel, concealing from him the fact of Bohn's agency for the Chamberlains; that in furtherance of the scheme to defraud Elliott, the Chamberlains traded Albert's Motel to the Calkinses in exchange for Motel 66, the agreed price for Albert's Motel being set at \$125,000.00; that further pursuing the scheme to defraud Elliott, Bohn opened an escrow to purchase Albert's Motel from the Calkinses for the sum of \$142,500, title to be taken by Bohn subject to the first trust deed in favor of Elliott upon which the balance then due was \$37,599.02, the sum of \$39,940.98 to be paid in cash and the balance of \$65,000 to be represented by a second purchase money trust deed.

The complaint also recites, and the court found, that at the time she entered this transaction, Bohn had no reasonable prospect of raising the cash down payment required except from Elliott; that pursuant to her scheme to defraud Elliott, she prevailed on him to take, in lieu of his first trust deed securing a balance of \$37,599.02 on said motel, her note for \$41,059 secured by a third trust deed; that the difference of \$3,459.98 was paid by Elliott into escrow and paid by the escrow to Bohn; that by virtue of Elliott's release of his first trust deed, Bohn procured a loan of \$40,000 from another party secured by a first trust deed on the motel; that out of the proceeds of this loan the Calkinses received \$39,780.29; that Bohn represented to Elliott prior to his entering this transaction that Albert's Motel was worth in excess of the three contemplated encumbrances (\$146,000) and that Elliott's security would not be impaired by the release of his first trust deed position and acceptance of a third trust deed; that Bohn knew this representation was false, and knew the value of the motel would not exceed \$105,000; and that Elliott was induced to

enter into the transaction in reliance on this false representation, whereby Bohn obtained at least \$39,106.85.

It is also alleged and found that in furtherance of the scheme to defraud Elliott, Bohn sold Albert's Motel to Natalie Chamberlain on December 23, 1948, for \$148,500, subject to the three encumbrances totaling \$143,278.72, and received from Mrs. Chamberlain \$5,221.28 in cash; that on the same day, Mrs. Chamberlain sold the motel to the Wolpe group, subject to the above encumbrances, for \$155,778.72, and received from them \$7,500 in cash; that after a series of transfers of the property, a subsequent owner became delinquent in payment on the second trust deed then owned by W. R. Johnson; that said trust deed was foreclosed and the motel was sold at public auction to the highest bidder for the sum of \$57,000; that by reason of the aforesaid sale, Elliott's security was extinguished and by reason of the conspiracy between Bohn and the Chamberlains, Elliott was defrauded in the sum of \$39,106.85.

The court further found that in civil action C-3615, plaintiff alleged that Bohn "is and was an artful and designing person, and that she used her feminine wiles upon * * * Elliott to induce him to shift his investment, as aforesaid, and falsely led him to believe that she was romantically interested in him." The court found that the default judgment entered on the first cause of action was based on Bohn's misrepresentation, fraud and deceit.

We may pause here, before considering the St. Andrews transaction and reproducing other findings of the trial court, to deal with certain contentions advanced by Bohn. She argues that there is no basis for denying her relief in this proceeding apart from the court's erroneous assumption that the judgment in civil action C-3615 actually adjudicated her fraudulent conduct and its erroneous application of the doctrine of collateral estoppel. She urges that her own testimony clearly shows her innocence of wrongdoing. She points out that the record contains testimony that her default was entered while her attorney was in Washington, D. C., and that upon his return she:

conferred with him and told him that she was not guilty of the fraud therein charged; that she wished to pay the amount of the note but desired to avoid the expense to Elliott's guardian and herself of a lawsuit; and that she allowed her default to stand upon advice of her attorney that the judgment to be entered would merely be a simple money judgment based on her debt to Elliott.

[2] The vice of Bohn's approach is her fallacious premise that the court's determination may be sustained only by the invocation of the doctrine of collateral estoppel, which we may concede has no application here. But she overlooks that there is ample support in the evidence in addition to the judgment rendered against her in the civil action. The rule is well settled that where a judgment has been entered upon a default, the essential allegations of the complaint upon which the judgment was entered are competent evidence in another proceeding as judicial admissions. *Estate of McCarthy*, 127 Cal.App. 80, 87, 15 P.2d 223; *Fitzgerald v. Herzer*, 78 Cal.App.2d 127, 131, 177 P.2d 364; *Thiel v. Southern Pacific Co.*, 9 Cir., 149 F.2d 783, 787; *Bonazzi v. Fortney*, 94 Vt. 263, 110 A. 439, 441; *Miller v. Journal Co.*, 246 Mo. 722, 152 S.W. 40, 42; 4 *Wigmore on Evidence*, 3d ed., secs. 1066, 1072, pp. 60, 79; 1 *Greenleaf on Evidence*, 16th ed., sec. 527a.

[3-5] By permitting her default to be entered, Bohn admitted the truth of all the material allegations in the complaint. *Fitzgerald v. Herzer*, supra. These admissions form the nucleus of the court's findings with respect to the motel transaction. They do not stand alone, however, for in the testimony given by Bohn in her deposition and from the evidence adduced at the commissioner's hearing, there emerged the entire pattern of events which culminated in the ultimate spoliation of a considerable portion of Elliott's substance. From the character of the dealings, the relation of the parties, the interlocking transactions between Bohn and the Chamberlains and the circumstances surrounding Elliott's involvement in the motel deal, the court might legitimately infer that Elliott was induced

by the fraudulent representations of Bohn and by an abuse of the confidence he reposed in her by virtue of their close personal relationship to part with his money, thus becoming a victim of her scheme of self-enrichment at his expense. *Hunter v. McKenzie*, 197 Cal. 176, 185, 186, 239 P. 1090; *Mathewson v. Naylor*, 18 Cal.App.2d 741, 744, 64 P.2d 979; *Lentz v. Hartman*, 43 Cal. App.2d 609, 613, 111 P.2d 404. It is well established that since direct proof of fraudulent intent is often an impossibility because of the clandestine nature of a wrongful undertaking, proof indicative of fraud may come by inference from circumstances surrounding the transaction and the relationship and interest of the parties thereto. *Fross v. Wotton*, 3 Cal.2d 384, 393, 44 P.2d 350; *McNulty v. Copp*, 91 Cal.App.2d 484, 490, 205 P.2d 438; *Taylor v. Osborne-Fitzpatrick Fin. Co.*, 57 Cal.App.2d 656, 661, 135 P.2d 598. It is equally true that a reasonable inference drawn from circumstantial evidence may be believed as against direct evidence to the contrary. *Scott v. Burke*, 39 Cal.2d 388, 398, 247 P.2d 313; *Gray v. Southern Pac. Co.*, 23 Cal.2d 632, 640-641, 145 P.2d 561; *Barham v. Widing*, 210 Cal. 206, 215, 291 P. 173.

Bohn was entitled to and did testify, in explanation, that she submitted to the default judgment because of the advice of counsel that it would not affect her license and because of various other considerations, including her desire to pay a just debt and avoid the expense of litigation. She also gave her version of the transaction in a manner exculpatory of her motives and in fortification of her innocence of wrongdoing. Many witnesses testified in her behalf on the issues involved. But these were items of evidence to be considered by the trier of fact against the background of her conduct in the transaction and the character of her admissions in suffering the default judgment. In passing on this conflicting evidence, the trial court's finding that Bohn engaged in a course of dishonest and fraudulent conduct toward Elliott finds abundant support in the record revealing the motel transaction and the admissions upon which the default judgment were based. Much of the picture there presented is one of an

apparently unscrupulous person taking advantage of an elderly man plainly incapable of looking after his own affairs. How else, to cite but one example at this point (others will be manifest in the narration of the St. Andrews transaction), can one explain Elliott's changing from a first to a third trust deed position on property which apparently was encumbered to its full value. It will be recalled that the motel brought only \$57,000 at the foreclosure sale by the holder of the second trust deed. Few lenders, of course, would normally be satisfied with collateral of little or no greater value than the amount loaned, since it lacks the margin of security needed in the event of market fluctuations.

[6] Bohn stoutly maintains that the judgment in case C-3615 does not adjudicate her guilty of any wrongdoing. She asserts that the claim there alleged is simply one arising from her agreement to pay Elliott a stated sum, as evidenced by her promissory note. The record refutes this. The complaint alleges two causes of action, the first founded on fraud, as the allegations we have hitherto set out clearly establish, and the second based on a promissory note given as a concomitant of the fraudulent transaction. That the judgment is predicated on fraud patently appears since it decrees that plaintiff recover jointly from Bohn and Natalie Chamberlain the sum of \$42,974.09 on plaintiff's *first cause of action*, which alleged the transaction based on the fraud of *both* of these defendants; on the second cause of action, which stated the contract count, recovery is decreed from Bohn *alone* in the above amount, to which is added the sum of \$1,029 as attorney's fees as provided in the note. "Therefore, it cannot be said that the judgment is not predicated on fraud, or that the liability on that basis was abandoned." *Wilson v. Walters*, 19 Cal.2d 111, 122, 119 P.2d 340, 346. In the *Wilson* case the court effectively disposes of a contention virtually identical with that raised by Bohn.

[7,8] Bohn argues that the allegations of fraud and conspiracy were not material or essential to the judgment as rendered and

added nothing to it; hence, it is claimed, these allegations were neither admitted by her default nor adjudicated in that judgment. This is a mistaken conception. The root and origin of a liability becomes of extreme importance, to give but one example, in determining the effect of any subsequent discharge in bankruptcy of the judgment debtor. With respect to those liabilities not included in a discharge in bankruptcy, section 35 of the Federal Bankruptcy Act, Title 11 U.S.C.A., as amended, June 22, 1938, provides: "(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, * * * except such as * * * (2) are liabilities for obtaining money or property by false pretenses or false representations." The significance of the assertion of liability based on fraud is demonstrated in *Wilson v. Walters*, supra, where the court stated 19 Cal.2d at pages 120-121, 119 P.2d at page 345: "When property or money has been obtained by fraudulent representations and the remedy for the liability thereby created may be predicated on either contract or tort (fraudulent representations), such liability is not cancelled by a discharge in bankruptcy even though the creditor makes his claim on contract rather than on the fraud in the bankruptcy proceedings and the claim is allowed. He is still entitled to recover the difference between the amount received on the allowance and the damages actually suffered. There is no waiver of the tort liability." See, also, *Zimmern v. Blount*, 5 Cir., 238 F. 740, 745. It was with this eventuality in mind that the following sage counsel has been given: "Any person suing upon a cause of action is bound to anticipate that bankruptcy may intervene, and should draw the pleadings, upon which his cause of action is based, so that it will appear not dischargeable, if he wishes any judgment entered in that particular case to be free from the stay of the bankruptcy court while the discharge matter is pending." In *re Lusch*, D.C., 251 F. 316, 317. See *Fitzgerald v. Herzer*, 78 Cal.App.2d 127, 130, 177 P.2d 364. That the allegations of fraud in the first cause of action were far from superfluous is thus too palpable to admit of dispute. Plaintiff had two independent, but

consistent causes of action, a suit on the note and a cause of action growing out of fraud, and under approved procedure was entitled to pursue both until satisfaction was had. *Williams v. Marshall*, 37 Cal.2d 445, 457, 235 P.2d 372; *Perkins v. Benguet Consol. Min. Co.*, 55 Cal.App.2d 720, 755, 132 P.2d 70; *Zimmern v. Blount*, supra.

[9-14] Equally untenable is Bohn's contention that count one of the accusation (the Albert's Motel transaction) is barred by the three-year limitation period imposed by section 10177(f) of the Business and Professions Code. This defense was not raised in the administrative proceedings (nor, for that matter, is it mentioned in the petition for the writ of mandate). It is well established that the statute of limitations is a personal privilege which is waived unless asserted at the proper time and in the proper manner, whether it be a general statute of limitations or one relating to a special proceeding. *Hall v. Chamberlain*, 31 Cal.2d 673, 679-680, 192 P.2d 759; *Sheeter v. Lifur*, 113 Cal.App.2d 729, 739, 249 P.2d 336; 16 Cal.Jur., 603-604. This general rule applies to proceedings before an administrative tribunal. *California Employment Comm. v. MacGregor*, 64 Cal.App.2d 691, 693, 149 P.2d 304; 42 Am.Jur., Public Administrative Law, sec. 236, p. 675-676. There is no merit in Bohn's assertion that merely because the court made findings upon this issue, which was raised for the first time in Bohn's brief to the court, that this issue was validly injected into the case. The attorney general points out that he prepared findings relative to the tolling and extension of the limitations period in "an excess of caution" because Bohn purported to raise such issues in her brief to the trial court. But as they were not part of the issues raised or adjudicated in the administrative hearing, the findings thereon were immaterial and wholly surplusage. *Central Heights Improvement Co. v. Memorial Parks*, 40 Cal.App.2d 591, 611, 105 P.2d 596; *Lucy v. Lucy*, 22 Cal.App.2d 629, 635, 71 P.2d 949; *Spencer v. Deems*, 43 Cal.App. 601, 606, 185 P. 671. It is fundamental that the review of administrative proceedings provided by section 1094.5 of the Code of Civil Procedure is confined to the issues

appearing in the record of that body as made out by the parties to the proceedings, though additional *evidence*, in a proper case, may be received. (2 Cal.Jur.2d, Administrative Law, p. 309, 408.) It was never contemplated that a party to an administrative hearing should withhold any defense then available to him or make only a perfunctory or "skeleton" showing in the hearing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court. *Dare v. Board of Medical Examiners*, 21 Cal.2d 790, 799, 136 P.2d 304. The rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play. Had Bohn desired to avail herself of the asserted bar of limitations, she should have done so in the administrative forum, where the commissioner could have prepared his case, alert to the need of resisting this defense, and the hearing officer might have made appropriate findings thereon. "Having failed to raise the defense of the statute of limitations before the commission, the appellant waived his right to that personal defense." *California Employment Comm. v. MacGregor*, 64 Cal.App.2d 691, 693, 149 P.2d 304.

The St. Andrews Transaction

About ten months after Elliott relinquished his first trust deed for a third trust deed on Albert's Motel, another transaction took place between Bohn and Elliott. The subject of this transaction was the note and trust deed received by Elliott from the sale of his St. Andrews Street home to Mrs. Bernsen through Bohn's agency. Early in June, 1949, the amount due on the note was \$13,418.27, payable in installments of \$75 per month, including interest of four percent per annum. At about this time, the U. S. Government was asserting a tax claim of some \$9,000 or \$10,000 against Elliott. Bohn testified in her deposition that she was aware of this fact; she also knew that Elliott had tried to raise money by discounting the note. She testified that Elliott told her he had been offered only \$7,500 for the note. Bohn testified that

she told Elliott that Mrs. Chamberlain would give him \$9,000 for the note and trust deed, payable out of an escrow she anticipated would soon close. Thereupon Elliott assigned the note and deed of trust to Bohn, who in turn gave Elliott her own note for \$8,000. This note was unsecured, bore no interest, had no provisions for any monthly payments and was not due for three years.

Bohn next took the note and deed of trust assigned to her by Elliott and pledged it as security for a loan of \$5,000 from Mrs. Eisenman. Of this sum, Bohn gave Elliott \$1,000, gave Mrs. Chamberlain \$1,000 and retained the balance for herself.

On February 1, 1950, Elliott's guardian filed civil action C-3352 against Bohn and others entitled "Complaint for Cancellation of Assignment of Trust Deed and Damages for Fraud, Appointment of Receiver." It contained four counts, the first for the appointment of a receiver and the second and third for rescission based on lack of consideration and Elliott's mental incapacity. The fourth cause of action, which is here germane, set out the circumstances of the assignment of the note and deed of trust, alleging that on the date of the assignment, Elliott was 84 years old and suffering from mental weakness brought on by old age. It further alleged that Bohn procured said assignment by representing to Elliott that she would immediately make available to him \$9,000 with which to pay the tax claim being asserted against him; that this representation was known by Bohn to be false and made with intent to deceive Elliott and induce him to make the transfer, which he then made in reliance thereon; that Bohn thereafter failed to make available the promised funds. There was thus pleaded a complete and sufficient count in fraud in the fourth cause of action.

Bohn's answer denied all of the allegations of fraud, but after it was filed she and her attorney entered into a written stipulation with plaintiff dated March 21, 1951. The stipulation recited that in the event Bohn, within 45 days, redelivered the note and deed of trust together with \$792.25, plus any amounts of principal and interest paid after the date of the

stipulation, the action would be dismissed; otherwise, "plaintiff may take judgment *on his fourth cause of action* for the sum of \$12,418.27" plus interest and costs. (Emphasis added.) The form of judgment was agreed upon in this stipulation, which was subsequently filed. At about the same time Bohn and her attorney each signed another document entitled "Stipulation," which was never filed in the civil action, but was introduced in evidence before the commissioner. This document reads in part:

"I

"That the allegations of plaintiff's fourth cause of action are, and each of them is, true.

II

"That the transfer of the note secured by trust deed described in plaintiff's complaint from said William E. Elliott to defendant, Claire F. Bohn, *was procured through the fraud and false representations knowingly and fraudulently made by defendant, Claire F. Bohn, and relied upon by plaintiff, William E. Elliott, while said defendant, Claire F. Bohn, was acting in a fiduciary capacity toward said William E. Elliott.*

III

"This stipulation may be filed in any voluntary or involuntary bankruptcy proceeding of Claire F. Bohn hereafter commenced under the Bankruptcy Act as amended." (Emphasis added.)

Bohn failed to reassign the note or trust deed, and on August 13, 1951, judgment was entered pursuant to the stipulation filed.

[15, 16] The trial court found substantially in accord with the allegations of fraud in the assignment to Bohn of the note and deed of trust as set out in the fourth cause of action, and found specifically that said cause of action was based upon fraud, deceit and false representations by Bohn in securing said assignment. There is patently no substance in Bohn's argument that these findings are unsupported by the evidence and that the judgment ren-

dered in case C-3352 was merely based on the theory of rescission of a contract for failure of consideration. Bohn specifically stipulated to a judgment on the *fourth cause of action*, the only count in which the fraud relating to the St. Andrews transaction is alleged with meticulous detail. Under such circumstances, the allegations of fraud therein contained were embraced within the stipulation and became the foundation of the judgment predicated thereon. *Wilson v. Walters*, 19 Cal.2d 111, 120, 122, 119 P.2d 340. Furthermore, the court in the instant matter had before it the writing in which Bohn specifically admitted that "the allegations in plaintiff's fourth cause of action are * * * true" and that she procured the transfer of the note and trust deed through false representations while she occupied a fiduciary status toward Elliott. This extrajudicial statement was competent evidence as an admission against interest under well-established principles, Code of Civil Proc. sec. 1870, subd. 2. All this, coupled with the unconscionable circumstances under which Bohn obtained the note and her callousness in using it to obtain funds, four-fifths of which were divided between Mrs. Chamberlain and herself, provide ample support for the findings attacked.

Evaluation of the Record

[17] We need not dwell at length upon Bohn's explanations that she suffered judgment to be taken in one case by default and stipulated to judgment in another in order to preserve Elliott's estate from further depletion and to perpetuate his claim against the possibility of discharge by bankruptcy. These statements come illy from one whose financial depredations had already severely plundered her victim. Were these transactions as innocent or legitimate as Bohn now claims them to have been, it might be expected that she would have had available less compromising means of adjusting her indebtedness. Her testimony, and that of her attorney, shows that she was at all times cognizant of the jeopardy in which she would place herself as a licensee by a voluntary confession of fraud; she made her choice, she

states, upon the advice of both her counsel and her conscience in the belief that the probity of her motives would be recognized upon any subsequent disciplinary proceeding. But not only her admissions and stipulations, but the circumstances of her transactions with Elliott, militate against her present claim that no element of fraud tinged or vitiated those dealings. Under the impact of these admissions and stipulations, the statutory presumption of innocence which Bohn seeks to invoke loses much of its vitality. We find sufficient basis, in view of the total record presented, for the court's finding that Bohn "acted and conducted herself in a fraudulent and dishonest manner, so that her reputation for dishonesty and untruthfulness would have warranted the denial of her application for a real estate broker's license" under section 10177(f) of the Business and Professions Code. *Karrell v. Watson*, 116 Cal.App.2d 769, 254 P.2d 651, 255 P.2d 464. Taking into consideration the flagrancy of Bohn's conduct (her imposition on an elderly man who reposed trust and confidence in her) and the magnitude of the loss sustained by Elliott (whose guardian secured judgments totaling \$55,392.36 against Bohn), we cannot quarrel with the court's conclusion that no equitable grounds appeared for the issuance of a writ of mandate.

[18] In her reply brief, Bohn argues that the accusation fails to state the facts of any wrongdoing sufficient to support this proceeding against her, citing *Manning v. Watson*, 108 Cal.App.2d 705, 239 P.2d 688. However, the distinguishing elements found by this court in *Karrell v. Watson*, supra, 116 Cal.App.2d at page 778, 254 P.2d 651, apply here with equal validity. The accusation specifically referred to the complaints in actions C-3615 and C-3352, charged that judgments had been obtained by default and stipulation respectively, and charged that the judgment in C-3615 was based on the grounds of fraud, misrepresentation and deceit, and that the transaction referred to in C-3352 was based on the same grounds. The nature, elements and character of the acts charged were thus not only clearly stated in the accusation, but

included references to the complaints setting out the transactions in full. That Bohn was plainly apprised of the acts and conduct charged appears from her own answer, in which she herself referred to the transactions involved in the complaints, denied fraud in connection therewith, and expressed her intent to discharge her obligations arising therefrom.

[19-21] Various other findings are objected to on the ground that they find no support in the evidence. It would be a work of supererogation to list them in detail, since the evidence we have stated sufficiently justified the trial court in making every material finding essential to its judgment. It is elementary law that if a judgment is amply supported by findings which are sustained by sufficient evidence, questions relative to other findings become immaterial upon appeal and may be disregarded. Logan v. Forster, 114 Cal.App.2d 587, 602, 250 P.2d 730; American Nat. Bank v. Donnellan, 170 Cal. 9, 15, 148 P. 188; Moore v. Mosher, 88 Cal.App.2d 324, 325, 198 P.2d 714; Guild v. Stockton Ice Rink Co., 77 Cal.App.2d 17, 22-23, 174 P.2d 338. Similarly, no merit attaches to Bohn's complaint regarding the court's conclusion of law that by the prior judgments she was collaterally estopped from denying that she acted fraudulently and dishonestly in the transactions therein referred to. The questioned conclusion was one of thirteen conclusions of law drawn by the trial court, which, unfortunately, did not winnow the findings and conclusions prepared by counsel with that nice discrimination that would have eliminated all surplusage from the case. However, it has been consistently held that a judgment will not be reversed because a conclusion is not legally sound, if the judgment is in fact a proper one. Spencer v. Duncan, 107 Cal. 423, 426, 40 P. 549; Platner v. Vincent, 194 Cal. 436, 444, 229 P. 24; Hammond Lbr. Co. v. Gordon, 84 Cal.App. 701, 706, 258 P. 612; Fitts v.

Mission Health, etc., Shop, 58 Cal.App. 362, 364, 208 P. 691. As stated in Spencer v. Duncan, supra, in quoting from two decisions of the Supreme Court, 107 Cal. at pages 426-427, 40 P. at page 550: "But we do not reverse for what we regard as *bad logic*, but for what we consider *bad law*. * * * Where some of the conclusions of law in a decision are not properly drawn from the facts found, this is no ground for reversing the judgment, if the ultimate conclusion upon which the judgment rests is not erroneous in view of the facts found." (Emphasis added.) This states the law here applicable.

[22] Throughout Bohn's brief there are interpolated many drastic pronouncements suggestive of some hidden, underlying, and indeed, unconscious prejudice against her which prevented an unbiased consideration of the evidence. We feel that such criticism is unwarranted. Bohn herself testified *in extenso* and her deposition was introduced. She brought in 12 witnesses who testified in her behalf. Arrayed against her were not only the judgments, her admissions from the pleadings, her stipulation and her written statement of having acted fraudulently while bound by a fiduciary relationship, but the damaging nature and circumstances of the transactions themselves. All this conflicting mass of evidence was weighed by the trial judge in his independent review of the record, and, drawing reasonable inferences therefrom, he found against her. Contrary to her assertion, Bohn has had her day in court, and though it may have been marred by an adverse judgment, this result would appear to stem from the infirmities of her case rather than from any latent hostility of the triers of the facts.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Manning T. ALLEN et al., Plaintiffs, Appellants and Respondents,

v.

CITY OF LONG BEACH, a municipal corporation, et al., Defendants, Respondents and Appellants.*

Erwin L. ALGER et al., Plaintiffs, Appellants, and Respondents,

v.

CITY OF LONG BEACH, a municipal corporation, et al., Defendants, Respondents, and Appellants.

Civ. 19866, 19867.

District Court of Appeal, Second District,
Division 1, California.

Jan. 3, 1955.

Rehearing Denied Jan. 26, 1955.

Hearing Granted March 3, 1955.

Actions, consolidated for trial, brought by members of city fire department and city police department to contest validity of section of charter of City of Long Beach altering pension plan. The Superior Court of Los Angeles County, Paul Nourse, J., entered judgment upholding section except as it regarded obligations of veterans returning from service, and all parties appealed. The District Court of Appeal, Drapeau, J., held, inter alia, that modification to require contributions of 10 per cent of wages to pension fund, where previously contributions of no more than two per cent had been exacted, was reasonable and firemen and policemen were not deprived of constitutional guarantees of equal protection and due process of laws, of privileges and immunities, uniformity of laws, or guarantees against alteration of contractual obligations or against taking of personal property to satisfy municipal debts, but that provision requiring returned veterans to contribute amount which would have been deducted from their salaries had they not been so absent was unreasonable and in conflict with statute.

Judgment affirmed.

1. Constitutional Law ☞102(2)

Under freeholders' charter of City of Long Beach, members of city fire and police departments have vested rights to pensions.

* Opinion vacated 287 P.2d 765.

2. Municipal Corporations

☞187(1, 7), 200(1, 7)

Right of members of City of Long Beach police and fire departments to pensions is contractual and vests upon employment and cannot be destroyed, but there is no right to pension in any certain amount or certain terms but only right to "substantial or reasonable pension", and right is subject to implied qualifications that electorate may make reasonable modifications and changes in system and that amount, terms and conditions of benefits may be altered.

3. Officers ☞94

Governmental agencies may make reasonable changes in pension systems when necessary to keep systems adjusted to changing conditions, to maintain integrity of such systems and to carry out systems' benefit policies, and permissible scope of such changes should be to safeguard pension systems and adjust them to changing conditions.

4. Constitutional Law

☞87, 140(2), 205(7), 238(1), 277(2)

Statutes ☞73(2)

Modification, by City of Long Beach, of pension plan for city firemen and policemen, to require contributions of 10 per cent of wages to pension fund, where previously contributions of no more than two per cent had been exacted, was reasonable and firemen and policemen were not deprived of constitutional guarantees of equal protection and due process of laws, of privileges and immunities, uniformity of laws, or guarantees against alteration of contractual obligations or against taking of personal property to satisfy municipal debts. Const. art. 1, §§ 11, 21; art. 11, § 15; U.S.C.A.Const. art. 1, § 10; Amend. 14.

5. Constitutional Law

☞37, 140(2), 205(7), 238(1), 277(2)

Statutes ☞73(2)

Modification, by City of Long Beach, of pension plan for city firemen and policemen to base computation of pension benefits on average of five-year period before benefits are payable rather than only on last year of service was within power of

municipality and did not deprive city firemen and policemen of constitutional guarantees of equal protection and due process of laws, of privileges and immunities, uniformity of laws, or against alteration of contractual obligations or against taking of personal property to satisfy municipal debts. Const. art. 1, §§ 11, 21; art. 11, § 15; U.S.C.A.Const. art. 1, § 10; Amend. 14.

6. Judgment ⇨715(3)

Judgment, in action by members of city fire department against City of Long Beach, which determined that amendment to charter which substantially altered pension rights was unconstitutional for impairing the municipality's contractual obligations, was not res judicata on question of municipality's rights to make reasonable modification of pension system, in subsequent proceeding by members of city firemen and policemen involving subsequent charter amendment.

7. Army and Navy ⇨51

Municipal Corporations 187(4), 200(4)

Modification, by City of Long Beach, of pension plan of city firemen and policemen to require employee absent by reason of military service to pay to city, upon his return from service, amount of money which would have been deducted from his salary was unreasonable and in conflict with statute providing that employee returning to employment in governmental agency after military service shall be entitled to participate in insurance pursuant to established rules and practices in effect at time such officer or employee joined armed forces. Military and Veterans Code, § 395.1.

Albert D. White and Nowland M. Reid, Long Beach, for plaintiffs, appellants and respondents Allen et al.

Kenneth Sperry, Long Beach, for plaintiffs, appellants and respondents Alger et al.

Walhfred Jacobson, City Atty., Irving M. Smith, City Atty., and Clifford E. Hayes, Deputy City Atty., Long Beach,

for defendants, respondents, and appellants City of Long Beach et al.

DRAPEAU, Justice.

The same legal issues are presented by the two above-entitled actions for declaratory relief. By stipulation they were consolidated for trial in the Superior Court, and were briefed and argued together on appeal. So but one opinion has been prepared, which is, of course, applicable to each case.

[1] The plaintiffs in one case are all members of the police force of the City of Long Beach; the plaintiffs in the other case are all members of the fire department of the said city. Each of them has a vested right to a pension under the provisions of Section 187 of the freeholders' charter of the city. See *Kern v. City of Long Beach*, 29 Cal.2d 848, 179 P.2d 799; *Palaske v. City of Long Beach*, 93 Cal. App.2d 120, 208 P.2d 764; and *Allen v. City of Long Beach*, 101 Cal.App.2d 15, 224 P.2d 792.

Section 187 was enacted in 1925. It was held that pension rights under the section were an obligation of the city, whether or not funds were available in the pension fund. *England v. City of Long Beach*, 27 Cal.2d 343, 163 P.2d 865.

In 1944 Section 187.1 was enacted, effective March 29, 1945. This section repealed Section 187, and all pension rights thereunder, with a saving clause applicable only to those who had served twenty years prior to the effective date of the amendment.

This section was held unconstitutional and void as to city employees who commenced work after the adoption of Section 187. *Kern v. City of Long Beach*, supra. In that case our Supreme Court said, 29 Cal.2d at page 856, 179 P.2d at page 803, that the employees of the City of Long Beach had "a vested pension right and that respondent city, by completely repealing all pension provisions, has attempted to impair its contractual obligations. This it may not constitutionally do * * *".

Now the courts of California are again called upon to construe the rights of the

City of Long Beach and these same employees in another amendment to the city charter, effective June 5, 1951, Section 187.2.

The parts of this new section pertinent to this inquiry are as follows:

(a) That the amount to be paid to each person receiving a pension after the effective date of the section shall be computed upon the average salary earned by him during five years immediately preceding his retirement.

Before the amendment this amount was computed upon the employee's salary for the last year only of his service.

(b) Establishing a pension fund, out of which all city pensions will be paid, into which the city will pay by appropriation money to keep the fund solvent, and into which also each employee shall pay ten per cent of his salary, deducted semi-monthly.

Originally no contributions were required. Later on two per cent was deducted from salaries for the pension fund.

(c) That upon the termination of service of any employee before the effective date of his retirement, he shall be paid back all of the deductions from his salary, together with interest thereon at the rate of two and one-half per cent compounded annually.

(d) That any employee absent from his employment by reason of military service shall pay to the city upon his return the amount of money that would have been deducted from his salary had he not been so absent.

Section 187.2 contains substantially the same provisions as in the state retirement system.

Thus it appears that these plaintiffs are beneficiaries of what might be termed a bob-tailed pension system. For they were all employed after Section 187 went into effect in 1925, and before it was repealed in 1945. Members of the police and fire departments employed after 1945 are given pension rights under the state retirement system, the city having contracted with that system, as permitted by law.

Plaintiffs attack the new charter section because they assert that all of their pension rights as set forth in Section 187 were finally adjudicated in *Allen v. City of Long Beach*, supra, 101 Cal.App.2d 15, 224 P.2d 792, and in *Palaske v. City of Long Beach*, supra, 93 Cal.App.2d 120, 208 P.2d 764; that the city does not have the power to modify any of said rights by amendment to its charter; that these rights are part and parcel of a contract between each plaintiff and the city, continuing, and protected under constitutional law.

In support of these assertions plaintiffs rely upon Sections 11 and 21 of Article I, and Section 15 of Article XI of the Constitution of the State of California, and Section 10 of Article I of the Constitution of the United States, and the cases stated.

Certain of the plaintiffs also attack that part of the new charter amendment, with respect to payments required to be made by employees returning from military service.

Plaintiffs contend that Section 187.2 substantially alters the city's existing contractual obligation to them, in that the provision for deducting ten percent of their salaries in effect reduced by more than forty percent retirement, death, and disability benefits that would otherwise have been payable to them. They say that, according to the testimony of an actuary called by the city, the practical effect of the ten percent deduction is to compel each of them to pay approximately one-half of the ultimate cost to the city of their pension plan. They say also: "subdivision (2) of Section 187.2 would change the basis of the retirement pension from an amount which fluctuates in accordance with the salary currently attached to the rank held at the time of retirement to a fixed pension based upon 'the applicable percentage of the average monthly salary during the five years immediately preceding the retirement or death of the person whose service formed the basis of such right to a pension'". And that: "It cannot be gainsaid that the right to receive a pension which fluctuates with the salary currently attached to the rank held at the time of death

or retirement is a valuable right, because this formula tends to adjust the pension benefits to the current value of the dollar.”

So plaintiffs argue that the amendment is unconstitutional as impairing the obligation of the city’s existing contract with them; furthermore, that it provides for an arbitrary assessment or tax, contrary to the due-process and equal-protection clauses of our state and federal constitutions, as well as Article XI, Section 15 of the California Constitution, which prohibits taking private property to pay municipal obligations.

The Superior Court found that Section 187.2 is constitutional and valid; that the provisions of the section set forth a reasonable and substantial pension plan, excepting only the one provision relative to employees returning from military service. The Court found that that provision was unreasonable and invalid.

Plaintiffs appeal from that portion of the judgment that followed, adverse to them; and the city appeals from that portion of the judgment adverse to it.

In an able and well considered memorandum of opinion the trial judge points out that the cases relied upon by plaintiffs are not solely determinative of the issues here; that the pension rights of these employees must be construed in the light of all the decisions of the Supreme Court and of the District Court of Appeal affecting their rights under Sections 187 of the city charter, and affecting rights of others under like provisions in other laws.

The trial judge says in his opinion:

[2] “In the cases of *Kern v. City of Long Beach*, 29 Cal.2d 848 [179 P.2d 799], and *Packer v. Board of Retirement*, 35 Cal. 2d 212 [217 P.2d 660], the Supreme Court has unequivocally held that while the right to a pension is a contractual one which vests upon employment and cannot be destroyed, it is nevertheless not a right to a pension in any certain amount or any certain terms but only a right to a ‘substantial or reasonable pension’ and that this right, that is, the right to a ‘substantial or reasonable pension’, is subject to the implied qualifications that the governing body (in this

case, the electorate of Long Beach) may make reasonable modifications and changes in the system and that ‘the amount, terms and conditions of the benefits may be altered.’”

This Court agrees with this reasoning, and with the trial court’s finding that the changes in the pension right of plaintiffs made by the new section left them with a substantial and reasonable pension plan. The City of Long Beach was empowered to make the changes, and with the one exception, none of the changes trenched upon any constitutional right of plaintiffs.

[3] Reasonable modifications may be made by governmental agencies when necessary to keep pension systems adjusted to changing conditions, to maintain the integrity of such systems, and to carry out their benefit policy. *Terry v. City of Berkeley*, 41 Cal.2d 698, 263 P.2d 833; *Packer v. Board of Retirement*, 35 Cal.2d 212, 217 P.2d 660; *Kern v. City of Long Beach*, supra, 29 Cal.2d 848, 179 P.2d 799; *Rustad v. City of Long Beach*, 122 Cal.App.2d 106, 264 P.2d 955; *Allstot v. City of Long Beach*, 104 Cal.App.2d 441, 231 P.2d 498.

The permissible scope of such changes should be to safeguard pension systems, adjust them to changing conditions, and to carry out their policy. *Wallace v. City of Fresno*, 42 Cal.2d 180, 265 P.2d 884.

So we come to grips with the principal questions in this case: Does the requirement that plaintiffs pay ten percent of their salaries into the pension fund come within the permissible scope of the power to change or modify pension systems by governmental agencies? And does the method of computing these pensions on the average salaries for the last five years, instead of the last year, come within the same scope?

[4] Applying the principles stated in the cases compels the conclusion that the changes in plaintiffs’ pension system made by section 187.2 (with the one exception stated) are within the permissible scope of such changes as defined by the courts of this state.

It is unfortunate that the plaintiffs in these two cases have had so much litigation

with their employer. It is unfortunate too that when the city set up its pension system in the beginning it failed to require reasonable contributions from the beneficiaries of the system, and then attempted to deprive them of their pension rights altogether.

Whether plaintiffs or the city are responsible for the litigation is beside the point. The duty of our courts is to determine whether or not the charter amendment goes beyond the bounds of reasonable modification of the pension system. In this analysis it becomes apparent that to require pension systems to be supported in too great amount from taxes of municipalities, or other governmental agencies, will in the long run destroy the systems themselves. For in the long run the tax burden upon succeeding generations may well become so onerous that the people will find a way to discontinue such overweighted pension systems entirely. And it is but fair and right that all the beneficiaries of pension systems should pay some fair share of the cost of the benefits of which they are assured. Now the city pays in excess of \$650,000 a year to pensioners under plaintiffs' system, and under the challenged amendment those not yet pensioned pay approximately \$110,000 a year.

Plaintiffs' argument that if this judgment is affirmed they can be saddled next year with a twenty or thirty per cent deduction, and so on, increasing until all their rights are wiped out lacks substance. For any increase in deductions must stand or fall with the test of reasonableness as used in the cases.

[5] The method of computation of plaintiffs' pensions on the five-year average is also within the power of the municipality. Whether they will lose or gain will depend upon economic conditions when they retire. Salaries follow our national economy, and no one can look into the future and say whether they will go up or go down. This part of the amendment is as much an adjustment to changing conditions as was the old system, fluctuating year by year.

[6] Upon the same reasoning, and applying the same legal principles, this Court has concluded that there was no error in finding that the issues in this case were not *res adjudicata*, or in rejecting evidence that plaintiffs had refrained from accepting other higher paying employment in the belief that they were earning the right to receive the specific retirement benefits provided before the adoption of Section 187.2. The right of the electorate of the City of Long Beach to make reasonable modifications in its pension system was not, and could not have been an issue in the cases upon which plaintiffs ground their claims of *res adjudicata*.

Finally this Court agrees with the exception made by the trial court relative to employees in military service. This question is determined by Section 395.1 of the Military and Veterans Code. This section provides that an employee returning to his employment in any governmental agency after military service "shall be entitled to participate in insurance * * * pursuant to established rules and practices * * * in effect at the time such officer or employee left his office or position to join the armed forces of the United States."

[7] This exception is unreasonable, as the word is used in California cases having to do with this subject, when the disparity in the compensation ordinarily paid in the armed forces with that paid in civil service is considered. One discharged after some time in the armed forces could lose all of his pension rights as a civil servant, due to conditions beyond his control. It is doubtful whether men returning from any extended military service would be financially able to make up arrears of unpaid deductions required for reinstatement in a civil pension system.

The judgments are, and each of them is, affirmed. All of the parties shall pay their own costs.

DORAN, Acting P. J., and MOSK, J. pro tem., concur.

130 Cal.App.2d 145

In the Matter of the ESTATE of Leo John MEYERS, also known as Leo J. Meyers and L. J. Meyers, Deceased.

Muriel MEYERS and Florence Morris, Petitioners and Respondents,

v.

Michael S. BERMAN, Contestant and Appellant.

Civ. 20411.

District Court of Appeal, Second District, Division 3, California.

Jan. 7, 1955.

Proceeding on petition to remove administrator of estate of decedent. The Superior Court, Los Angeles County, Roy L. Herndon, J., ordered removal and administrator appealed. The District Court of Appeal, Shinn, P. J., held that evidence was insufficient to establish such neglect of duty on part of administrator as would be sufficient to warrant his removal.

Reversed.

1. Executors and Administrators ⇨35(15)

In proceeding to remove administrator, evidence tending to prove as reason for his removal that he was subservient to wishes of his mother, who was widow of decedent and principal beneficiary of estate, was improperly admitted, where petition for removal did not raise issue as to ability or willingness of administrator to perform his duties independently of his mother or charge him with having interests adverse to those of estate.

2. Executors and Administrators ⇨35(14)

One whose fitness to act as executor or administrator is challenged by petition for his removal is entitled to be advised as to specific grounds upon which his removal is sought.

3. Executors and Administrators ⇨35(15)

In proceeding to remove administrator, evidence on issue of alleged influence over administrator by his mother, who was widow of decedent and principal beneficiary of estate, was insufficient to sustain removal.

4. Executors and Administrators ⇨35(15)

In proceeding to remove administrator, evidence on issue of administrator's alleged neglect of duty to discover assets of estate and in filing complete inventory, was insufficient to warrant his removal.

5. Executors and Administrators ⇨15, 18

One holding property in joint tenancy with decedent is not for that reason alone unfit to act as executor or administrator of estate of deceased joint tenant.

6. Executors and Administrators ⇨18

Adversity of interest on part of administrator should be regarded as of no consequence whatever unless it presents threat to best interests of estate.

7. Executors and Administrators ⇨35(16)

Question of administrator's adversity of interest regarding estate, such as would warrant his removal, is factual question depending upon circumstances of particular case.

8. Executors and Administrators ⇨18

Mere fact of existence of joint tenancy ownership of decedent and survivor in property, which but for joint tenancy would have devolved upon estate, does not in itself constitute sufficient basis for denial of issuance of letters of administration to surviving joint tenant.

9. Executors and Administrators ⇨35(1)

Executor or administrator will not be removed for mere delay or failure to file inventory within time prescribed by statute, unless delay or failure has caused loss to estate. Probate Code, §§ 600, 610.

Sydney Tannen, Beverly Hills, and W. L. Engelhardt, Los Angeles, for appellant.

A. A. Rotberg, Los Angeles, for respondents.

SHINN, Presiding Justice.

Leo John Meyers died intestate July 12, 1952, leaving him surviving his widow, Ann Berman Meyers, and two daughters by a former wife, namely, Muriel Meyers and Florence Morris. Mrs. Meyers has a son, Michael S. Berman, by a former

husband. On December 11, 1952, upon nomination of Mrs. Meyers, Michael was appointed administrator of the estate. On February 17, 1953, an inheritance tax appraiser was appointed as appraiser of the estate. On December 15, 1953, a partial inventory and appraisal was filed showing assets of \$900. November 6, 1953, Muriel Meyers filed a petition for the removal of Berman as administrator and for the appointment of herself and Florence Morris as administratrices. The ground of the petition was stated as follows: "That said Michael S. Berman, as Administrator of said estate, has wrongfully neglected the estate and has long neglected to file any inventory in said estate or to perform any other act in connection with the administration of said estate." Due notice was given and the matter was heard upon oral evidence. The court made findings as follows: "The Court finds that it is true that Michael S. Berman, as Administrator of said estate, has neglected his duties in filing a full and complete inventory in the above estate and has failed to exercise that degree of independent judgment and diligence reasonably to be expected to ascertain and discover the assets which belong to said estate; That it is true that Michael S. Berman is the son of Ann H. Berman Meyers, the widow of said decedent who claims substantially all of the property in which decedent had an interest during his lifetime, and that a substantial conflict of interests between the above estate and said widow exists; The Court finds that it is true that said Michael S. Berman, as Administrator of the above estate, does not exercise that degree of independence of his mother, Ann H. Berman Meyers, as would enable him to act adversely to her in any matters involving the said estate."

The court concluded from the facts found that the administrator was unfit to serve as such and should be removed. He was ordered removed and the petition for the appointment of Muriel Meyers and Florence Morris was granted. Michael S. Berman appeals.

[1] It is claimed by the appellant that the petition for removal did not raise an

issue as to the ability or willingness of Berman to perform his duties independently of his mother or charge him with having directly or indirectly interests adverse to those of the estate. It is true that the petition did not allege, as the court found, that Mrs. Meyers claimed substantially all the property in which Mr. Meyers had an interest and that Berman could not act free from his mother's influence in matters in which she claimed adversely to the estate. Appellant objected to the introduction of evidence tending to prove as a reason for his removal that he was subservient to the wishes of his mother. His objections should have been sustained.

[2-4] One whose fitness to act as executor or administrator is challenged by petition for his removal is entitled to be advised as to the specific grounds upon which his removal is sought. In *re Estate of Buchman*, 123 Cal.App.2d 546, 267 P.2d 73. However, in our opinion the findings with respect to the adverse interests of Mrs. Meyers and her alleged influence over her son were not, in view of the evidence, a sufficient ground for appellant's removal. Neither do we believe that there was evidence of neglect of duty sufficient to warrant his removal.

There was evidence of the following facts. At the time of his death Mr. Meyers owned an interest in the following properties, namely, an apartment house in Los Angeles containing 20 apartments; another apartment house of 18 units; a family dwelling which was furnished; a vacant lot in Inglewood; several lots in Hawaiian Gardens; a 1947 Chrysler car; some household furniture and some miscellaneous antiques. He and Mrs. Meyers had a joint bank account. Mrs. Meyers testified that the real properties with the exception of a lot in San Bernardino County of small value were in joint tenancy and that a bank account was also in joint tenancy of herself and her husband; after Mr. Meyers' death, she drew \$6,000 from the bank account. She has been operating the apartment houses, collecting the rents and using them for her own purposes.

By statements made by the attorneys for the respective parties, the court was advised that there was pending a suit in equity of Muriel Meyers and Florence Morris against the widow, the administrator and the latter's wife, to set aside conveyances of property in joint tenancy upon the grounds of fraud and undue influence. In response to a question by the court it was stated that the joint tenancy deeds had been executed over a span of 12 to 14 years "from almost the very inception of the marriage." It was stated further that in the pending action a decree was sought that the defendants hold title in trust for either the estate or for the heirs. The action was set for trial and presumably would be tried within a month after the date of the hearing. It was not contended at the hearing, nor is it urged on appeal, that it was necessary for a personal representative of the estate to sue to set aside the deeds or to become a party plaintiff to the pending action. It was not questioned that the claims of all parties to the property would be properly adjudicated therein. There was no question as to any neglect of duty on the part of the administrator to assert title to the several parcels of real estate on behalf of the estate.

We turn now to the evidence respecting the alleged neglect to discover assets of the estate. Mr. Berman testified that he relied upon his mother for information as to any monies in banks at the time of Mr. Meyers' death; he and his mother did not know of the existence of any safe deposit box. They made a search for jewelry and found none; they thought there were some United States Savings Bonds and postal savings bonds and made a search for them but had found none; they knew there had been some bonds but they did not know the amount of them; he had been consulting with his attorney and they had been working on a tax return but had not completed it. He had filed a partial inventory because he thought additional property might be discovered, and that was the reason the partial inventory had not been filed at an earlier date. He testified that some furniture had been sold by his mother

for about \$50 and that he would not sue his mother for this amount nor for the \$6,000 she had withdrawn from the bank without seeking the advice of his attorney and that he would be guided by such advice. Mrs. Meyers testified that so far as she knew her husband had never had a safe deposit box and that she and her son had gone through all of Mr. Meyers' papers for information with respect to any of his property. In this search she had the assistance of an accountant; she had been looking for other property to inventory and had found none. With reference to the property involved in the equity suit, the court stated: "Mrs. Meyers and the administrator make no secret of the fact that Mrs. Meyers and the other surviving joint tenants claim that property adversely to the estate." This evidence did not sustain the allegation of the petition that the administrator had neglected his duties. It appeared satisfactorily that Mr. Meyers had placed practically all his property in joint tenancy although the statements respecting the same were vague as to the identity of the person or persons who held title with Mr. Meyers to the several parcels of property. There was no evidence whatever to suggest the existence of property other than the real property that was in joint tenancy and what was shown in the partial inventory. The administrator at all times had the advice of his attorney and no cause was shown for a belief that the administrator had failed or would fail to honestly report to the court any property that belonged to the estate. Mr. Berman stated frankly that he relied largely upon his mother for information but we think this was proper in view of the fact that she was quite familiar with her husband's affairs.

Without doubt appellant intended to support the claims of his mother as well as the claims of himself and his wife to joint tenancy interests in the real property, but this fact did not warrant his removal as administrator. His inaction to assert claims on behalf of the estate against his mother and his wife and his natural unwillingness to surrender his own claims to joint tenancy interests interfered in no

manner with the prosecution of the claims of Mr. Meyers' daughters made on behalf of themselves and the estate.

[5-8] Upon this phase of the case the question is whether one holding some property in joint tenancy with a decedent is for that reason alone unfit to act as executor or administrator of the estate of the deceased joint tenant. Our answer is that no disqualification exists. Joint tenancy ownership of husband and wife has become a common type of ownership. It is especially common with respect to the home. The surviving spouse, however, does not claim adversely to the estate in a sense that borders upon disqualification to handle the administration of the estate. Adversity of interest should be regarded as of no consequence whatever unless it presents a threat to the best interests of the estate. It is a factual question depending upon the circumstances of the particular case. The law does not say that a surviving joint tenant may not act as the administrator. Nor do the courts make it a practice to refuse letters to a surviving spouse in such circumstances. To do so would deprive them of valuable statutory and natural rights. To be sure there may be circumstances which would warrant the court in denying the right of administration to a surviving joint tenant but there would have to be a showing of real necessity. The mere fact of the existence of joint tenancy ownership of the decedent and the survivor in property which but for the joint tenancy would have devolved upon the estate does not meet the requirement either in law or in fact. The trial court believed that Mr. Berman would assert as against the estate all the claims which his mother would assert for herself. This no doubt was a correct appraisal of the situation. But we do not discover any facts in evidence which would disqualify Mrs. Meyers from serving as administratrix, and it would follow that Mr. Berman was

not disqualified to act, however subservient he may be to the wishes of his mother.

[9] Section 600 of the Probate Code makes it the duty of an executor or administrator to file an inventory and appraisal within 3 months after his appointment. Section 610 gives the court authority to revoke the letters of an executor or administrator who "neglects or refuses to file an inventory within the time prescribed." The law was stated in *Re Estate of Buchman*, 123 Cal.App.2d 546, 554, 267 P.2d 73, 80, *supra*, as follows: "The general rule is that an executor or administrator will not be removed for the mere delay or failure to file an inventory within the time prescribed by the statute, unless the delay or failure has caused a loss to the estate. In *re Chadbourne's Estate*, 15 Cal.App. 363, 114 P. 1012; *Willoughby v. Willoughby*, 203 Ala. 138, 82 So. 168, 169; In *re Fehlmann's Estate*, 134 Or. 33, 292 P. 1029, 1033, 72 A.L.R. 949; 33 C.J.S., *Executors and Administrators*, § 90c, page 1035; 21 Am.Jur. 459, § 153."

The court did not find any facts with relation to the cause of the delay in filing a complete inventory and we have discovered no evidence which would justify the court's order of removal upon the ground of mere delay. The explanation was that the filing was withheld in the hope of the discovery of additional assets. While this appears to have been a vain hope, it was, if true, a sufficient answer to a claim of neglect. The representative of the estate usually acts in such matters under the advice of his attorney. There was no showing whatever of detriment or loss to the estate as the result of delay in filing an inventory.

The orders appealed from are reversed.

PARKER WOOD and VALLÉE, JJ., concur.

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

James GARROW, Jr., Defendant and
Appellant.

Cr. 1004.

District Court of Appeal, Fourth District,
California.

Jan. 3, 1955.

Rehearing Denied Jan. 14, 1955.

Hearing Denied Feb. 2, 1955.

Prosecution for grand theft of automobile, burglary with intent to commit theft, and possession of a firearm by a person convicted of a felony. The Superior Court, San Diego County, Arthur L. Mundo, J., entered judgment on verdict of not guilty of grand theft of automobile and guilty of other counts. Accused appealed. The District Court of Appeal, Griffin, J., held that record indicated that counsel appointed by court to defend accused fairly represented him, that court's instruction to jury on the intent required in burglary was contrary to instruction previously given to jury, and that accused, on his own testimony, had sufficient possession of gun to support conviction under statute forbidding possession of firearm by person previously convicted of felony.

Judgment affirmed in part, reversed in part and new trial ordered on burglary count.

1. Criminal Law §641(1)

In criminal prosecution, if accused felt that counsel appointed by court to represent him was not properly representing him, he should have complained to trial court.

2. Criminal Law §641(1)

In criminal prosecution, record indicated that counsel appointed by court to defend accused fairly represented him.

3. Criminal Law §1159(4)

District Court of Appeal cannot disturb the findings of the trier of facts unless it can justly conclude that the entire testimony of the witnesses is per se unbelievable.

4. Criminal Law §1159(2)

In considering sufficiency of evidence to support conviction, District Court of Appeal can only determine whether there was evidence in the record justifying the inference of guilt.

5. Burglary §9(2)

Where a person enters a house in pursuance of an express invitation of the proprietor, but he nevertheless enters with the intent to steal, he is guilty of burglary. Pen.Code, § 459.

6. Burglary §41(3)

In prosecution for burglary, where defendant had previously entered room of owner of gun with permission, and then entered room and took gun and shells, evidence was sufficient to support jury's finding that accused entered room with intent to commit theft therein. Pen.Code, § 459.

7. Criminal Law §810

In prosecution for automobile theft and burglary, where instruction led jury to believe that it was not necessary on burglary charge to show that at time defendant entered the room he intended to permanently deprive owner of property therein by theft, and was contrary to one previously given, instruction must have confused jury to such an extent as to be erroneous. Pen.Code, § 459.

8. Burglary §3

To constitute burglary, in addition to the specific intent to enter building, there must also be the specific intent to commit theft therein, and definition of theft in that case is the same as it would be in any other case, although it is not necessary to show that defendant actually took anything. Pen.Code, § 459.

9. Weapons §17(4)

In prosecution under statute forbidding custody and control of a firearm by a person previously convicted of a felony, where accused conceded he took gun, had it in his possession, and was hunting ducks with it, evidence was sufficient to show custody and control of firearm. Pen.Code, § 12021.

10. Criminal Law \S 369(2)

In prosecution under statute forbidding possession of firearms by persons previously convicted of felonies, it was not error for clerk to read into record defendant's previous conviction of a felony, as former conviction was an integral part of the offense charged. Pen.Code, \S 1025, 1093, subd. 1, 12021.

11. Witnesses \S 337(5)

In prosecution for burglary and automobile theft, and possession of a weapon by a person previously convicted of a felony, it was not error for district attorney to cross-examine accused as to previous convictions, as this was a proper method of impeachment, although former conviction was admitted. Pen.Code, \S 12021; Code Civ.Proc. \S 2051.

12. Criminal Law \S 1119(5)

In criminal prosecution, where nothing appeared on record relating to accused's contention on appeal that two jurors associated defendant with another individual, to whom reference was made during trial, there was nothing on which to predicate a charge of misconduct.

13. Criminal Law \S 1128(1)

Matters outside the record may not be considered on appeal.

14. Witnesses \S 301

In prosecution under statute forbidding possession of firearms by persons previously convicted of felonies, requiring accused to answer on cross-examination how pistol came to be in glove compartment of automobile he was driving did not violate privilege against self-incrimination as possession of gun was all one transaction and accused was subject to cross-examination on the part he had played in it. U.S. C.A.Const. Amend. 5; Pen.Code, \S 12021; Code Civ.Proc. 2048.

GRIFFIN, Justice.

Defendant was charged in one count with grand theft of a Cadillac automobile; in a second count with burglary with intent to commit theft; in a third count with violating section 12021 of the Penal Code in possessing a firearm (22 caliber automatic) having been previously convicted of a felony; and with a prior conviction of a felony, Dyer Act, Sec. 2312, Title 18 U.S.C.A., and having served a term therefor in a penal institution.

Defendant, represented by court-appointed counsel, plead not guilty to the three counts, and admitted the prior conviction. A trial by jury resulted in a conviction on the second and third counts and a verdict of not guilty on the first count. In propria persona defendant appealed from the judgment of conviction and filed a 49-page typewritten brief. He recites many contentions why the judgment should be reversed.

[1,2] The first contention as we construe it, is that the counsel appointed by the court to represent defendant at the trial was "obviously disinterested and inadequately prepared" to conduct defendant's defense, and that the court erred in not recognizing this fact and not replacing him with another attorney. Much of defendant's argument, in this respect, is based upon conclusions of the defendant, upon alleged statements claimed to have passed between defendant and his counsel which are not a part of the record, in failing to call certain witnesses, and in failing to sufficiently point out to the jury certain claimed inconsistencies in the evidence, particularly between the testimony of the defendant and that of the prosecution witnesses. Suffice it to say, we have examined the entire record before us and find nothing that would indicate to us that defendant's counsel had not thoroughly defended the action, had not sufficiently cross-examined the witnesses, or failed to bring out the material facts that were obtainable. There was no sufficient showing that the testimony of the witnesses desired would be of any particular value

James Garrow, Jr., in pro. per.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

or would be material to defendant's defense to the crimes of which he stands convicted.

The witness about which the main complaint is made, although subpoenaed by defendant's counsel, was not in court due to serious illness, and it was agreed between respective counsel that a delay of the trial was unnecessary since they were willing to stipulate as to what the testimony would be. Apparently no stipulation was entered into and no further need of the testimony was indicated at the close of the trial. Defendant made no objection to this fact at that time. Defendant's own version as to what the witness would have testified at the trial would have been but cumulative and would furnish no material evidence of defendant's innocence of the offenses for which he suffered conviction. If defendant felt his counsel did not adequately represent him he should have complained to the trial judge and given him an opportunity to correct the situation. An examination of the entire record indicates that the defendant was fairly represented by the counsel appointed to defend him. *People v. Youders*, 96 Cal.App.2d 562, 215 P.2d 743.

The evidence produced at the trial is voluminous and is somewhat in conflict. William Meyers, the complaining witness, just purchased a beer bar (Red Onion) in Coronado, from one Whiteside who was still occupying a sleeping room upstairs over the bar. In the bar room was a closed door leading to a stairway proceeding up to this room. The door was unlocked on most occasions. About Wednesday or Thursday, December 17, 1953, defendant came to this bar and engaged in conversation with Meyers. He told him he was a bartender and was going to work for one Olson across the street; and that Olson was out of the city. Defendant stated that he was sleepy and Meyers, according to his testimony, told defendant he did not believe that Whiteside would mind if he used his bed for an hour or so. Apparently defendant did this. It appears that Whiteside came into the bar about that time and Meyers told him what he had done and Whiteside seemed agreeable. After defendant awakened he came downstairs and

borrowed \$6 from Meyers and left for Los Angeles and returned the next day and repaid it. Meyers testified that around noon on Saturday he and his wife and defendant went to San Diego and purchased some beer glasses; that his night bartender wanted a night off so he, Meyers, decided to work for the bartender; that defendant was sitting around the place waiting for Olson to return and defendant asked Meyers if he could help out and that he did so until about one a. m.; that Mrs. Meyers took the cash from the register, put it in a money bag and hid it under some bottles in the cooler and closed the establishment. Apparently Meyers gave defendant permission to sleep in the bar room that night. On Sunday morning the Meyers came from their residence a few blocks away, opened the bar, and defendant was there lying on a cushioned bench with blankets on him. After some time, Meyers indicated that he would like to have a duck dinner that day and asked defendant to go down the street and see if he could buy one for him. Meyers gave him some money and defendant left. He could not find one and suggested that he thought he could obtain one near Chula Vista if he had a way to get there. Meyers loaned defendant his Cadillac car for this purpose. Defendant left about 11 a. m. and returned at 1:30 p. m. and delivered the duck to Meyers at his home. They dressed it and put it in the oven to cook. Defendant obtained a one-half pint bottle of liquor and the two of them mixed some drinks. Meyers said he was becoming bored with defendant's presence and suggested that he return to the Red Onion and see if the night bartender came to work at 6 p. m., on time. Defendant returned to Meyers' house and ate some of the duck dinner with the Meyers and a Mrs. Warwick. Later, at Meyers' request, defendant was taken up town by Mrs. Warwick and the Meyers retired. It appears that the defendant went back to the Red Onion and engaged in conversation with the night bartender; that the bartender had some urgent reason to leave and asked defendant to tend bar and close up for him because he had seen him there on the previous night and knew he was friendly with the

Meyers. Defendant tended bar. Two girls came in to the bar about 10 o'clock and they agreed with the defendant that business was slow and that they would lock up the bar and, with one other boy go to Tijuana. Defendant said he had the use of a Cadillac and would meet them across the street. Apparently, defendant went to the Meyers residence and took the Cadillac. He had the keys with him as well as the key to the bar room which were on one key ring. It appears that either that evening or the night before defendant went up into the Whiteside bedroom, wrapped up his clothes, picked up an Italian Baretta (22-caliber automatic) which was hidden on the shelf in that room, and also took four boxes of shells to fit this gun. Defendant had been shown this gun by Whiteside on a previous occasion when defendant was in that room. He also took the money from the bar register consisting of about \$145 in change and paper bills. Meyers testified he did not give defendant permission to relieve the bartender, to close the bar, to take the cash, to enter the bedroom of Whiteside, to take the automatic, or the automobile.

About 5 a. m. on Monday, December 21, Meyers was awakened by a police officer. Later, his car was returned to him from the Tijuana border. Meyers went to the Red Onion, examined the register, and looked for the previous day's receipts but they, as well as the money bag, were gone. Apparently defendant drove the Cadillac to Tijuana with the occupants. After several drinks at various bars defendant told his guests he needed gasoline for the Cadillac. He said he wanted to buy it on the American side, so he crossed the border and being unable to find a station open, started back to Tijuana and was stopped for inspection by a deputy sheriff who, observing the absence of an ownership certificate on the car, inquired of defendant as to the title to the Cadillac. Defendant gave the name and telephone number of Meyers, said he was employed by him, and asked the officer to call him. They unlocked and looked in the glove compartment for the certificate and found the 22-caliber automatic gun. Whiteside had retained the clip from it in

his pocket and accordingly it would only fire one shell at a time. The officer inquired of defendant as to the ownership of the gun and he told him it belonged to a friend of his; that they had been out shooting and his friend had left the gun in that compartment. He denied having any shells for it. Defendant's personal clothing was on the back seat, as well as a bank money bag containing about \$47 in silver. Defendant said it belonged to the bar where he worked; that he had the rest of the money in his pocket. \$40 in bills were produced. While defendant was in the patrol office he said he was feeling ill and wished to retire to the rest room. Therein the officer noticed defendant throw paper towels in the trash can, dangle his left arm over it, and then throw more towels in it. The trash can was examined and four boxes of 22-caliber shells were found, as well as a pair of dice. Defendant denied knowledge of the shells. Later, he stated the first knowledge he had of the gun was when it was on the back seat of the car.

Defendant's story of the trip to Tijuana and of the good time they had there was corroborated by one of the party. She testified she did not see any gun on the back seat or any other place in the car; that defendant did not return for them and they were required to find their own way back to Coronado.

Whiteside testified that on Saturday morning he talked with defendant and they became interested in guns and shooting in general; that he showed defendant this gun which he kept on the top shelf of a little closet of the room he occupied; that defendant was present when he took it down; that he had seven boxes of shells for it; that he told defendant he could keep his clothes in that room and that he gave him some blankets and said if he could find a place to sleep it was all right with him; that defendant slept in a booth downstairs in the bar and that he, Whiteside, slept in his room. He then testified that he made a check on Monday, about 12:30 a. m. and found the gun and four boxes of shells missing; that he had been away from his room from early Sunday afternoon until 12:30 Monday morning; that he did not give de-

fendant permission to stay in the room following the discussion about the guns because he had only a single bed in it and he thought defendant did not want to stay there. He testified he never gave defendant permission to take the gun.

Defendant's story at the trial was that it was Wednesday, December 16th when he first saw Meyers and used Whiteside's room for a few hours; that he returned to Los Angeles to receive some money to repay Meyers his \$6, and stayed Friday night at the Red Onion; that he and Meyers reached a tentative agreement about defendant going to work for him and he was to use the Whiteside bedroom when he moved out; that he and Meyers became quite definite friends; that he worked Saturday evening for Meyers tending bar, and that Meyers showed him where he kept the money overnight; that the next day Meyers spoke about wanting a duck and let him use his car for the purpose of securing one; that he returned to Meyers' home and drank with him and Meyers fell asleep; that, at Meyers' request, he drove to the Red Onion in Meyers' car to see if the night bartender had come on duty; that he had Meyers' car keys with him in his pocket; that he returned, had dinner with them, and a Mrs. Warwick later took him back to the Red Onion; that he went there and asked the bartender to draw some money for him because he had paid for the duck for Meyers and was a little short of cash; that he signed a chit for \$10 and assured the bartender it was all right with Meyers; that the bartender left early and left defendant in charge; that the girls came in and they planned the trip; that he took the till money to Meyers' home to leave it but the lights were out and he did not want to disturb them; that he "borrowed" the car because he thought about anything he would do would be all right with Meyers; that while in Tijuana he had already spent the \$10 he had "drawn" and drew another \$10 to buy gasoline, etc.; that in re-crossing the border line the officers discovered the "cannon" in the glove compartment, and it disturbed him because he had a prior affair and that the law authorities frown on people having

dangerous weapons under those circumstances; that he was somewhat intoxicated and, realizing he had a few boxes of shells in his pocket, he dumped them into the waste basket; that he did not know there was a pistol in the glove compartment; that he did not intend to steal anything and that at the time he entered the bar or the room occupied by Whiteside, he never intended to steal anything or commit any felony. He claimed that Meyers testified against him as he did because defendant had threatened a false arrest suit against him and accordingly Meyers testified falsely against him. Defendant admitted the Whiteside gun was quite valuable and that he should have asked Meyers if he could borrow his car that night, but claimed he was in the Whiteside room that night to get his clothing; that he was going to take it to the Meyers' home to have it sent out with their laundry. He testified he did not take the gun that night but did take it and four boxes of shells, without Whiteside's permission, from his room on Sunday, about 11:30 a. m.; that he took it in connection with Meyers' suggestion that he get a duck; that he drove down the bay shore and saw a few ducks on the water and decided they were too far out to hit with that weapon so he went on to Chula Vista and bought one; that by that time he was sober enough to realize it was out of season and it was not just the thing to do, so he returned the gun to the glove compartment and locked it; that he did not recall telling the officers he was out hunting with a friend.

Meyers denied making any arrangements with defendant about hiring him and using the living quarters; denied he ever authorized defendant to operate the bar for his bartender, to take any money, or replace it with chits.

In defendant's brief he reiterates this same story with a few additions and concessions, and maintains that at the time charged he had no custody, possession or control over the pistol in the glove compartment because it had been there since Sunday morning, and the car had been in the possession of Meyers since that time; that defendant's testimony is "above re-

proach" and plaintiff's witnesses' testimonies were, in numerous instances, "falsifications and outrageous distortions of fact."

[3, 4] These claimed variances and contradictions in the testimony afforded an opportunity for a persuasive argument to the jury against the reliability of such witnesses. We cannot disturb the findings of the trier of facts unless we can justly conclude that the entire testimony of the witnesses is per se unbelievable. *People v. Boyce*, 99 Cal.App.2d 439, 443, 221 P.2d 1011. No such situation is here presented. The question for the appellate court to pass upon is whether there was evidence in the record justifying the inference of guilt. We will therefore now consider the question of the sufficiency of the evidence to support the charge of burglary. The jury found it to be burglary of the first degree and the trial court reduced it to burglary of the second degree.

Section 459 of the Penal Code defines burglary as follows:

"Every person who enters any house, room, apartment, * * * with intent to commit grand or petit larceny or any felony is guilty of burglary."

[5, 6] It readily appears, at the time defendant entered the Whiteside room to take the gun and shells, which he admittedly took, he may well have entered it with the intent to commit theft of the gun at that time, even though on other occasions, he may have had passive permission to use the room for the purposes indicated. It has been held that where a person enters a house in pursuance of an express invitation of the proprietor, if he nevertheless enters with the intent to steal, he is guilty of burglary. *People v. Lowen*, 109 Cal. 381, 42 P. 32. See also *People v. Brittain*, 142 Cal. 8, 75 P. 314; *People v. Barry*, 94 Cal. 481, 29 P. 1026; *People v. Young*, 65 Cal. 225, 3 P. 813; and 4 Cal.Jur. 718, sec. 3. Of course, if at the time defendant entered the room, as contended by him, he entertained no intent to commit theft therein, or if such intent subsequently arose, no offense of burglary was made out. However, from the circumstances related, the evidence pro-

duced, and the inferences that may be reasonably drawn therefrom, the jury was justified in not believing defendant's story and in finding him guilty of that charge.

[7] The serious question presented involves the instruction of the trial judge bearing on this very question. While the original instructions given to the jury are not made a part of the record on this appeal, we will assume from the transcript that the definitions of grand theft and burglary were given in the language of the statutes. After the jury retired it returned for further instructions and the following colloquy took place between its foreman and the judge:

"The Jury Foreman: * * * I believe you said there were two points to be decided on the grand theft auto and the burglary charge before we could render a verdict of guilty or not guilty. We would like to have those two points restated, * * * mainly the act of taking and the intent.

"The Court: Well, in the case of grand theft you have to have the intent permanently to deprive the owner of his property. In burglary you have to have the specific intent to enter a room or house, or any building, and so forth, with the intent therein to commit the crime of theft, or any other felony.

"Is that sufficient?

"The Jury Foreman: Does the point intent with regard to burglary also include the provision of permanent possession?

"The Court: No.

"The Jury Foreman: As it does in the case of the car theft?

"The Court: No. The specific intent on a charge of burglary is the specific intent to enter a building or room, and so forth, with the intent therein to commit the crime of theft, or any other felony.

"In grand theft the specific intent there must be permanently to deprive the owner of his property.

"The Jury Foreman: That satisfies us. Thanks."

[8] It would appear to us that since the jury retired and returned a not guilty ver-

dict as to the grand theft count, it was led to believe from the instructions given that it was not necessary on the burglary charge to show that at the time defendant entered the room he intended to permanently deprive the owner of certain property therein by theft. If so, it would be an erroneous construction of the law. *People v. Lamey*, 103 Cal.App. 66, 283 P. 848. In addition to the specific intent to enter the building there must also be a specific intent to *commit theft therein*. The definition of theft in that case is the same as it would be in any other case, including the count pertaining to the Cadillac. It is true that it is not necessary to show that the defendant actually took anything, but there must be a showing that he intended to commit theft therein when he entered.

In *In re Connell*, 68 Cal.App.2d 360, 156 P.2d 483, it was held that to constitute the crime of larceny an intent to steal is essential, and it must be an intent wholly and permanently to deprive the owner of the property. This intent must exist at the time of the taking.

In *People v. Brown*, 105 Cal. 66, 38 P. 518, it was held that where a defendant is accused of the crime of burglary committed in entering a house with intent to commit grand larceny, it is necessary that the felonious intent must be permanently to deprive the owner of his property, and an instruction that larceny might be committed even though it was only the intent of the party taking the property to deprive the owner of it temporarily, is erroneous; that while the felonious intent of the party taking the property of another need not necessarily be an intention to convert the property to his own use, still it must in all cases be an intent wholly and permanently to deprive the owner thereof; that the taking of the bicycle of another temporarily for revenge, with intention to return it, is not larceny, but only a trespass. See also *Hayes v. Financial Indemnity Company*, 118 Cal. App.2d Supp. 883, 257 P.2d 765. Accordingly, it appears to us that the oral instruction given by the judge was contrary to the one previously given, and must have confused the jury to such an extent that it did not believe that before it could convict the

defendant of the crime of burglary it must first find that defendant, at the time he entered the room, intended to wholly and permanently deprive the owner of property therein by theft. A new trial on this count should be ordered and tried under proper instructions.

[9] As to the third count, defendant concedes he took the gun involved, had it in his possession, and was "hunting ducks with it" on Sunday. The evidence is in conflict as to whether he actually took the gun on Sunday morning or when he closed the bar on Sunday night and took his clothes with him. At any rate, he possessed it in the automobile glove compartment. It was placed there by him and was under his control and custody and apparently he was the only one who knew it was there. This is sufficient to show custody and control of the weapon by a person having been previously convicted of a felony in violation of Penal Code section 12021. *People v. Warren*, 16 Cal.2d 103, 112, 104 P.2d 1024; *People v. Hernandez*, 115 Cal.App.2d 435, 252 P.2d 75, and cases cited; *People v. Ekberg*, 94 Cal.App.2d 613, 211 P.2d 316; *People v. Quong*, 5 Cal.App.2d 137, 42 P.2d 386.

[10, 11] It is next argued that it was error for the clerk to read and for the district attorney to refer to defendant's previous conviction of a felony since he admitted such conviction when arraigned, citing sections 1025 and 1093, subd. 1, Penal Code. This would be true if defendant had not been charged with the offense of possession and control of a firearm capable of being concealed upon the person of one previously convicted of a felony. To this charge defendant entered a plea of not guilty. The clerk did not read the added count alleging prior conviction of a felony, which defendant admitted. It was proper for the clerk to read this portion of the information to the jury since the fact of former conviction was an integral part of the offense charged. *People v. Forrester*, 116 Cal.App. 240, 242, 2 P.2d 558. With respect to the prosecuting attorney, he questioned defendant on cross-examination as to his prior conviction of a felony, which is a proper method of impeachment. Code Civ.Proc. sec. 2051.

Such impeachment is proper though the charge be admitted. *People v. Crowley*, 100 Cal. 478, 482, 35 P. 84.

[12, 13] Next, defendant contends in his brief that two of the jurors associated defendant with an individual to whom reference was made during the trial, and that this association had a possible unfavorable reaction on the jury. No showing appears in the record as to this, hence there is nothing on which to predicate a charge of misconduct. Matters outside the record may not be considered on appeal. *Rogers v. Tennant*, 45 Cal. 184; *Reed & Company v. Marshall*, 12 Cal.App. 697, 108 P. 719; 2 Cal.Jur. 687, sec. 394.

[14] Some complaint is made because the trial court overruled counsel for defendant's objections to certain questions being propounded to the defendant by the prosecutor on cross-examination. Defendant was asked how the gun came to be in the car. Objection was made to the question on the ground that the answer might tend to incriminate the defendant and he sought shelter therefrom under the Fifth Amendment to the United States Constitution. The court overruled the objection and defendant answered that he placed it there on Sunday afternoon. He claims, as we understand the argument, that he was accordingly forced into a confession, and without which the jury would not have convicted him on this count. We see no merit to the argument. Defendant denied knowledge of its presence in the car at the border and it would not exact much reasoning power to guess that defendant placed it there. This was all one transaction and defendant was subject to cross-examination on the part he had played in it. Sec. 2048, Code Civ.Proc.; *People v. Kynette*, 15 Cal. 2d 731, 752, 104 P.2d 794; *People v. Warren*, 16 Cal.2d 103, 104 P.2d 1024; *People v. Peete*, 28 Cal.2d 306, 169 P.2d 924.

That portion of the judgment relating to the burglary charge in count two is reversed and a new trial ordered. The remaining portion of the judgment is affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Kenneth A. McCONNELL and Louise A. McConnell, Plaintiffs and Appellants,

v.

Harry L. COWAN, Defendant and Respondent.*

Civ. 20326.

District Court of Appeal, Second District,
Division 3, California.

Jan. 12, 1955.

Rehearing Denied Feb. 1, 1955.

Hearing Granted March 9, 1955.

Action by lessees against real estate broker for declaratory relief, rescission, and to quiet title, and cross-action by broker praying that contract for real estate commission be declared valid. From adverse judgment of Superior Court, Los Angeles County, Joseph M. Maltby, J., the lessees appealed. The District Court of Appeal, Vallée, J., held that where broker dictated original offer from lessees to lessor, drafted offer from lessor to lessees, which lessees accepted, negotiated all transactions without interference of either party and without full disclosure to both of them of all facts then known to him, and did not bring lessor and lessees together until they both had agreed on terms of lease, broker acted as "agent" and not as "middleman", and his failure to disclose to lessor dual nature of his representation and to obtain his consent to payment of a commission by lessees precluded recovery of any compensation from lessees.

Judgment reversed.

1. Appeal and Error ⇨842(2)

Finding that real estate broker was acting as a middleman and not as an agent of either lessor or lessees was a mere conclusion of law and as such could be disregarded as a finding by reviewing court.

2. Brokers ⇨67(2)

A real estate broker cannot collect a commission from both parties to a lease transaction without disclosing dual nature of his representation and obtaining consent of each principal to payment of a commission by other, except when he is merely a middleman.

* Opinion vacated 285 P.2d 261.

3. Brokers ⇐6

A broker is a "middleman" when he has no other duty to perform but to bring the parties together, leaving them to negotiate and to come to an agreement themselves without any aid from him.

See publication Words and Phrases, for other judicial constructions and definitions of "Middleman".

4. Brokers ⇐67(1)

A broker who is a mere middleman is in no fiduciary relation to his principal and does not sustain a confidential relation to either party, and therefore he may contract for and receive compensation from each of the parties.

5. Brokers ⇐6

In order for a broker to be a mere middleman he must not be vested with the least discretion and the first employer must have no right to rely on obtaining the benefit of his judgment.

6. Brokers ⇐67(2)

Where broker dictated original offer from lessees to lessor, drafted offer from lessor to lessees, which lessees accepted, negotiated all transactions without interference of either party and without full disclosure to both of them of all facts then known to him, and did not bring lessor and lessees together until they both had agreed on terms of lease, broker acted as "agent" and not as "middleman", and his failure to disclose to lessor dual nature of his representation and to obtain his consent to payment of a commission by lessees precluded recovery of any compensation from lessees.

See publication Words and Phrases, for other judicial constructions and definitions of "Agent".

Lyle M. Stevens, Long Beach, for appellants.

Leo Friedman, Orlan S. Friedman, Beverly Hills, for respondent.

VALLÉE, Justice.

Plaintiffs brought this suit for declaratory relief, rescission, and to quiet title. The controversy arose out of a dispute as

to the validity of a contract for a real estate commission. Defendant filed a cross-complaint praying that the contract be declared valid. Judgment was for defendant.

Plaintiffs are husband and wife. The husband having acted alone will be referred to as plaintiff. Defendant is a licensed real estate broker.

About one year prior to October 1952, defendant talked with E. D. Mitchell, the owner of the southeast corner of Broadway and Atlantic Avenue in Long Beach, concerning the leasing of the property. On October 24, 1952, defendant for the first time discussed with plaintiff the matter of putting a drive-in restaurant on the property. Defendant testified that plaintiff gave him a letter authorizing him to make an offer to Mitchell; he (defendant) had dictated the letter, it was taken down in longhand, and plaintiff had it typed. The letter was addressed to defendant: "Mr. Harry L. Cowan, *Leasing Agent.*" (Italics added.) It reads:

You are herewith authorized to offer for me to Mr. D. Mitchell the owner of the Southeast corner of Atlantic & Broadway, City, the following proposition as follows: that

I will pay the sum of \$750 per month for a portion of this property which size shall be acceptable to me, for the term of ten or fifteen years (which shall be also agreeable to me) and provided however that Mr. Mitchell shall expend the sum of \$25,000 for improvements as per my plans and specifications to be used for the same type of business as I now operate.

I will only accept this location or part thereof provided Mr. Mitchell pays you your desired *leasing fee.* (Italics added.)

Defendant further testified that at the time plaintiff gave him the letter plaintiff had said "he would take the place whether he got the building built or he didn't get the building built. He would take a ground lease or take it with the building on it. * * * I was to see Mr. Mitchell to find out if I could get one of the deals."

On October 24 plaintiff and defendant also orally agreed that in the event plaintiff was able to secure a lease of the property, defendant was to receive as a commission 5% of the net profits of the business transacted on the property.

Defendant testified that on the same day he gave the terms of the offer to Mitchell; he did not show plaintiff's letter to Mitchell; Mitchell wanted to consider the matter over the week end. The following Monday morning, October 27, defendant contacted Mitchell. Mitchell said he did not want to erect the building but he would lease the property as a ground lease. He (defendant) went to plaintiff's office and had a conversation with him. Plaintiff said he would lease half of the property for \$500 a month. They then had a discussion as to the commission defendant was to receive for obtaining the lease; he wanted the oral agreement of the 24th to be put in writing. Plaintiff signed two sheets of blank letterhead and gave them to him. Later that day defendant typed a commission agreement on one of the sheets, and on November 5 he defined "net profits" on the other sheet. He gave plaintiff a copy of each letter.¹

I. The letter of October 27, 1952 reads:

"October 27 1952

"Mr. Harry L. Cowan
"206 Times Building
"City.

"Dear Mr. Cowan:

"This letter will herewith constitute a firm agreement without any reservations whatsoever upon my part, that I

"(1) for and in consideration of ten dollars receipt of which is acknowledged by myself and other considerations given by you to me—guarantee to pay to you the sum of

"Five Per Cent of the Net Profit of the total volume of business transacted at the Drive-In to be erected upon a portion of the now vacant property located upon the Southeast corner of Broadway & Atlantic, Long Beach and owned by D. Mitchell.

"(2) This percentage shall be paid to you every three months for the entire term that this business is operated directly or indirectly by myself, my heirs or assigns. (in other words you shall receive this five percent each and every month—but paid to you each three

The letter of October 27 in part reads: "for and in consideration of ten dollars receipt of which is acknowledged by myself and other considerations given by you to me—guarantee to pay to you the sum of. * * *" Defendant testified that he never gave plaintiff the \$10. Relative to the "other considerations given," he testified, "I had intended to take that piece of property for myself, with Mr. McConnell. That was my discussion with Mr. McConnell. He said he had tried to obtain this piece of property, could not get it. * * * I said that I was going down to see Mitchell to see if I could line it up for myself. He said, 'What kind of deal will you make with me, if you get it for me and not take it for yourself?' I said, 'What kind of a deal do you think would be fair?' And that is how we arrived at the five per cent"; plaintiff "never could have gotten" the lease without his (defendant's) "forbearance" of his taking the lease himself. Defendant also testified that part of the consideration was that he was to obtain a lease on the property for plaintiff.

Defendant testified that on October 28, 1952, Mitchell executed in his office an

months or four quarterly installments each year.

"Yours very truly,

"Ken McConnell [Signed]

"Made in duplicate this date."

The letter of November 5, 1952 reads:

"November 5 1952.

"Mr. Harry L. Cowan

"206 Times Building

"Long Beach

"California.

"Dear Mr. Cowan:

"In addition to my agreement made to you in the letter to you dated October 27th 1952 wherein you are to receive five percent of the net profits from the entire operation of my drive-in to be built on the Mitchell property on Broadway & Atlantic, Long Beach I further agree that this percentage shall be paid to you, your heirs or assigns, that also my income taxes will not be deducted from the net profits of said operation before computing your percentage, and that you may at your option inspect or have inspected my books.

"Yours very truly,

"Made in duplicate:

"Ken McConnell [Signed]"

instrument whereby he agreed to lease half of the property to plaintiff. After Mitchell signed the agreement, he (defendant) called plaintiff and "told him that *we* had a deal for \$500 a month, ground rental, and then I believe I went on back to the office, that he had his check ready to cover this deal. * * * Mr. McConnell went back in my car to Mr. Mitchell's office." (Italics added.)

The agreement between defendant and Mitchell was typed on letter-size stationery and is in the form of a letter, addressed to defendant as leasing agent. It reads:

"October 28, 1952

"Mr. H. L. Cowan, Leasing Agent

"206 Times Building

"Long Beach, California

"Dear Mr. Cowan:

"Please be advised that I herewith agree to lease the ground (to Mr. Ken McConnell for the purpose of a DRIVE-IN) which ground is located

at the Southeast corner of Atlantic and Broadway in the city of Long Beach upon the following basis: (1) [Half of present area.] (2) [For 10 years with option to renew for 5 years.] (3) [Rental \$500. a month.] (4) [Lessee to pay half of any tax increase after ten years.]

"(5) I will pay H. L. Cowan a three percent leasing commission on the total rental upon the signing of said lease and you have forty-eight hours in which to accept or reject this proposal. If Option on lease is exercised H. L. Cowan to receive his commission at that time on said option.

"Yours very truly,

"D. Mitchell [Signed]

"D. Mitchell

"Accepted:

"Ken McConnell [Signed]

"Ken MC.CONELL

"It is understood that this lease is to embody Lots 2, 4, 6, 8, 10, 12, 14, 16, the entire 16 ft. vacated alley and the West 34 ft. of Lots 1, 3, 5, 7, 9, 11, 13, and 15. Being approximately 190 ft. on Atlantic Avenue and 200 ft. on Broadway Avenue.

"E. D. Mitchell

"[Signed]

"K. McC [Signed]"

Two different typewriters were used to type the agreement. The major part of the letter agreement was typed with pica type, while the last sentence of paragraph (5) and the paragraph at the bottom of the page describing the property were typed with elite type. The name "D Mitchell" was written in blackish colored ink, while the name "Ken McConnell" was written with emerald blue ink. The initialing of the last paragraph was done by plaintiff in the same blackish colored ink with which Mitchell had signed his name, but Mitchell approved the last paragraph by signing his name with royal blue ink.

Defendant testified that it was "possible" that he drafted the letter of October 28,

took it to plaintiff's office, plaintiff signed it, and then he took it to Mitchell's office where the last sentence in paragraph (5) and the description of the property leased were typed in, and that the entire instrument was not typed in Mitchell's office. Plaintiff testified that when he signed his name to the document, the provisions that appear in elite type were not present; they were added after defendant had driven him to Mitchell's office. Mitchell testified that when plaintiff signed the instrument, he (plaintiff) had not met him and that it was after plaintiff had accepted his proposal for the ground lease that he learned it was plaintiff who wanted to lease the property. Defendant never disclosed to Mitchell that he was receiving a commission from plaintiff.

After plaintiff and Mitchell had executed the agreement of October 28, they discussed the leasing of the other half of the property. On November 4, plaintiff and Mitchell executed two leases of the property, one for the western half, and the other for the eastern half. The lease on the latter half runs concurrently with the former. Mitchell testified that although defendant was not consulted with reference to the lease for the western half, it was because "we had agreed on everything in the lease before, and it was just merely a case of me telling Mr. Ulman [his attorney] what the provisions of the lease were and he wrote them down. There was no argument. * * * The conditions are practically those embodied in the agreement here [letter of October 28]." Defendant did not assist nor was he in any manner involved in the preparation of the lease of the eastern half. After plaintiff and Mitchell executed the leases, Mitchell paid defendant \$1,800 as a commission.

When plaintiffs rested their case, defendant's motion for a nonsuit as to the first and second causes of action, rescission and fraud respectively, was granted. The trial proceeded as to the third and fourth causes of action, declaratory relief and quiet title.

The court found that: Mitchell had no knowledge of the commission agreement between plaintiff and defendant, however, plaintiff knew defendant was to be paid a 3% commission by Mitchell; "[t]hroughout the transaction, defendant was acting as a middleman, bringing Mitchell and plaintiff together, and defendant was not acting as an agent of either Mitchell or of plaintiff"; the commission agreement between plaintiff and defendant is valid and defendant is entitled to receive 5% of the net profits of the business operated on the leased property. It was adjudged that plaintiffs take nothing on their complaint and it was declared that the agreement between plaintiff and defendant is valid. Plaintiffs appeal.

[1] The finding that defendant was acting as a middleman was not a finding

of fact, but was a mere conclusion of law and as such it may be disregarded as a finding. *Wayt v. Patee*, 205 Cal. 46, 53, 269 P. 660.

Plaintiffs claim the trial court committed three errors. In essence, however, all three alleged errors raise only one question: Was it error for the trial court to conclude that defendant was acting as a middleman rather than as the agent of either Mitchell or of plaintiff?

[2] It is a well established rule, founded on public policy, that a broker cannot collect a commission from both parties to a lease transaction without disclosing the dual nature of his representation and obtaining the consent of each principal to the payment of a commission by the other. *Hagge v. Drew*, 73 Cal.App.2d 739, 741-742, 167 P.2d 263. A person employing a broker to negotiate a lease in his behalf bargains for the disinterested skill, diligence, and zeal of the agent for his own exclusive benefit. The rule is based on the doctrine that it is the duty of an agent of a lessor to lease the property at the highest price, and of an agent of a lessee to lease it for the lowest. Consequently, where he attempts to act for both sides, he is confronted with the impossible task of securing for each the most advantageous bargain. *Gordon v. Beck*, 196 Cal. 768, 773, 239 P. 309; 2 Cal.Jur.2d 778, § 107; 8 Am.Jur. 1036, § 87; Annotation 14 A.L.R. 466.

If an agent is engaged by both parties to effect a sale or lease of property from one to the other, he cannot recover compensation from either party unless both parties knew of the double agency at the time of the transaction. The law will not permit him to enforce his contract for compensation against either party. "The reason for the rule is that he thereby puts himself in a position where his duty to one conflicts with his duty to the other, where his own interests tempt him to be unfaithful to both principals, a position which is against sound public policy and good morals. * * * It is no answer to this objection to say that he did, in the particular case, act fairly and honor-

ably to both. The infirmity of his contract does not arise from his actual conduct in the given case, but from the policy of the law, which will not allow a man to gain anything from a relation so conducive to bad faith and double dealing. And the fact that the party whom he sues was aware of the double agency and of the payment, or agreement to pay, compensation by the other party, and consented thereto, does not entitle him to recover. He must show knowledge by both parties. One party might willingly consent, believing that the advantage would accrue to him, to the detriment of the other. The law will not tolerate such an arrangement, except with the knowledge and consent of both, and will enter into no inquiry to determine whether or not the particular negotiation was fairly conducted by the agent. It leaves him as it finds him, affording him no relief." *Glenn v. Rice*, 174 Cal. 269, 272, 162 P. 1020, 1021.

[3,4] There is, as defendant contends, an exception to this rule when a broker is employed as a mere middleman. *Clark v. Allen*, 125 Cal. 276, 57 P. 985; *Hooper v. Mayfield*, 114 Cal.App.2d 802, 251 P.2d 330; *Williams v. Kinsey*, 74 Cal.App.2d 583, 169 P.2d 487; *Carothers v. Caine*, 38 Cal.App. 71, 175 P. 478; *King v. Reed*, 24 Cal.App. 229, 141 P. 41. A broker is simply a middleman when he has no other duty to perform but to bring the parties together, leaving them to negotiate and to come to an agreement themselves without any aid from him. *Rhode v. Bartholomew*, 94 Cal.App.2d 272, 280, 210 P.2d 768; *Jensen v. Bowen*, 37 N.D. 352, 164 N.W. 4. He merely brings the parties together in order to enable them to make their own contract; he neither negotiates for nor is he employed to negotiate by either side, since the parties when they meet do their own negotiating and make their own bargains. In such a case the broker is in no sense representing conflicting interests because he has nothing whatever to do with the trade; his advice and assistance are not called for. A middleman is in no fiduciary relation to his principal and does not sustain a confidential relation to either

party. *King v. Reed*, 24 Cal.App. 229, 141 P. 41. Therefore, there is nothing against good morals and sound public policy in allowing a middleman to contract for and receive compensation from each of the parties. *Clark v. Allen*, 125 Cal. 276, 57 P. 985.

[5] To be a mere middleman the agent must not be vested with the least discretion and the first employer must have no right to rely on obtaining the benefit of his judgment. If a broker takes any part in the negotiations, no matter how slight, he is not a middleman but is an agent. *Rhode v. Bartholomew*, 94 Cal.App. 2d 272, 280, 210 P.2d 768; *Abrams v. Guston*, 110 Cal.App.2d 556, 557, 243 P.2d 109; *Jensen v. Bowen*, 37 N.D. 352, 164 N.W. 4, 5.

Defendant urges that he was only a middleman—that he merely brought plaintiff and Mitchell together so that they were able to make their own contract without any aid from him. The contention cannot be sustained.

[6] Defendant conceded he dictated the initial offer from plaintiff to Mitchell and that he drafted the offer from Mitchell to plaintiff, which plaintiff accepted. Both of these instruments were in the form of letters addressed to defendant as "Leasing Agent." Thus he considered himself an agent in the transaction. The letter of October 24th authorized defendant to submit an offer to Mitchell. Plaintiff stated he would lease a portion of the property "which size shall be acceptable to me, for the term of ten or fifteen years (which shall be also agreeable to me) and provided however that Mr. Mitchell shall expend the sum of \$25,000 for improvements. * * *" This letter was merely an offer to accept an offer. Even if Mitchell had consented to erect a building on the premises, an agreement would have had to be reached as to the size of the property and the duration of the lease. Plaintiff had told defendant he would take the property even if Mitchell would not build. Plaintiff thereby put defendant in a position to negotiate with

Mitchell concerning the erection of a building, the size of the property to be leased, and the length of the lease.

Defendant presented plaintiff's offer to Mitchell who wished to think it over. It was defendant who contacted Mitchell the following Monday morning to learn what the decision was; he had not arranged it so Mitchell could contact plaintiff inasmuch as he had not told Mitchell it was plaintiff who wanted to lease the property. Then defendant, not Mitchell, went to plaintiff's office and discussed Mitchell's offer with plaintiff. When Mitchell signed the letter of October 28th, defendant called plaintiff and told him "we" have a deal. He testified that without his efforts plaintiff would not have been able to obtain the lease. In order to consummate the negotiations, defendant went to plaintiff's office to have plaintiff sign the document and to pick up the check. It was not until he brought plaintiff to Mitchell's office that plaintiff first met Mitchell—after all the important terms and details of the contract had been accepted by both parties. From the two sizes of type on the agreement of October 28th, it is clear that the letter was typed at two different times; that defendant had the major portion of the letter typed on a pica typewriter and that plaintiff then signed it, and that when they went to Mitchell's office the last sentence of paragraph (5) and the paragraph at the bottom of the page describing the property were added by using an elite typewriter; and that Mitchell and plaintiff then approved the minor insertions. This also accounts for the varied colors of ink that were used in signing and initialing the document.

As early as the fall of 1951, defendant had shown an interest in the property. The fact that he was desirous of leasing the property himself and then later for the consideration of the assignment of 5% of the profits agreed to secure the same for the plaintiff, negatives a conclusion that defendant intended to be only a middleman and leave plaintiff and Mitchell to negotiate their own contract. Defendant's commission from plaintiff was entirely dependent upon plaintiff's procuring an agreement to

lease. He admitted that in the event the lease was not obtained he could not have received any commission because there would be no business from which a commission could be derived. Also, the amount of his commission would fluctuate according to the net profits of the business. He wanted to be certain that an agreement would be consummated and that the rent would be as low as possible so that net profits would be greater, rent being a charge against gross profits; net profits being inversely proportional to what the rental charge would be. If the business was such that it could pay 5% of its net profits to him as a commission, Mitchell was entitled to know this fact so that he could use it as a basis for determining the rent; particularly where defendant was to perform no services for the business after the lease was executed and where Mitchell was paying him a commission to secure for him a lease of the premises.

Defendant was in a position where he could either inflate or deflate the value or worth to one or the other of the parties. He could, if he so desired, exert his best efforts toward obtaining a lease at the lowest possible figure in order to further his interests by way of 5% of the net profits of the business to be paid to him by plaintiff. On the other hand, he could, without knowledge of the other, inflate the value of the lease to the lessee, thereby securing for himself a greater commission by way of 3% of the moneys to be paid for rent over a period of ten years.

Defendant was clothed with authority to do everything necessary, usual, and proper in the ordinary course of business to effectuate the purpose of his agency. Not only was he invested with, but he actively exercised discretion in advising plaintiff and in negotiating for him the lease of the property. He negotiated all transactions without interference of either party and without a full disclosure to both of them of all facts then known to him. The parties were not brought together until they both had agreed on the terms of the lease. It is immaterial that defendant did not participate in the execution of the lease itself; the lease embodied the terms agreed upon by

both parties in the letter of October 28th. We conclude that defendant acted as an agent and not as a middleman.

Defendant having failed to disclose to Mitchell the dual nature of his representation and to obtain his consent to the payment of a commission by plaintiff, he cannot recover any compensation from plaintiff.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.



130 Cal.App.2d 151

STANDARD ACCIDENT INSURANCE COMPANY, a corporation (Defendant in Intervention), Plaintiff and Respondent,

v.

David S. PRATT, Defendant and Respondent,

Sophle Newman, Intervenor and Appellant.
Civ. 5018.

District Court of Appeal, Fourth District,
California.

Jan. 7, 1955.

Rehearing Denied Jan. 27, 1955.

Hearing Denied March 3, 1955.

Action for declaratory relief on automobile liability policy brought by insurer against insured. A third party, who had sustained injuries when struck by insured's automobile was allowed to intervene. The Superior Court, Orange County, Robert Gardner, J., entered judgment in favor of insurer and intervenor appealed. The District Court of Appeal, Mussell, J., held that where rescission of automobile liability policy was made because of material false representations, the rescission dated back to time representations became false, and where representations were made on application for insurance policy, policy was void ab initio and insured was not liable to third party injured by insured's operation of automobile.

Judgment affirmed.

278 P.2d—31½

1. Declaratory Judgment ⇨347

In action for declaratory relief as to automobile liability policy brought by insurer against insured, evidence sustained findings that insured had impairment of vision known to him at time he made application for insurance and that he did not possess a valid California operator's license.

2. Appeal and Error ⇨1010(1)

Where finding of trial court, that insured had physical impairment at time of making application for automobile liability insurance policy, was supported by substantial evidence, it could not be disturbed on appeal.

3. Insurance ⇨264(1)

Where statements made in insured's application for automobile liability policy were not referred to in policy, or contained therein or made a part thereof, statements were not express warranties, and insurer was not estopped from urging statements, even though designated as warranties in application. Insurance Code, §§ 441, 443.

4. Insurance ⇨264(1)

Even though statements are declared to be warranties in application for insurance, they will not be regarded as such if qualified by other stipulations, which offered a fair inference that the parties did not so intend them.

5. Insurance ⇨247

Where, in application for automobile liability policy, insured made false representations, that he had a valid operator's license and that he had no visual impairment, the misrepresentations were material in inducing insurer to issue policy, and insurer was entitled to rescind policy from time false representations were made. Insurance Code, §§ 330, 331, 334, 351, 359, 441.

6. Insurance ⇨247

Where rescission of automobile liability policy was made because of material false representations, made on application for policy, policy was void ab initio, and insurer was not liable to third party injured by insured's operation of automobile.

James E. Walker, Santa Ana, for appellant.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondent Standard Accident Ins. Co.

MUSSELL, Justice.

Sophie Newman, intervenor in an action for declaratory relief brought by Standard Accident Insurance Company, a corporation, appeals from a judgment decreeing, among other things, that a certain policy of liability insurance issued by said company was rescinded as of the date of its issuance and that the company was not obligated to pay any judgment against the insured or defend the insured in an action brought against him by Sophie Newman for injuries sustained in an automobile accident.

It is alleged in the complaint that on June 12, 1951, David S. Pratt applied for an insurance policy to insure his 1951 Ford automobile; that he stated in his application he had a valid California operator's license and no physical impairments; that in reliance upon the statements and representations included in said application, plaintiff issued its policy insuring Pratt in the sum of \$10,000; that on August 4, 1951, Pratt, while driving said vehicle, was involved in an automobile accident wherein Sophie Newman received injuries; that thereafter plaintiff ascertained that Pratt did not have a valid California operator's license, that he had faulty vision when he made his application for insurance and that he knew of said condition; that if plaintiff had known that Pratt had no valid California operator's license or that he had faulty vision, it would not have issued the policy; that on October 10, 1951, plaintiff rescinded the policy and returned the premium in the sum of \$72 to Pratt; that on February 19, 1952, Pratt notified plaintiff that Sophie Newman had instituted suit against him arising out of the accident of August 4, 1951, and demanded that plaintiff defend the action; that this demand was declined by plaintiff.

Pratt's answer consists principally of denials of the allegations of the complaint, together with an affirmative defense that when he accepted the return of the \$72 premium he acted under a mistake of fact

and that plaintiff should be estopped to assert its cancellation because plaintiff could have readily ascertained that Pratt did not have a valid operator's license and had a physical impairment before it issued the policy.

Sophie Newman was granted leave to intervene in the action and in her complaint in intervention alleged that she is plaintiff in an action against Pratt arising out of a collision of his automobile with intervenor while she was crossing a pedestrian crosswalk; that she was injured in said accident and that her injuries were caused by the carelessness and negligence of Pratt; that on or about August 6, 1951, an agent and adjuster for the insurance company stated to her that the company would admit liability and all that remained to be settled was the amount of damages; that relying on these statements she withheld bringing suit; that the company did not disclaim responsibility for her injuries or the conduct of Pratt until December 21, 1951; that for a long time prior to August 4, 1951, the insurance company fully knew and understood Pratt's physical condition and negligently and carelessly failed to take proper precautions against the insurance of a hazardous risk and failed to investigate Pratt's physical condition and the status of his operator's license. The complaint concluded with allegations adopting those in Pratt's answer and alleging his insolvency. The prayer was that the court deny the relief sought in plaintiff insurance company's complaint and declare that the insurance policy was in full force and effect at the time of the accident and that the company has a liability to pay intervenor any judgment that may be rendered in her behalf in her action against Pratt.

There is no dispute as to most of the facts. Pratt purchased the Ford automobile in the spring of 1951. He did not have a California operator's license and did not apply for one because "He wasn't sure that he could pass the eye test or that he could get a license." He testified that he obtained a temporary permit from one Victor J. Papenek for the sum of \$25; that this license was not a valid California driver's license;

that he knew "That it was gotten in a slightly irregular way"; and that he received the license from Papenek two or three weeks before the accident of August 4, 1951. On June 12, 1951, Pratt applied for insurance on his automobile at the office of the Automobile Club of Southern California in Santa Ana. The application which he signed contained two printed questions which are here involved: (1) Has applicant a valid California operator's license; and (2) Has applicant any physical impairments? Pratt answered the first question "Yes" and the second question "No". These statements were signed by Pratt and were designated as warranties in the application in the following language: "Warranties—The following are statements of facts known to and warranted by the applicant to be true." The application was accepted by the Inter-insurance Exchange of the Automobile Club of Southern California and the policy of insurance here involved was issued by the plaintiff Standard Accident Insurance Company on June 12, 1951. The policy contains no reference to the application or to the representations made therein by Pratt. Attached to the face of the policy is a statement designated "Declarations", which likewise contains no reference to the application and relates to matters which are not in dispute. Paragraph 18 of the conditions of the insuring agreements of the policy reads as follows: "18. Declarations * * * By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance."

[1,2] There is a conflict in the evidence as to whether Pratt had any "physical impairments" as those words are used in the policy and understood by the parties. The trial court found in this connection that "David S. Pratt had a physical impairment, to wit, faulty vision, and at all times herein mentioned had faulty vision, a condition known to him at the time he made said ap-

plication for automobile liability insurance contract." This finding is supported by substantial evidence and cannot be disturbed on appeal. *Berniker v. Berniker*, 30 Cal.2d 439, 444, 182 P.2d 557. The trial court further found that at the time he made application for said automobile insurance contract defendant David S. Pratt "Did not have nor possess a valid California operator's license nor has he ever had or ever possessed, at any time mentioned herein, a valid California operator's license." This finding is also supported by substantial evidence and is not here questioned.

[3,4] Appellant contends that plaintiff Standard Accident Insurance Company is estopped to urge the warranties that Pratt had a valid California operator's license and did not have a physical impairment because it did not comply with section 443 of the Insurance Code, which reads as follows:

"Express warranty to be embodied in policy or other instrument. Every express warranty made at or before the execution of a policy shall be contained in the policy itself, or in another instrument signed by the insured and referred to in the policy, as making a part of it."

This contention is without merit. An express warranty is defined in section 441 of said code as "A statement in a policy of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof." The statements here involved and contained in the application were not referred to in the policy, contained therein or made a part thereof and therefore are not express warranties within the meaning of section 441 of the Insurance Code, *Isaac Upham Co. v. United States, etc., Co.*, 59 Cal.App. 606, 611, 211 P. 809; *Employers' Liability Assur. Corp. v. Industrial Accident Comm.*, 177 Cal. 771, 776, 171 P. 935, and even when statements in the application are declared to be warranties, they will not be regarded as such if qualified by other stipulations, which afford a fair inference that the parties did not so intend them. *National Bank of D. O. Mills & Co. v. Union Ins. Co.*, 88 Cal. 497, 506,

26 P. 509; *Wheaton v. North British & M. Insurance Co.*, 76 Cal. 415, 423, 18 P. 758. In 14 Cal.Jur. 422 it is said that the application is the proposal for insurance, and it is in reliance upon the facts stated in the application that the policy is usually issued and that an application is nothing more than a representation by a party when he applies for insurance.

[5] Section 359 of the Insurance Code provides that "If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time the representation became false." Section 351 of said code provides that "A representation may be made at the time of, or before, issuance of the policy." Section 331 of said code provides that "Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance." In *Mirich v. Underwriters at Lloyd's London*, 64 Cal.App.2d 522, 529, 149 P.2d 19, 24, it is held as follows:

"It is immaterial whether the omission to state the true facts was intentional or unintentional if defendant was misled by the statements that were made by the applicant. Section 331 of the Insurance Code * * * provides: 'Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance.' See also *Telford v. New York Life Ins. Co.*, 1937, 9 Cal.2d 103, 105, 69 P.2d 835; *Iverson v. Metropolitan Life, etc., Co.*, 1907, 151 Cal. 746, 91 P. 609, 13 L.R.A.,N.S., 866; and *Pierre v. Metropolitan Life Ins. Co.*, 1937, 22 Cal.App.2d 346, 70 P.2d 985."

Concealment is defined in section 330 of said code as neglect to communicate that which a party knows, and ought to communicate, and section 334 provides that "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries." There is substantial evidence

herein showing that Pratt concealed the fact that his eyesight was impaired, that he did not have a valid California operator's license and that his representations in the application respecting these matters were false. In either case the plaintiff insurance company was entitled to rescind the contract if the concealments or representations were material in inducing it to issue the policy.

Mr. Thompson, underwriting manager for the Departments of Insurance of the Automobile Club of Southern California, testified that in issuing an insurance policy, the company wanted information concerning operators' licenses and that:

"* * * [w]e take its presence to indicate two or three things, among them, first, that the applicant is operating his automobile legally, with the result that when we issue him a policy of insurance we are insuring a legal operation, and we do not wish to insure any but a legal operation; second, the possession of a California operator's license is proof of prima facie evidence, at least, that the applicant has passed some check as to his eyesight, and should therefore have sufficient vision to enable him to drive then in a reasonably safe manner; second, that he has at least an elementary or rudimentary knowledge of the motor vehicle laws of the State of California; and third, that he has demonstrated to an employee of the Department of Motor Vehicles a certain degree of driving proficiency behind the wheel. Those were the main reasons."

There was substantial testimony that if the company had known that Pratt did not have a valid California operator's license, it would not have taken his application. The record also discloses sufficient substantial testimony to support the inference that the representations made by Pratt in his application and here involved were material.

[6] Appellant argues that a rescission of the contract on October 12, 1951, is not binding upon appellant intervenor since the

accident in which she was injured occurred on August 4, 1951. However, where, as here, the rescission is made because of material false representations, it dates back to the time the representations became false and voided the policy ab initio. In *General Accident, etc., Corp. v. Industrial Accident Comm.*, 196 Cal. 179, 189, 237 P. 33, 37, it was held that:

"Material facts intentionally concealed or false representations made in reference to them with intent to mislead the insurer is fraud, which, at his option avoids the policy; and, where it is provided that a concealment will warrant the rescission of a contract of insurance, rescission is not an exclusive remedy, as contended by respondent Commission, and the insurer may set up the concealment in an action on the policy. 32 C.J., p. 1271."

In *Emery v. Pacific Employers Ins. Co.*, 8 Cal.2d 663, 67 P.2d 1046, plaintiffs recovered judgment against one James Bronis for injuries received when the automobile in which they were riding was struck by an automobile being driven and owned by Bronis. The judgment being unpaid, they brought action against the defendant insurance company upon a policy of automobile liability insurance, issued by it to Bronis, and the court held, 8 Cal.2d at page 665, 67 P.2d at page 1048:

"The contention of the defendant insurance company is that the policy is void by reason of false representations contained in the application for insurance and false warranties of the insured in the policy. By statutory provision and similar terms of the policy the right of the injured person who has secured judgment against the insured is to bring an action against the insurer 'on the policy and subject to its terms and limitations.' Hence if the policy is void or voidable as to Bronis, plaintiffs cannot recover thereon." (Citing cases.)

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.

TRADERS & GENERAL INSURANCE COMPANY, a corporation, Plaintiff and Respondent,

v.

PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation, Loren C. Rosenthal, Dorothy L. Rosenthal, Inez Shinn, Scotty G. Harris and John J. Harris and Harris Motor Company, Defendants,

Pacific Employers Insurance Company, a Corporation, Appellant.

Civ. 20290.

District Court of Appeal, Second District, Division 1, California.

Jan. 10, 1955.

Hearing Denied March 9, 1955.

Action by conditional vendee's automobile liability insurer against conditional vendor's liability insurer for declaratory judgment determining liability on judgment for personal injury sustained when automobile on conditional sale to vendee was involved in collision. The Superior Court, Los Angeles County, W. I. Gilbert, Jr., J. pro tem., entered judgment against respective insurers for stipulated amounts, and vendor's insurer appealed. The District Court of Appeal, Mosk, J. pro tem., 276 P.2d 628, held, *inter alia*, that where conditional vendor's liability policy was not restricted in coverage to the named insured, but included users with permission, vendor's insurer was not entitled to subrogation against a user who was involved in accident or against user's liability insurer. On rehearing, the same court adhered to the previous determination.

Judgment affirmed.

1. Appeal and Error ⇨835(2)

Ordinarily, new matter will not be considered on a petition for rehearing.

2. Insurance ⇨136(1)

The cardinal purpose of statute providing that original or true copy of automobile liability policy shall be delivered to each owner is to acquaint the insured with all of the terms of the contract of insurance as a necessary incident to prevention of fraud or mistake concerning the cover-

age and the conditions attached to coverage. Insurance Code, § 383.5.

3. Insurance ⇨435.2

Statute requiring that original or true copy of automobile liability policy shall be delivered to each "owner" defines "owner" only for purpose of that section, and did not operate to establish as "owner" a conditional vendee who obtained insurance, or effect question of liability as between the liability insurers of conditional vendee and vendor respectively. Insurance Code, § 383.5.

4. Automobiles ⇨192(8)

Where conditional vendor delivered possession of automobile to conditional vendee and failed to give notice of transfer to department of motor vehicles prior to occurrence of accident, vendor was considered owner of vehicle and vendee was considered operator with permission of owner. Vehicle Code, §§ 177, 402.

5. Insurance ⇨435.2

Conditional vendee's automobile liability policy provision that "Except with respect to bailment lease, conditional sales, mortgage or other encumbrance the named insured is the sole owner of the automobile except as herein stated: No Exceptions" did not operate to establish vendee as owner for purpose of determining respective liabilities of liability insurers of vendee and vendor.

6. Contracts ⇨167

All applicable law enters into and is a part of every contract by inference.

7. Insurance ⇨78

Where automobile dealer was agent of insurer to bind insurer to insurance risk, but not an agent to transfer automobile on behalf of insurer, any omission of agent in legal requisites for transfer of automobile was not attributable to insurer on agency theory.

8. Estoppel ⇨56

A change in position in reliance on another's word or conduct is an essential element of estoppel, and absence thereof prevents application of the doctrine.

9. Insurance ⇨373(1)

Where conditional vendor's automobile liability insurer had not acted or changed its position in reliance on anything done by vendee's insurer or by vendor, vendee's liability insurer, even though vendor, who was agent of vendee's insurer, had failed to transfer title to vendee, was not estopped, under terms of policy, to deny ownership in vendee. Vehicle Code, §§ 177, 178, 402.

10. Insurance ⇨512½

Where no title to automobile passed to conditional vendee, conditional vendor's liability insurer, who sought to establish vendee as owner for purpose of imposing liability on vendee's liability insurer, could not take advantage of its policy clause stating that policy should be excess insurance in respect to loss arising from an automobile other than one owned by named insured.

11. Automobiles ⇨192(1)

Insurance ⇨512½

There is no such thing as primary and secondary liability as between the vehicle owner and the operator thereof with permission, and, where owner and operator were both covered by liability insurance, liability of respected insurers would be determined under pro rata clauses, rather than on basis of primary and secondary liability.

12. Insurance ⇨606(5)

Where conditional vendor's automobile liability policy was not restricted in coverage to the named insured, but included users with permission, vendor's insurer was not entitled to subrogation against a user who was involved in accident or against user's liability insurer.

Frank W. Woodhead, and Robert E. Morrow, Los Angeles, for appellant.

W. P. Smith, and Henry F. Walker, Los Angeles, for respondent.

MOSK, Justice pro tem.

A rehearing was granted in this case in order that we might give consideration to the contention raised for the first time on

the petition for rehearing filed by appellant Pacific Employers Insurance Company as to the applicability of section 383.5 of the Insurance Code.

[1] It is well-settled that ordinarily new matter will not be considered on a petition for rehearing. *Dougherty v. Henarie*, 49 Cal. 686; *Prince v. Hill*, 170 Cal. 192, 195, 149 P. 578; *Epperson v. Rosemond*, 100 Cal.App.2d 344, 348, 223 P.2d 655, 224 P.2d 480. Criticism of the practice of raising new points in petitions for rehearing was expressed by the Supreme Court as early as 1857 in the case of *Andrews v. Mokelumne Hill Co.*, 7 Cal. 330, 334. Although the admonition in *Andrews* is well worth repetition and emphasis, we have considered and shall dispose of the problem on its merits.

The pertinent portion of Ins.Code § 383.5 reads as follows: "§ 383.5. Contracts of motor vehicle insurance: Definitions: Form and delivery of contract; Violation of section: Purpose. * * *

"'Owner' as used in this section means any person who is named as an insured in such contract of insurance or document, or in a loss payable clause therein, and, whether or not he is named therein, the vendee, pledgor, or chattel mortgagor of a motor vehicle where insurance contracts subject to this section are procured with respect to the motor vehicle by or on behalf of either party to the purchase, pledge, or mortgage."

The definition of "owner" is by the provisions of § 383.5 limited to "as used in this section". This is necessarily so, for "owner" is variously defined elsewhere in the codes. For example, see Veh.Code, §§ 66, 67, 402, 176, 177, 716. If we consider "section", as used in § 383.5, in its broadest aspect, the four included articles, Ins.Code, §§ 380-449, cover definition and scope, types of policies, insurer's name on policy and warranties. None of the included sections are applicable to the case at hand.

Section 383.5 has as its avowed purpose "to prevent fraud or mistake in connection with the transaction of insurance covering motor vehicles" by requiring delivery of the original or a true copy of the policy "to each owner" as therein defined. Ob-

viously it is desirable, and the legislature considered it important enough to enact the requirement in 1941, for the insurer to be obligated to provide a copy of the document, which is described in § 383.5, to the owner, who is described in the same section as virtually every person who could conceivably be affected by insurance coverage.

[2] That the foregoing is the intent of § 383.5 was held in *Frieze v. West American Ins. Co.*, 8 Cir., 188 F.2d 331. The court there pointed out, at page 335 " * * * that the State of California has adopted as the public policy of that State the requirement that the document constituting the original policy or a true copy thereof shall be delivered to each 'owner' in order that fraud or mistake in connection with the transaction of insurance covering motor vehicles be prevented. See Sec. 383.5 supra. * * * If, as the statute clearly states, the purpose of the requirement that the original policy or a true copy thereof be given the (owner) was to prevent fraud or mistake, we must reach the conclusion that a cardinal purpose of the statute was to acquaint the assured with all of the terms of the contract of insurance as a necessary incident to the prevention of fraud or mistake * * *." A rehearing in *Frieze* was denied, 8 Cir., 190 F.2d 381, 382, the court stating it had considered "the effect of section 383.5".

The same conclusion was reached in 8 Op.Atty.Gen. 358. That opinion was devoted to discussing what activities constitute fraud or mistake, the prevention of which was "the stated purpose of the section", and the regulatory powers of the insurance commissioner in furtherance of the stated purpose of the section.

In only one other case has § 383.5 been considered: *United Pacific Ins. Co. v. Ohio Casualty Ins. Co.*, 9 Cir., 172 F.2d 836. That case is not particularly helpful, however, since it involved the question of whether a partner unnamed in a policy became an owner by operation of the statute. The court held he did not.

[3] We perceive nothing in the code section relied upon by appellant that ex-

tends its application beyond the purpose stated therein: to prevent fraud or mistake by requiring agents or brokers to deliver an original or copy of an insurance policy to each owner, as owner is defined for that purpose only. The section is not sufficiently elastic to be stretched into the area involved herein, nor does it indicate a legislative intent to have it prevail over the dominant authorities cited in our opinion heretofore rendered, which we hereby adopt and which reads as follows:

As the result of a judgment in a negligence lawsuit, Traders & General Insurance Company, a corporation (herein called Traders) and Pacific Employers Insurance Company, a corporation (herein called Pacific) found themselves in disagreement over insurance coverage of the defendants therein found liable. This declaratory relief action resulted.

Scotty G. Harris and John J. Harris were co-partners conducting an automobile dealership in Ventura under the fictitious firm name of Harris Motor Company (herein called Harris). Pacific issued its policy of automobile liability insurance to Harris on March 21, 1950. Some time prior to January 10, 1951, Harris acquired and was the owner of a 1950 De Soto coupe automobile.

At approximately 2 o'clock on the afternoon of the 10th of January, Harris entered into a sales contract as conditional vendor with one Inez Shinn (herein called Shinn) as conditional vendee, involving the De Soto. At that time Shinn made the first required payment, signed the appropriate line on the certificate of ownership for transfer by a new registered owner, and thereupon was given possession of the vehicle by Harris. The certificate of ownership was not delivered to Shinn. No notice of any transfer of the De Soto was given to the Department of Motor Vehicles until January 26, 1951. This was found by the trial court to be "the lapse of an unreasonable length of time following the delivery of said motor vehicle" to Shinn.

At about 7:50 p. m. on the 10th of January, while operating the De Soto, Shinn collided with a vehicle driven by Loren C.

Rosenthal and in which his wife Dorothy L. Rosenthal was riding. The Rosenthals sustained personal injuries for which they brought an action in Ventura Superior Court, and obtained a judgment against Shinn and Harris in the sum of \$7,313.46. This, except for a reduction of \$39.82, was affirmed on appeal. *Rosenthal v. Harris Motor Co.*, 118 Cal.App.2d 403, 257 P.2d 1034. At the time of this proceeding the judgment was final. It was stipulated that on January 10th the Pacific policy was in full force and effect. Harris was an agent of Traders with power to bind insurance risks, and on that date executed a policy of automobile liability insurance with Shinn as named insured. It was stipulated that the Traders policy was also in full force and effect at the time of the accident.

Traders instituted this declaratory relief action, and as the prevailing party has become the respondent herein. The trial court concluded that at the time of the accident Harris was the owner of the De Soto, and it was being driven by Shinn with the permission of Harris. Based upon that and other conclusions hereinafter discussed, the court entered its judgment against Pacific for 20/21sts and Traders for 1/21st of the Rosenthal judgment.

The first contention of appellant is that the court erred in finding that Shinn was driving the De Soto at the time of the accident with the consent and permission of Harris. To the contrary, insists Pacific, by virtue of the contract and operation of law Shinn was the owner and as such was covered solely by Traders.

[4] But the rule is now well settled that a conditional vendor is considered the owner of a vehicle and the conditional vendee is held to be the operator with permission of the owner, where the vendor delivers possession to the vendee and fails to comply with section 177 with reference to giving notice of the transfer prior to the occurrence of the accident. *Veh.Code*, §§ 402 and 177; *Guillot v. Hagman*, 30 Cal. App.2d 582, 86 P.2d 865; *Votaw v. Farmers Automobile Inter-Ins. Exch.*, 15 Cal.2d 24, 27, 97 P.2d 958, 126 A.L.R. 538; *Ferri v. Pacific Finance Corp.*, 21 Cal.2d 773,

135 P.2d 569; Bunch v. Kin, 2 Cal.App.2d 81, 37 P.2d 744. In Gutknecht v. Johnson, 62 Cal.App.2d 315, 144 P.2d 854, 856, the accident occurred the day following the execution of the conditional sale contract and the Department of Motor Vehicles was not notified for six days. The court held the conditional vendor was the owner and liable for the negligent operation by the vendee "where he delivers possession of the car to the vendee and fails to comply with section 177 (of the Vehicle Code) with reference to giving notice of the transfer prior to the occurrence of the accident". To the same effect is Leplat v. Raley Wiles Auto Sales, 62 Cal.App.2d 628, 145 P.2d 350. And conclusively so far as we are concerned, the same rule was again enunciated in Rosenthal v. Harris Motor Co., supra, 118 Cal.App.2d at page 406, 257 P.2d 1034.

The conditional sales contract between Harris and Shinn provided title was not to pass from the vendor until full payment of the entire contract balance. Even if this were not conclusive, however, Vehicle Code, § 186(a) provides that "No transfer of the title or any interest in or to a vehicle registered hereunder shall pass and any attempted transfer shall not be effective unless and until" certain requirements have been met, notably notification of the Department of Motor Vehicles, which as hereinbefore indicated was not undertaken until sixteen days after the accident.

[5] Pacific concedes there are numerous authorities holding a conditional vendor liable under Veh.Code, § 402 where there has been non-compliance with the provisions relating to transfer. But, it insists, this is for the protection of innocent third party victims of negligence; in the instant case Traders seeks to relieve itself from contractual obligations by virtue of the fortuitous circumstance that Harris, its own authorized agent, had failed to perform his duty imposed by law relating to transfers. As a result of this conduct, and the provisions of item number 6 in the Traders policy declarations, an estoppel is urged to prevent Traders from denying ownership in Shinn, its named insured.

This item reads as follows: "Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the named insured is the sole owner of the automobile, except as herein stated: No Exceptions."

Several reasons persuade us the Pacific position is untenable. First of all, we do not read item six as an unqualified concession by Traders that Shinn is the owner of the automobile. The clause expressly excepts from sole ownership status the relationship resulting from a conditional sale. The added words "no exceptions" do not eliminate the conditional sales relationship, for it is undisputed that the Harris-Shinn transaction was a conditional sale. Even if we must cling to strict semantics, however, we believe the second "except" and "no exceptions" cancel each other, comparable to the manner in which two negatives constitute a positive. Thus in effect the provision reads, "except as to the conditional sale, the vendee is the owner".

[6] Secondly, all applicable law enters into and is a part of every contract by inference (12 Cal.Jur.2d 348), and this is no exception. Since the law, Veh.Code, §§ 402, 177 and 178, makes the conditional vendor the owner, as convincingly noted by the trial court, it would be paradoxical indeed if under these circumstances one is held to be the owner under the law but not under his insurance contract. Norris v. Pacific Indemnity Co., 39 Cal.2d 420, 247 P.2d 1, upon which appellant relies, does not so hold. In that case the facts revealed that the owner's son, contrary to express instructions, lent the car to the driver, a situation the court determined to be operation without consent.

[7] Thirdly, while Harris was the agent of Traders, it bore that relationship to bind Traders to insurance risks, not to sell or transfer automobiles on its behalf. Thus any omission of Harris in the legal requisites for the transfer of the vehicle is not attributable to Traders on an agency theory.

[8,9] Finally, as irrefutably pointed out by the trial court, there can be no estoppel

here because Pacific in no way acted or changed its position in reliance on anything done by Traders or Harris. The Pacific policy had been outstanding for about ten months before the Traders binder was issued. A change in position in reliance on another's work or conduct is an essential element of estoppel. Its absence prevents application of the doctrine. *Safeway Steel Products, Inc., v. Lefever*, 117 Cal.App.2d 489, 256 P.2d 32; 18 Cal.Jur.2d 406.

Pacific next contends that its coverage is excess insurance whereas that provided by Traders is primary insurance. Excess insurance has been defined as that which provides coverage only for loss in excess of other valid and collectible insurance. (5 Stanford L.Rev. 147.)

Condition 12 of the Pacific policy provides:

"12. Other Insurance.

"If the Insured has other insurance against a loss covered by this policy, the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the Declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; providing however, that the insurance under this policy shall be excess insurance with respect to (1) loss arising out of the use of any non-owned automobile * * *" The policy defines an owned automobile as "an automobile owned by the named insured" and a non-owned automobile as "any other automobile."

[10] The first portion of the foregoing condition provides for pro-rate liability, which has been defined as the apportionment of the loss with other valid and collectible insurance. Under the second portion, Pacific insists it escapes liability, since the policy was for excess insurance on the vehicle which was non-owned by Harris because it was owned by Shinn. However, the major premise of this syllogism falls, for as hereinbefore discussed, no title passed to the conditional vendee from Harris either pursuant to the contract or by virtue of law.

This leaves applicable the pro-rate provisions of the Pacific policy, which are substantially the same as the pro-rate clause in the Traders policy. Under these circumstances, argues appellant, since there is overlapping or double coverage the court should compare the "other insurance" clauses of both policies and hold that since Shinn was the primary tort-feasor and the named insured in the Traders policy, Traders should be primarily responsible and Pacific liable only for the excess, if any.

Many jurisdictions distinguish between primary and secondary liability and apply excess coverage only to the later. *Commercial Casualty Ins. Co. v. Hartford Acc. & Indem. Co.*, 190 Minn. 528, 252 N.W. 434, 253 N.W. 888; *Trinity Universal Ins. Co. v. General Acc., F. & L. A. Corp.*, 138 Ohio St. 488, 35 N.E.2d 836; *American Surety Co. of New York v. American Indemnity Co.*, 8 N.J.Super. 343, 72 A.2d 798; *Speier v. Ayling*, 158 Pa.Super. 404, 45 A.2d 385; *Commercial Cas. Ins. Co. v. Hartford Acc. & Indem. Co.*, 190 Minn. 528, 252 N.W. 434, 253 N.W. 888; *Zurich General Accident & Liability Ins. Co. v. Clamor*, 7 Cir., 124 F.2d 717; *Great American Indemnity Co. v. McMenamin*, Tex.Civ.App., 134 S.W. 2d 734.

[11] But that theory has been expressly rejected in this state. "This principle cannot apply in California", said the court in *Air Transport Mfg. Co. v. Employers' Liab., etc., Corp.*, 91 Cal.App.2d 129, 132, 204 P.2d 647, 649, "for the reason that there is no such thing as primary and secondary liability as between a vehicle owner and the operator thereof with permission." To the same effect is *Consolidated Shippers v. Pacific Employers Ins. Co.*, 45 Cal.App.2d 288, 114 P.2d 34.

Appellant finally urges that the trial court erred in not giving it the benefit of subrogation, pursuant to Vehicle Code § 402(d), which provides "In the event a recovery is had under the provisions of this section against an owner on account of imputed negligence, such owner is subrogated to all the rights of the person injured or whose property has been injured and may recover from such operator the total amount of any judgment and costs recov-

ered against such owner. * * * In its brief appellant contends it has been uniformly held that the insurer of the party who is secondarily liable has excess coverage, and the insurer of the party primarily liable has primary coverage. It cites cases from several jurisdictions, but overlooks California law to the contrary as hereinbefore noted. Employers Liability Assur. Corp. of London, England v. Pacific, etc., Ins. Co., 102 Cal.App.2d 188, 192, 227 P.2d 53; Air Transport Mfg. Co. v. Employers' Liab., etc., Corp., supra; Consolidated Shippers v. Pacific Employers Ins. Co., supra.

Nevertheless, insists appellant, even if Harris was liable as owner, under Vehicle Code § 402 Harris would be entitled to indemnity from Shinn; as Harris' insurance carrier, then Pacific would be entitled to reimbursement from Traders, which covers Shinn; to prevent this multiplicity and circuitry of lawsuits, the trial court should have recognized Pacific's right of subrogation. Aetna Casualty & Surety Co. v. Buckeye Union Cas. Co., 157 Ohio St. 385, 105 N.E.2d 568, 31 A.L.R.2d 1317; Central Surety & Ins. Corp. v. London & Lancashire I. Co., 181 Wash. 353, 43 P.2d 12. This contention, however, is built upon the erroneous belief that the Pacific policy covered only Harris' liability as owner and did not provide any coverage for the operator, Shinn.

[12] The Pacific policy was not restricted in coverage to the named insured. The insured to whom coverage was granted included not only the named insured but also any person using an automobile covered thereby with permission of the named insured. As operator of the De Soto with the permission of the owner Harris, Shinn was expressly included as an insured under the Pacific policy.

There is no question of the accuracy of the court's computation, since counsel conceded in open court that the pro-rate distribution of financial responsibility, if found to be appropriate, is 20/21sts against Pacific and 1/21st against Traders.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

130 Cal.App.2d 134

John F. SULLIVAN, Plaintiff and
Respondent,
v.

George J. MATT, Don K. Miller and Southern Pacific Company, et al., Defendants and Appellants.
Civ. 20221.

District Court of Appeal, Second District,
Division 3, California.
Jan. 6, 1955.

Rehearing Denied Jan. 25, 1955.
Hearing Denied March 3, 1955.

Action for damages for personal injuries sustained from an assault made upon plaintiff by representatives of the defendant railroad. Judgment for plaintiff for \$10,000 compensatory damages and \$10,000 exemplary damages against all defendants in the Superior Court of Los Angeles County, C. C. McDonald, J., and the defendants appealed. The District Court of Appeal, Vallée, J., held that the plaintiff in using a parking lot was not engaged in interstate commerce, so as to make the Federal Employers' Liability Act applicable, and that all defendants were liable for compensatory damages for the injuries sustained by plaintiff, and that the individual representatives of the defendant were liable for the exemplary damages but that the railroad was not liable for exemplary damages.

Judgment against the individual defendants affirmed and judgment against the defendant railroad modified by striking therefrom the award of exemplary damages.

1. Master and Servant ☞87

If the facts bring the case within the provision of the Federal Employers' Liability Act that every railroad common carrier while engaging in interstate commerce is liable to any person suffering injury while so employed by the carrier in such commerce resulting from negligence of any of the officers or employees of the carrier, the Act controls. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

2. Master and Servant ☞89(1)

Generally an employee is deemed "in the course of his employment" while following his only practicable route of imme-

diating ingress and egress. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

See publication Words and Phrases, for other judicial constructions and definitions of "In Course of Employment".

3. Master and Servant ⇨284(1)

Where more than one inference can be drawn from the evidence the question of whether an employee was at time of receiving injury sued for engaged in interstate commerce within the Employers' Liability Act is for the jury. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

4. Master and Servant ⇨284(3)

Generally whether an employee was acting in course of his employment at time of receiving injury within the Employers' Liability Act is a question of fact. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

5. Master and Servant ⇨276(1, 10)

Evidence warranted jury in finding that railroad employee in using a parking lot was not engaged in "interstate commerce" and was acting in course of his employment when assaulted by representatives of railroad and hence the Federal Employers' Liability Act was not applicable. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

See publication Words and Phrases, for other judicial constructions and definitions of "Interstate Commerce".

6. Master and Servant ⇨302(3, 6)

A master is liable for an assault committed by servant, where act was done within scope of servant's employment, but is not liable where wrongful act is one which the servant is not authorized to do in the nature of his employment but where the servant has for some purpose of own departed from his master's business.

7. Master and Servant ⇨302(1)

Authorization of master to perform an act which occasioned an injury to a third person need not be expressly conferred, in order to fasten liability on the master for the act of the servant, and responsibility attaches, if the act is committed by virtue of authority, which fairly may be implied

from the nature of the employment and the duties incident thereto.

8. Master and Servant ⇨279(7)

Evidence authorized finding that representatives of defendant railroad were acting within course of their employment in allegedly committing an assault upon another railroad employee and that it did not arise out of a private quarrel between the participants.

9. Appeal and Error ⇨1061(3)

Where defendant at close of plaintiff's case made a motion for judgment of nonsuit, and before grounds of motion could be stated, trial judge stated that he would not hear any argument, error if any was not prejudicial, where it was patent that if grounds had been stated the motion would have been denied.

10. Appeal and Error ⇨216(1, 2)

In the absence of a request for clarification of given instructions or that a desired instruction be given, a party cannot complain on review of the court's failure to take such action.

11. Appeal and Error ⇨216(1, 2)

In employee's action against railroad for injuries where the railroad did not propose any instructions with respect to its theory that facts brought the case within the Federal Employers' Liability Act nor was any request made for clarification of instructions proffered by the employee, the railroad was not entitled to complain on appeal.

12. Appeal and Error ⇨1064(4)

Repetition in instructions alone is not reversible error.

13. Appeal and Error ⇨1004(1)

Remedy for an excessive verdict is generally with the trial judge, and a reviewing court may not interfere with an award of damages, unless the amount is so outrageously excessive as to immediately suggest passion or prejudice.

14. Assault and Battery ⇨40

Evidence justified an award of \$10,000 damages against railroad for an assault committed upon railroad employee by railroad representatives where the jury im-

pliedly found that the assault was willful and malicious. Civ.Code, § 3294.

Wm. C. Wetherbee, Los Angeles, for respondent.

15. New Trial ⇨163(2)

Where jury in awarding damages for an assault found that it was willful and malicious, the trial judge in denying motions for a new trial in effect approved the finding of the jury.

16. Damages ⇨208(8)

Generally the granting or withholding of exemplary damages is wholly within the discretion of the trier of fact. Civ.Code, § 3294.

17. Damages ⇨94

Exemplary damages should be reasonable with relation to the actual damages but there is no fixed ratio by which to determine the proportion between the two classes of damages. Civ.Code, § 3294.

18. Assault and Battery ⇨40

Evidence justified an award of \$10,000 exemplary damages against railroad representatives for an assault committed upon another railroad employee, where the jury awarded \$10,000 compensatory damages, since the relation between the awards appeared to be reasonable. Civ.Code, § 3294.

19. Master and Servant ⇨185(28)

The mere retention of employees in service whose special skill and experience are necessary to operation of employer's operations is not a ratification of their malicious acts committed upon another employee within the course of their employment.

20. Master and Servant ⇨282

An award of exemplary damages against railroad for an assault committed by its representatives on another employee could not be sustained, where there was no evidence of malice on the part of the railroad, and the mere fact that the railroad retained the representatives in its service was not a ratification of their tortious acts where both of them had special skill and experience.

VALLÉE, Justice.

Appeal by defendants from an adverse judgment entered on a jury verdict in an action for damages for personal injuries.

The injuries resulted from an assault made on plaintiff by defendants Matt and Miller on May 10, 1951. For several years prior to that time plaintiff and defendants Matt and Miller were employees of defendant Southern Pacific Company. Matt became superintendent of the Los Angeles Terminal in April 1950. Miller was terminal trainmaster under Matt. At the time of the assault plaintiff was a yardman in the Los Angeles Terminal. Matt had been plaintiff's superior for several years. He had complete charge and supervision of plaintiff and all employees at the company's Los Angeles yard. Matt and plaintiff had a number of unpleasant experiences and Matt disliked plaintiff.

When Matt became superintendent, his secretary was Evelyn Heinbaugh. Plaintiff began keeping company with Mrs. Heinbaugh, seeing her both on and off the job. Matt objected, and overworked, abused, and harassed plaintiff. Plaintiff advised the division superintendent of Matt's treatment, but nothing was done about it. Matt told plaintiff and Mrs. Heinbaugh that if they did not stop seeing each other they would lose their jobs; that it was bad for the company. In March 1951 plaintiff voluntarily reduced his rank from general yardmaster to yardmaster, and later to yardman, to avoid direct contact with Matt. Matt attempted intimacies with Evelyn Heinbaugh. When she resisted he became belligerent and she was compelled to take another position with the company where she was not working directly under him.

Matt testified he thought the conduct of plaintiff and Mrs. Heinbaugh was detrimental to Southern Pacific Company and that it constituted indifference and negligence in the performance of their duties in violation of company rule 801 which provided in part, "Indifference in the performance of duties will not be condoned." It

Slane, Mantalica & Davis, C. W. Cornell, Edward A. Hume, and John H. Gordon, Los Angeles, for appellants.

was his duty to enforce the rule by assessing demerits or instituting disciplinary proceedings. Prior to the assault he did not take any action against either plaintiff or Mrs. Heinbaugh.

Matt knew plaintiff customarily parked his car at the H & H service station prior to going on his 2:59 p. m. shift and that Mrs. Heinbaugh accompanied him as a passenger. He was familiar with automobiles purchased by the company, but he did not make a practice of inspecting them. On the day of the altercation Matt called Miller, cancelled Miller's arrangement to join a Mr. Olson in picking up a new company Ford, and arranged to accompany Miller himself. While Matt and Miller were on duty they picked up the Ford and took it to the H & H service station to inspect it, but did not look inside it before the altercation.

The H & H service station was located at the northeast corner of Alice Street and San Fernando Road and was owned by a Mr. Herrick. The Southern Pacific Company yards were across San Fernando Road with a wire fence between the highway and the Southern Pacific property. Granada Street was one block north of Alice Street. At the north sidewalk of Granada Street there was a stairway to a bridge across San Fernando Road, providing ingress and egress to and from the company property. Between the service station and Granada Street there were a hardware store, a garage, a repair shop, and other buildings. The owner of the service station property used part of it as a parking lot. Southern Pacific Company and individual employees of the company parked cars on the lot.

At 2:38 p. m. on May 10, 1951, plaintiff, driving his car, drove into the parking lot accompanied by Mrs. Heinbaugh. As he did, Mrs. Heinbaugh asked him if they had time for coffee. He was due to report at work at 2:59 p. m. Matt and Miller were on the parking lot; Matt next to the Ford, Miller behind it. As plaintiff parked his car, Matt in a loud voice said, "There is that pimp and his two-bit chippie now." Plaintiff walked over to Matt and demanded

that he go over and apologize to Mrs. Heinbaugh. Matt took a swing at plaintiff and Miller hit plaintiff on the jaw. Plaintiff said to Miller, "What, you too?" Miller said, "Yes, you S. B." A fight followed, Matt and Miller beating plaintiff. The fight stopped, plaintiff walked away, Miller followed, the fight resumed, and Matt struck plaintiff on the head with a pick handle and "the lights went out." Plaintiff was severely injured. During the fight Matt yelled at plaintiff and Mrs. Heinbaugh, "You're both out of service for this."

Immediately following the fracas, Matt went to the office of the company and ordered plaintiff out of service. Later plaintiff was charged with violation of company rule 801 in being quarrelsome and vicious, and with violation of rule 802 in entering into an altercation. After a hearing, plaintiff was discharged. Miller was later promoted to superintendent of the Union Station on Matt's recommendation. At the hearing Miller testified that plaintiff struck Matt two or three times before he (Miller) entered the altercation. At the trial of the present action Miller testified that plaintiff did not strike Matt before he (Miller) assaulted plaintiff.

The complaint alleged that defendants, and each of them, assaulted and beat plaintiff and did so with malice, wantonness, and ill will. The jury returned a verdict for plaintiff against all defendants for \$10,000 compensatory damages and \$15,000 exemplary damages. On motion of plaintiff, the exemplary damages were reduced to \$10,000 to conform to the allegations of the complaint. Defendants appeal from the judgment which followed.

Southern Pacific Company contends that the rights, duties, and obligations of plaintiff and of the company were at the time in question governed by the Federal Employers' Liability Act.¹ The contention is predicated on the untenable premise that, as a matter of law, the parking lot was adjacent to the premises of the company and was plaintiff's only practicable route of immediate ingress to his work; therefore, plaintiff was engaged in interstate com-

1. 45 U.S.C.A. § 51.

merce and was acting in the course of his employment at the time.

[1-5] Every common carrier by railroad while engaging in interstate commerce is liable in damages to any person suffering injury while he is so employed by such carrier in such commerce resulting from the negligence of any of the officers, agents, or employees of such carrier. 45 U.S.C.A. § 51. If the facts bring the case within the Federal Employers' Liability Act, that act controls. *Hosman v. Southern Pacific Co.*, 28 Cal.App.2d 621, 624, 83 P.2d 88. As a general rule an employee is deemed to be in the course of his employment while following his only practicable route of immediate ingress and egress. *Erie R. Co. v. Winfield*, 244 U.S. 170, 173, 37 S.Ct. 556, 61 L.Ed. 1057, 1065; *Cudahy Packing Co. of Nebraska v. Parramore*, 263 U.S. 418, 421, 44 S.Ct. 153, 68 L.Ed. 366, 368, 30 A.L.R. 532; *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 158, 48 S.Ct. 221, 72 L.Ed. 507, 508, 66 A.L.R. 1402; *Monteiro v. Paco Tankers, D.C.*, 93 F.Supp. 93, 95. Where more than one inference can be drawn from the evidence, the question whether an employee was, at the time of receiving the injury sued for, engaged in interstate commerce, is for the jury. *Pennsylvania Co. v. Donat*, 239 U.S. 50, 36 S.Ct. 4, 60 L.Ed. 139, 140; *Southern R. Co. v. Lloyd*, 239 U.S. 496, 36 S.Ct. 210, 60 L.Ed. 402, 406; *Williams v. Southern Pac. Co.*, 54 Cal. App. 571, 582, 202 P. 356, certiorari denied 258 U.S. 622, 42 S.Ct. 315, 66 L.Ed. 796; *Myers v. Southern Pacific Co.*, 14 Cal.App. 2d 287, 293, 58 P.2d 387. Generally, whether an employee was acting in the course of his employment at the time of receiving the injury is a question of fact. *Loper v. Morrison*, 23 Cal.2d 600, 607, 145 P.2d 1; *Industrial Indemnity Co. v. Industrial Accident Comm.*, 108 Cal.App.2d 632, 635, 239 P.2d 477. It cannot be said, as a matter of law, that in using the parking lot plaintiff was going to his work by the only practicable route of immediate ingress. It seems obvious that the jury was warranted in finding, as it impliedly did find, that plaintiff was not engaged in interstate commerce and was not acting in the course of his employ-

ment at the time in question. The Federal Employers' Liability Act is not applicable.

[6] Southern Pacific Company next contends the verdict against it is without support in the evidence. Plaintiff's injuries grew out of a private quarrel, so the argument goes, and had nothing to do with the furthering of the business of the company in interstate commerce; and Matt's motivation sprang from some personal malice between himself and plaintiff, citing *Carr v. Wm. C. Crowell Co.*, 28 Cal.2d 652, 171 P. 2d 5; *Yates v. Taft Lodge No. 1527*, 6 Cal. App.2d 389, 44 P.2d 409, and *Linck v. Matheson*, 63 Wash. 593, 116 P. 282. In *Carr v. Wm. C. Crowell Co.*, supra, the court said, 28 Cal.2d at page 656, 171 P.2d at page 8: "If an employee inflicts an injury out of personal malice, *not engendered by the employment*, the employer is not liable." (Italics added.) In *Yates v. Taft Lodge No. 1527*, supra, it is said, 6 Cal.App.2d at pages 390, 392, 44 P.2d at page 410: "It is well settled that a master is liable for an assault committed by his servant where the act is done within the scope of the servant's employment and that he is not liable where the wrongful act is one which the servant was not authorized or empowered to do under the nature of his employment, but where the servant has, for some purpose of his own, departed from his master's business. * * * In engaging in this controversy with the landlord over the interpretation of this contract, with which he was not concerned, we think he stepped aside from his duty and entered into a personal controversy, allowing his own resentment to lead him into an act which was outside the scope of his employment and beyond any express or implied authority conferred upon him by his employer." The Supreme Court of Washington in *Linck v. Matheson*, supra, 116 P. 284, stated: "'On the other hand, if the assault and battery made upon plaintiff was occasioned by reason of ill will, jealousy, hatred, or other ill feeling on the part of the waiter or waiters, independent of their duty as agents of the proprietor toward the lady in question, then the proprietor would not be holden in damages.'"

Plaintiff argues that on three theories there was abundant evidence that Matt and Miller were acting for and in the interests of Southern Pacific Company in assaulting him and running him out of service: (1) If association on the job creates frictions arising out of the work which result in an assault of one employee upon another, the conduct of the employee may be imputed to the employer because it is related to the employment, *Carr v. Wm. C. Crowell Co.*, supra, 28 Cal.2d 652, 171 P.2d 5; (2) Matt and Miller were acting within the course of their employment in making the assault; (3) Southern Pacific Company, with full knowledge of the surrounding circumstances, approved and ratified the actions of Matt and Miller from which liability follows.

In *Carr v. Wm. C. Crowell Co.*, supra, 28 Cal.2d at page 654, 171 P.2d at page 7, the court had this to say: "It is sufficient, however, if the injury resulted from a dispute arising out of the employment. Under the provisions of section 2338 of the Civil Code a principal is liable for 'wrongful acts' of his agent committed 'in and as a part of' the principal's business. 'It is not necessary that the assault should have been made 'as a means, or for the purpose of performing the work he (the employee) was employed to do.'" * * * The employer's responsibility for the tortious conduct of his employee 'extends far beyond his actual or possible control over the conduct of the servant. It rests on the broader ground that every man who prefers to manage his affairs through others remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others' while acting in the scope of their employment."

[7] Authorization of the master to perform an act which occasions injury to a

2. The instructions read: "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

"A battery is any wilful and unlawful use of force or violence upon the person of another.

"If you find the defendant, George J. Matt, or defendant, Don K. Miller, as an

third person need not be expressly conferred in order to fasten liability on the master. Responsibility attaches to the master if the act is committed by virtue of authority which fairly may be implied from the nature of the employment and the duties incident thereto. *Jameson v. Gavett*, 22 Cal.App.2d 646, 651, 71 P.2d 937.

[8] Application of these principles to the facts impels the conclusion that there was evidence that the assault was "engendered by the employment" and was committed in the prosecution of the business of Southern Pacific Company. The evidence was ample to show that the assault was not perpetrated by Matt solely on his own account. It clearly indicated that one of his purposes was to further the interests of the company. We cannot say there was an entire absence of any evidence to support the implied finding of the jury that Matt and Miller were acting within the course of their employment at the time the assault was committed. We think the jury could have concluded that Matt and Miller were acting within the course of their employment.

[9] At the close of plaintiff's case, Southern Pacific Company made a motion for a judgment of nonsuit. Before the grounds of the motion could be stated, the trial judge said he did not want to hear any argument. The company asserts error. The error, if any, was not prejudicial. It is patent from the record that if the grounds had been stated the motion would have been denied. Further, under the circumstances, it will be assumed the motion was made on all possible grounds; and we are not informed of any ground.

[10,11] At the request of plaintiff the court gave the instructions quoted in the margin.² Southern Pacific Company ar-

employee and agent of defendant, Southern Pacific Company, and within the scope of his employment committed an assault and battery by using unlawful force and violence upon the person of plaintiff, your verdict should be in favor of plaintiff.

* * * * *

"The defendant, Southern Pacific Com-

gues that these instructions were erroneous because they did not mention that the rights of the parties were to be determined under the Federal Employers' Liability Act and the defense that the assault was provoked by plaintiff. The latter defense was fully covered by at least eleven instructions given at the request of defendants. The theory of the instructions proposed by the company and given by the court was that it was not liable for the acts of Matt and Miller "unless and until plaintiff proves by a preponderance of the evidence that such acts were committed in and as a part of the transaction of the business of the Southern Pacific Company." The company did not propose any instruction with respect to its theory that the facts brought the case within the Federal Employers' Liability Act, nor was any request made for clarification of the instructions proffered by plaintiff. In the absence of a request for clarification of given instructions, or that a desired instruction be given, a party is in no position to complain on review of the court's failure to take such action. *Freitas v. Peerless Stages, Inc.*, 108 Cal.App.2d 749, 757, 239 P.2d 671, 33 A.L.R.2d 778.

[12] Southern Pacific Company next says that the court erred in giving unduly repetitious instructions. The point is without merit. Repetition alone is not reversible error. *Lebkicher v. Crosby*, 123 Cal. App.2d 631, 640, 267 P.2d 361. We have examined the instructions given and find no undue repetition.

pany, as principal, is responsible to plaintiff for the wrongful acts, if any, committed by George J. Matt or Don K. Miller as agents of said defendant, if such wrongful acts were committed in and as part of the transaction of the business of said defendant.

"If you should find in this case that George J. Matt or Don K. Miller committed an assault and battery upon the plaintiff and if you should further find that at the time and place of said assault and battery, if any, George J. Matt or Don K. Miller were acting in the business of said defendant, Southern Pacific Company, and within the scope of their authority, then said defendant is responsible for the acts of said George J. Matt or Don K. Miller and plaintiff is entitled

It is next contended that the compensatory and exemplary damages were excessive and unsupported by any substantial evidence. Plaintiff was hit on the head with a pick handle. He sustained a cerebral concussion, a disturbance of the brain. Following the injury he vomited, had dizzy spells, nausea, and headaches. The dizziness and headaches persisted about nine months. Five or six weeks after the assault, everything blurred and he nearly fell under a moving railroad car while trying to work. For about nine months he was unable to work at a steady job. In the first nine months after the fracas his loss of earnings was about \$3,780. A reasonable inference from the evidence is that in the following eight months his loss of earnings was about \$4,960. No doubt he suffered indignity, mortification, and disgrace.

[13-18] The remedy for an excessive verdict is generally with the trial judge. A reviewing court may not interfere with an award of damages unless the amount is so outrageously excessive as to immediately suggest passion or prejudice. *Hicks v. Ocean Shore Railroad, Inc.*, 18 Cal.2d 773, 785, 117 P.2d 850. No such showing is made here. Defendants moved for a new trial. The motions were denied. The award of compensatory damages appears to be reasonable. The jury impliedly found that the assault on plaintiff was willful and malicious. The trial judge, in denying the motions for a new trial, approved the finding. *Morgan v. French*, 70 Cal.App.2d 785,

to recover from defendant, Southern Pacific Company.

* * * * *

"Should you believe from all the evidence that defendant, George J. Matt or Don K. Miller, committed an assault and battery upon plaintiff for the purpose of securing his discharge from service with the Southern Pacific Company and should you further believe that such conduct, if any, on the part of said George J. Matt or Don K. Miller was in the course and scope of his employment with defendant, Southern Pacific Company, and for a purpose connected with and arising out of said employment, then you are instructed that said defendant, Southern Pacific Company, would also be liable for said assault and battery."

790, 161 P.2d 800. In an action for tort when the defendant has been guilty of oppression or malice, express or implied, the "plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Civ.Code, § 3294. As a rule the granting or withholding of exemplary damages is wholly within the discretion of the trier of fact. 14 Cal.Jur.2d 813, § 182. Its discretion is limited by the rule that exemplary damages should bear a reasonable relation to the actual damages. *Brewer v. Second Baptist Church*, 32 Cal.2d 791, 801, 197 P.2d 713. However, there is no fixed ratio by which to determine the proportion between the two classes of damages. *Finney v. Lockhart*, 35 Cal.2d 161, 164, 217 P.2d 19. In the present case it is apparent that the relation is reasonable and that there was no abuse of discretion in making the awards. Cf. *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal.2d 330, 340-341, 240 P.2d 282. The award of compensatory damages against Southern Pacific Company and the award of compensatory and exemplary damages against Matt and Miller may not be disturbed.

[19, 20] The award of exemplary damages against Southern Pacific Company cannot be sustained. There was no evidence of malice on its part. Merely retaining Matt as superintendent and Miller as trainmaster in the service was not, in our opinion, a ratification of their tortious acts. In the cases of both Matt and Miller, special skill and experience were necessary. It would be unfair to both the employer and employee to hold that the mere retention of an employee in service, whose special skill and experience were necessary, is a ratification of his malicious acts committed within the course of his employment. The company was not required to retain Sullivan and to discharge Matt and Miller or to discharge all three of them in order to disaffirm the conduct of Matt and Miller and thus shield itself from liability for their malicious acts. Since the discharge of Sullivan was held proper on a hearing under the Railway Labor Act, 45 U.S.C.A. § 151 et seq., the good faith and proper motives of the company in retaining Matt and Miller may not be questioned. When the actions of the

responsible representatives of the company were merely negative, consisting only of keeping Matt and Miller (skilled, experienced, and holding responsible positions in the service of the company), it cannot be said that they ratified the brutal conduct of Matt and Miller and shared in their malicious motives.

In other respects Matt and Miller make substantially the same contentions as Southern Pacific Company. None of them may be sustained.

The judgment against defendants Matt and Miller is affirmed. The judgment against defendant Southern Pacific Company is modified by striking therefrom the award of "\$10,000.00, as punitive or exemplary damages"; in all other respects it is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.



130 Cal.App.2d 64
In the Matter of the ESTATE of Ida
EVANIS, Deceased.

Charles M. Quinn, Margaret Vanderschoot,
William W. Quinn, Laura O. Brooks and
Robert Boro, Appellants,

Yackie Ehrhardt, Lottie Perry, Amelia Hopkins,
Ethel Rumsey, Olga Chauvin, Anthony Miller,
Elva Miller and Floyd Schwall, Respondents.

Civ. 8732.

District Court of Appeal, Third District,
California.

Jan. 3, 1955.

Proceeding by deceased's heirs on petition for distribution. Certain persons who were related to the predeceased husband claimed they were entitled to distribution of a portion of property in deceased's estate. The Superior Court, Sacramento County, Malcolm C. Glenn, J., entered an order which determined how

disputed property would be distributed in decree of final distribution and heirs of deceased appealed. Heirs of predeceased husband moved to dismiss appeal upon ground that no appealable order had been made. The District Court of Appeal, Van Dyke, P. J., held that where order merely announced court's intention with respect to distribution of certain real property, but order was not intended to constitute a final decree of distribution, the order was not final and appealable.

Appeal dismissed.

Appeal and Error §77(2)

Where probate court entered an order which announced court's intention with respect to distribution of certain real property of estate, but which indicated that court intended to subsequently enter formal decree of distribution, order was not final and appealable. Probate Code, §§ 1221, 1230; Code Civ.Proc. § 634.

Mento, Buchler & Littlefield, Sacramento, for appellants.

Albert H. Mundt, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

This appeal was initiated by a notice of appeal entered in the above entitled matter and stating that thereby the appellants appealed "from the order entered in the above matter denying the petition for distribution as prayed for and ordering that the estate be distributed one-half to the heirs of Ida Evanis and one-half to the heirs of John Evanis."

Respondents have moved to dismiss the appeal upon the ground that no appealable order, judgment or decree has been entered or made. The record shows the following: There had been filed in the estate proceedings a first and final account and petition for distribution wherein it was alleged that the appellants herein were the heirs of Ida Evanis, deceased, and entitled to distribution of all of the property in the estate. Distribution to them accordingly was prayed for. They were all heirs of Ida Evanis whose husband had predeceased her. Certain persons who were re-

lated to her predeceased husband claimed that they were entitled to distribution of a portion of the property in Ida's estate under the provisions of Sections 228 and 229 of the Probate Code. These persons filed objections to the petition for distribution. The matter was heard by the court and after the issues had been briefed the trial judge filed in the cause a written "opinion" which closed with the following paragraphs:

"From the foregoing authorities the Court concludes that the heirs of Ida Evanis and the heirs of John Evanis are each entitled to one half of the proceeds of the real property described in paragraph three of the stipulation, and also of the real property described in paragraph four of the stipulation, according to the laws of succession. As to the rest of the property, no dispute arises.

"The decree will so provide."

On the same day the clerk entered in the minutes of the court a document entitled "Order", which, after certain recitals not material here, read as follows:

"* * * the Court being fully advised;

"Orders that the account be settled and that the estate be distributed; the decree of distribution to provide that the heirs of Ida Evanis and the heirs of John Evanis are each entitled to one half of the proceeds of the real property described in paragraph three of the stipulation, and also of the real property described in paragraph four of the stipulation, according to the laws of succession. Opinion of court filed herein this day."

It is from this last order that the appeal is taken. It appears that no formal decree of distribution has ever been made or signed by the court or entered in the minutes.

Under these circumstances we hold that there has been no decree of distribution in the estate of Ida Evanis; that the order entered, even when read in connection with the signed opinion filed, was never intended by the court to constitute such decree

of distribution and for aught that appears in this record the trial court has still to perform the task of decreeing distribution of the property in said estate.

The appeal purports to appeal only from that part of the entered order which has to do with the distribution of property and as to such matter appeals only from that part of the order which distributes property to the heirs of John Evanis, it being quite apparently the position of the appellants, who are heirs of Ida Evanis, that the court erred in distributing anything to the heirs of John. There was property in the estate other than that to which the heirs of John laid any claim. It is obvious, therefore, that the order entered could not be considered a complete decree of distribution in any event. Looking at the signed opinion for the limited purpose for which we may consider that document, it is made clear that nothing therein supports a conclusion that the court was concerning itself with a decree of distribution as a whole, but only with that part of the decree to be made which would decide the issues presented by the objections filed. Said the court: "As to the rest of the property no dispute arises." As to the letting in of the heirs of John over the objections of the heirs of Ida, the court indicated that it would decree distribution of a part of the property to them, closing its opinion with the words: "The decree will so provide." The order from which the heirs of Ida have attempted to appeal equally shows upon its face that it was not intended in any way as a decree of distribution and that it has no further office to fulfill so far as distribution is concerned than to announce the intention of the court at that time with respect to such distribution. The trial court contemplated that a formal decree fully distributing all of the estate would be presented to him. The situation was tantamount to the familiar announcement to the attorneys of a proposed decision, with instructions to one or the other side to prepare findings for the court. These views are strengthened in consideration of the provisions of Section 1221 of the Probate Code requiring that all orders and decrees of the court or judge must be entered at

length in the minute book of the court or else signed by the judge and filed and that decrees of distribution must always be so entered at length; and by the provisions of Section 1230 of the Probate Code that "All issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions", which provisions bring into effect the provisions of Section 634 of the Code of Civil Procedure concerning the way in which decisions of the court are to be made, signed and filed.

The appeal is dismissed.

PEEK and SCHOTTKY, JJ., concur.



130 Cal.App.2d 167

F. H. GARBUTT, Plaintiff and Appellant,
v.

Danny Mack CAMPBELL, Defendant
and Respondent.

Civ. 20438.

District Court of Appeal, Second District,
Division 1, California.

Jan. 10, 1955.

Proceeding on motion to set aside default judgment in automobile accident case. The Superior Court, Ventura County, Walter J. Fourn, J., set aside default, and plaintiff appealed. The District Court of Appeal, held that where defendant was a minor at time judgment was entered, and did not appear in person or by guardian and took no action tantamount to ratification after overcoming infirmity, default could be reopened, in absence of evidence of laches or abuse of discretion, more than four years after entry and four days less than a year after defendant reached majority

Order affirmed.

1. Infants ☞90

It is the general rule that an infant must appear either by general guardian or

guardian ad litem approved by the court, and exceptions to rule are due to minor's conduct which is deemed tantamount to a ratification after overcoming infirmity.

2. Infants ⇐87

Where defendant was a minor at time judgment was entered, and did not appear in person or by guardian and took no action tantamount to ratification after overcoming infirmity, default could be reopened, in absence of evidence of laches or abuse of discretion, more than four years after entry and four days less than a year after defendant reached majority.

Stuart McHaffie, Los Angeles, for appellant.

Waite & Drapeau, Ventura, for respondent.

DORAN, Justice.

Plaintiff appeals from the order setting aside the default and permitting defendant to answer.

The complaint in the action was filed and the summons issued on June 28, 1949. The action was for damages to plaintiff's car resulting from the alleged negligence of defendant. The judgment was for \$495.87. Request for default filed July 29, 1949. Default judgment entered May 29, 1952. The court found that defendant was born January 19, 1932 and attained majority January 11, 1953. Motion to set aside default made January 7, 1954. Default set aside February 17, 1954.

Defendant "moved to set aside his default, the default judgment and for permission to file answer on the ground that said default and judgment were taken against him through his mistake, inadvertence, surprise or excusable neglect, and upon the ground that said defendant has disaffirmed the default and judgment for the reason that they were entered while he was a minor, and did not appear by a guardian. * * * The Court in its memorandum of opinion found that the true date of birth of defendant Campbell was as set forth in the birth certificate."

Appellant contends that, "The sole question involved in this appeal was whether or not the Court had jurisdiction to set aside the judgment 4 days less than one year after defendant attained majority and more than four years after entry of default and more than a year and a half after judgment made and entered."

As recited in respondent's brief, "It was and is the position of respondent that inasmuch as he did not recall service of process in this proceeding, and he was a minor at the time of its institution, to-wit: the age of seventeen (17) years and some months at the time of the entry of the default herein and at the time of the entry of judgment herein; and further, that since he was first notified of the existence of the judgment only when execution was levied upon his vehicle, in the early part of 1954, and he immediately thereafter took steps to answer the complaint and have the cause heard on its merits".

Appellant relies on *Cikuth v. Loero*, 14 Cal.App.2d 32, 57 P.2d 1009, and contends that the *Cikuth* case, "is on 'all fours' with the case at bar." There, however, the defendant participated in the trial of the action which, incidentally was a negligence case.

[1,2] It is the general rule of course that an infant must appear either by general guardian or guardian *ad litem* appointed by the court. The exceptions result from facts and circumstances that do not exist in the within action. As stated in *Keane v. Penha*, 76 Cal.App.2d 693, 173 P. 2d 835, 837, cited by respondent, "The fact that a minor's disaffirmance of a judgment is sometimes denied does not impair the virtue of the general rule. Such exceptions were due to the minor's conduct which was deemed to have been tantamount to a ratification after overcoming his infirmities but in the instant case the behavior of defendant was not similar to that of the minor in any of the exceptional cases."

There is no evidence of laches nor does the record reveal an abuse of discretion by the trial court.

The order is affirmed.

WHITE, P. J., and MOSK, J. pro tem., concur.

A. G. KEATING, Petitioner,

v.

SUPERIOR COURT of the State of California in and for the CITY AND COUNTY OF SAN FRANCISCO, and Honorable Samuel F. Finley, as Judge thereof, Respondents.*

Harry E. Foster, Real Party in Interest.
Civ. 16459.

District Court of Appeal, First District,
Division 2, California.

Jan. 6, 1955.

Hearing Granted March 3, 1955.

Original proceeding for writ of prohibition to prevent a judge from hearing retrial of an action. The District Court of Appeal, Nourse, P. J., held that where claim of trial judge's bias and prejudice was based on judge's remarks on evidence in previous trial of case, and no objection to these remarks had been made at time or during appeal from judgment and objection was first asserted over three years after first trial, prohibition was not available to prevent trial judge from hearing retrial of the action.

Writ denied.

1. Judges ⇨49(1)

State of mind of a trial judge as to lack of credibility of one of the parties, formed during trial of a case and based upon evidence in case, does not amount to bias or prejudice.

2. Judges ⇨51(2)

A claim of bias must be promptly made.

3. Prohibition ⇨17

Where claim of trial judge's bias and prejudice was based on judge's remarks on evidence in previous trial of case, and no objection to these remarks had been made at time or during appeal from judgment and objection was first asserted over three years after first trial, prohibition was not available to prevent trial judge from hearing retrial of the action. Code Civ.Proc. § 170.

Morris Lowenthal, Juliet Lowenthal, San Francisco, Karl D. Lyon, San Francisco, of counsel, for respondents and real parties in interest.

NOURSE, Presiding Justice.

Petitioner seeks prohibition to prevent Judge Samuel F. Finley from hearing the retrial of an action on the ground that, because of alleged bias and prejudice, the trial judge is disqualified to hear the case.

Petitioner was the defendant in an action which was brought by the plaintiff to recover compensatory and exemplary damages for a fraudulent conversion of the assets of plaintiff's business. The action was heard before the court without a jury. Shortly before the court announced its judgment for the plaintiff in the sum of \$35,000, the judge stated that he did not believe much of the testimony of the defendant as many statements "were untrue and palpably false."

At a later hearing of a motion to increase the judgment petitioner moved to introduce certain of his account books into evidence; the court, in ruling that they were irrelevant, stated: "and of course I make the further observation that the figures in the books were placed there either by the hand of or under the direction of Mr. Keating, and I have no confidence at all in Mr. Keating's integrity and veracity, and I wouldn't have any confidence in the figures that were in those books."

On August 8, 1951, after vacating a prior order concerning the amount of the damages, the court set the damages at \$40,940 and judgment was finally entered in the case on August 23, 1951. On appeal, Foster v. Keating, 1953, 120 Cal.App.2d 435, 261 P.2d 529, the judgment was reversed on the issue of the amount of the damages, but was affirmed on all the issues relating to the liability of petitioner. Petitions for rehearing and for hearing before the Supreme Court were denied (the latter on November 24, 1953).

On August 2, 1954, the plaintiff notified petitioner that he intended to move to set the case for a retrial. On August 11, 1954, petitioner filed with Judge Finley a petition

Dan L. Garrett, Jr., San Francisco for petitioner.

* Opinion vacated 289 P.2d 209.

for a change of judge. After a hearing on the petition (at which time Judge Finley reaffirmed his opinion that petitioner did not tell the truth during the trial of the action, but denied that he had any prejudice toward petitioner) he struck the petition from the record on the grounds that it was not timely and that there was no evidence which was ample to support a charge of disqualification.

The appellate court in the course of its opinion, *Foster v. Keating*, supra, 120 Cal. App.2d at page 455, 261 P.2d at page 541, held that: "[T]he findings of fact and conclusions of law insofar as they bear upon and determine the issue of liability are correct and amply supported by the evidence and the law, and will not be disturbed" and stated, 120 Cal.App.2d at page 440, 261 P.2d at page 532: "Defendant intentionally kept all records of the business under his supervision and management, placing therein only the data he felt necessary to paint the picture in a light most favorable to him, making up the records and confusing the operations with records pertaining to activities of his own business and to make it impossible for plaintiff or anyone else to detect the true facts." Its judgment read, 120 Cal.App.2d at page 455, 261 P.2d at page 541: "It is, therefore, ordered that the judgment be reversed, with directions that the trial court revise the findings of fact and conclusions of law, and take such further steps and proceedings in the action as may be meet and proper, all in accordance with the views herein expressed. Each party will bear his own costs on this appeal."

The effect of this judgment is that the cause was remanded for the sole purpose of correcting the findings of fact and conclusions of law—not for a retrial of all the issues.

[1] The writ must be denied on two grounds. (1) The state of mind of a trial judge as to the lack of credibility of one of the parties, formed during the trial of a case, and based upon the evidence in the case does not amount to bias or prejudice. *Kreling v. Superior Court*, 25 Cal.2d 305, 310-312, 153 P.2d 734.

[2,3] (2) A claim of bias must be promptly made. Here the remarks of the trial judge were made in open court on June 11, 1951. No complaint was made by this petitioner during the long course of his appeal from the judgment. It was not until more than three years later, on August 11, 1954, that he first raised the question of bias. Such unexplained delay fully justified the order of the trial court striking his claim of bias from the files. This conclusion is supported by *Woolley v. Superior Court*, 19 Cal.App.2d 611, 625, 66 P.2d 680, and is the essence of the limitations recited in section 170, Code of Civil Procedure.

The peremptory writ is denied and the alternative writ is discharged.

DOOLING and KAUFMAN, JJ., concur.



130 Cal.App.2d 182

Ruth Power-O'Malley WHITTLESEY, Mother on behalf of Ann De La Poer Bellah, Plaintiff and Appellant,

v.

James Warner BELLAH, Defendant and Respondent.

Civ. 20362.

District Court of Appeal, Second District, Division 1, California.

Jan. 11, 1955.

Hearing Denied March 9, 1955.

Proceeding under the uniform reciprocal enforcement of support laws of New York and California to increase child support payments then being made under New York separation decree. The Superior Court, Los Angeles County, Elmer D. Doyle, J., dismissed proceeding, and petitioner appealed. The District Court of Appeal, Drapeau, J., held that California court had jurisdiction to hear and determine matter even though father, a California resident, had not been given notice of the initiary proceeding in New York.

Reversed.

1. Constitutional Law ⇨309(1)

In the law of substituted service, it is elementary that fair play requires that a defendant be given notice sufficient to apprise him of what is going on and an opportunity to defend, and anything less than that is a denial of due process of law.

2. Courts ⇨7

An action for the future support of minor children is a personal one, and, being personal, it is transitory.

3. Parent and Child ⇨3(3)

In proceedings under the uniform reciprocal enforcement of support laws, California courts do not abdicate any of their judicial power, and California court was not bound by recommendation of foreign court, or by proof for the minor presented in that foreign court. Code Civ.Proc. §§ 1650-1690; McK.Unconsol.Laws N.Y. § 2111 et seq.

4. Parent and Child ⇨3(3)

It would be presumed that California trial court, in proceeding under the uniform reciprocal enforcement of support laws of New York and California, would properly evaluate the proof as to child's necessities with father's ability to pay, and with a judicial discretion that would not penalize father for not having been able to cross-examine the mother in New York. Code Civ.Proc. §§ 1650-1690; McK.Unconsol.Laws N.Y. § 2111 et seq.

5. Depositions ⇨8

Father, defendant in proceeding under uniform reciprocal enforcement of support laws of New York and California, could, in proceeding in California court, cross-examine mother in New York by deposition. Code Civ.Proc. §§ 1650-1690; McK.Unconsol.Laws N.Y. § 2111 et seq.

6. Parent and Child ⇨3(3)

California court had jurisdiction to hear and determine a matter arising under the uniform reciprocal enforcement of support laws of New York and California even though father, a California resident, had not been given notice of the initiary proceeding in New York. Code Civ.Proc. §§ 1650-1690; McK.Unconsol.Laws N.Y. §§ 2111 et seq.

7. Divorce ⇨403(1)

Where New York was the place of child's residence and California the place of father's residence, California court had jurisdiction to ascertain and enforce adequate support for the minor child, even though child's father and mother had obtained a Nevada divorce decree. Code Civ.Proc. §§ 1650-1690; McK.Unconsol.Laws N.Y. § 2111 et seq.

Loeb & Loeb and Herman F. Selvin, Los Angeles, for appellant.

Fox, Goldman & Kagon, Beverly Hills, for respondent.

DRAPEAU, Justice.

James Warner Bellah, respondent in this case, was married to petitioner in Alexandria, Virginia, in 1937. One child was born of this marriage,—Ann De La Poer Bellah.

In 1940 petitioner, Mrs. Bellah, secured a decree of judicial separation from Mr. Bellah, and custody of the child, in the State of New York. In 1942 she was awarded a decree of absolute divorce from Mr. Bellah in the State of Nevada. She has since remarried. Her name now is Ruth Power-O'Malley Whittlesey.

By agreement of Mr. and Mrs. Bellah, then husband and wife, the Nevada decree incorporated a provision requiring Mr. Bellah to pay the child \$25 a month for her support until her eighth birthday; \$35 a month until her thirteenth birthday; and \$50 a month until her twenty-first birthday or until her marriage or self-sustaining employment.

So far as may be determined from the sketchy record in this case, Mr. Bellah has always made these payments.

In June of 1953 the mother, on behalf of the child, petitioned the courts of New York, under the uniform reciprocal enforcement of support laws of New York and California, Code Civ.Proc. §§ 1650-1690; McK.Unconsol.Laws N.Y. § 2111 et seq.; and see *In re Susman*, 116 Cal.App. 2d 698, 254 P.2d 161, for an order requiring Mr. Bellah to increase his payments for the child to \$250 a month.

As the law provides, the Domestic Relations Court of the City of New York heard the petition in the first instance. That court ordered that the papers and testimony be forwarded to the proper court in California, and the judge made a notation on the papers that "the sum of \$250 per month for the support of the one child is recommended."

Mr. Bellah was then served with California process, the case came on duly for hearing in the Superior Court here, and was ordered dismissed. The mother, on behalf of the child, appeals from the order.

The most serious question on appeal is Mr. Bellah's defense that he had no notice of the New York proceeding until he was served in the California proceeding; and that consequently he had no opportunity to test the testimony of the child's mother by cross-examination.

It appears from the docket of the New York court that the petition was heard on an affidavit of non-service and the verified petition and testimony of the mother. The affidavit of non-service is by a police officer of the City of New York, "that he cannot with due diligence locate or serve the respondent designated in the said process within the City of New York." And it may fairly be said that the former Mrs. Bellah knew Mr. Bellah's address in California at all times.

Mr. Bellah argues that before a citizen of this state may be subjected to the application of the reciprocal enforcement of support laws, if he can be found with reasonable diligence, he is entitled to such notice of the proceeding in the initiating sister state as will enable him to appear and defend there. And that in this case he has been deprived of the right to appear in the court of first instance, to be represented by counsel in that court, to cross-examine witnesses adverse to him, and to test the legal sufficiency of that proceeding.

[1] In the law of substituted service it is elementary that fair play requires that a defendant be given notice sufficient to apprise him of what is going on and an opportunity to defend. Anything less than that is a denial of due process of law.

People v. One 1941 Chrysler 6 Touring Sedan, 81 Cal.App.2d 18, 183 P.2d 368. In this case it would have been a simple thing to have given Mr. Bellah actual notice of the New York proceedings. Proof that such notice was sent to him by mail, or was served upon him personally would have left a much more satisfactory record.

However, it seems to this Court that it would be more in consonance with the public policy of this state as declared by the Legislature in the uniform reciprocal enforcement of support law, and with the welfare of the child whose rights are here involved, to continue with this case, rather than to dismiss it.

[2] An action for the future support of minor children is a personal one. Being personal it is transitory. *Dimon v. Dimon*, 40 Cal.2d 516, 525, 254 P.2d 528.

[3] The application of the law of uniform reciprocal enforcement of support was given exhaustive study in *Smith v. Smith*, 125 Cal.App.2d 154, 270 P.2d 613. In that case Mr. Justice Vallée, speaking for the Court, points out that the courts of this state do not abdicate any of their judicial power in deciding this sort of proceeding.

Therefore, the amount of support money required by the minor child in this case is entirely at large in this state. We are not bound by the recommendation of the New York court, or by the proof for the minor presented in that court.

[4,5] And it may be presumed that the trial court in California will properly evaluate the proof as to the child's necessities with the ability of the father to pay, and with a judicial discretion that will not penalize the father for not having been able to cross-examine the mother. Moreover, he may yet cross-examine her in New York by deposition. *Smith v. Smith*, supra, 125 Cal.App.2d at page 168, 270 P.2d at page 623.

[6] This precise question was argued in the *Smith* case, and it was held that despite the lack of notice to the defendant in that case of the initiatory proceeding in the sister state, California's court had jurisdiction to hear and determine the matter. *Peti-*

tion for a hearing of the Smith case was denied by our Supreme Court.

[7] Mr. Bellah also argues that the Nevada decree until set aside or modified is the controlling order, and in effect binds the child. This argument overlooks the transitory character of these actions. Under the reciprocal enforcement laws of New York and California, in this case the courts of California have jurisdiction to ascertain and enforce adequate support for this minor child. It is sufficient for jurisdiction that New York is the place of residence of the child, and that California is the place of residence of the father.

The order is reversed.

WHITE, P. J., and DORAN, J., concur.



130 Cal.App.2d 70

George J. HANSEN, Plaintiff and
Respondent,

v.

Marvin BLEDSOE and Alvin Love, De-
fendants and Appellants.

Civ. 5010.

District Court of Appeal, Fourth District,
California.

Jan. 3, 1955.

Action for damages arising out of automobile collision at intersection. The Superior Court, Riverside County, John G. Gabbert, J., entered judgment awarding damages to driver of southbound automobile and denied eastbound driver's motion for new trial. Driver of eastbound automobile appealed. The District Court of Appeal, Griffin, J., held that award of damages was unsupported by any evidence and that since retrial was necessary on issue of damages, issue of negligence, which was close, should be retried also.

Judgment and order denying new trial reversed.

1. Automobiles ⇨245(39, 80)

In action by driver of southbound automobile for damages resulting from intersection collision with eastbound automobile on through street, whether eastbound driver was negligent in failing to look to see southbound automobile enter intersection and whether southbound driver was negligent in driving out into through street and failing to see other automobile were questions for jury. Vehicle Code, § 552.

2. Damages ⇨131(1)

Award of \$500 general damages to plaintiff whose only injury noted in record was that he was shaken up and received doctor's care was not justified, and award of \$409.55 for medical expenses was unsupported by evidence, and, consequently, award of damages was not justified. Rules on Appeal, rule 7(b).

3. New Trial ⇨9

Where retrial of action for damages resulting from intersection collision between eastbound automobile on through street and southbound automobile was necessary on issue of damages, and where issues of negligence of respective drivers was close one, retrial would be ordered on all issues.

John L. Roberts, Riverside, for appellants.

Alva D. McGuire, Riverside, for respondent.

GRIFFIN, Justice.

In this non-jury action for damages arising out of an automobile accident on May 28, 1951, plaintiff recovered judgment against defendants. Claims of damages by defendants against plaintiff on their cross-complaint were denied.

The contentions on this appeal are that plaintiff failed to prove that defendants were guilty of negligence which was a proximate cause of the accident; that plaintiff was guilty of negligence, as a matter of law, which was the sole proximate cause of his injuries and damages; and insufficiency of the evidence to sup-

port the findings and judgment. No reporter was present at the trial and the record of the evidence comes to us on a settled statement of oral testimony. Rule 7(b), Rules on Appeal.

The accident happened in Riverside at the intersection of Eighth and Pine Streets about noontime. Pine Street runs generally in a north and south direction. Eighth Street is a through highway (U.S. 60) 60 feet wide, with a double white center line. Each side of the street is divided into traffic lanes. Stop signs were erected on the Pine Street approach to Eighth Street. Plaintiff Hansen was driving his new 1951 Victoria Ford south on Pine Street. Defendant Love (aged 16) was driving a Chrysler Sedan owned by defendant Bledsoe east on Eighth Street in the first lane south of the center line. The two cars collided in the intersection.

Plaintiff testified that when he approached Eighth Street he stopped at the stop sign, looked to his left, then straight ahead, then to his right, and saw no automobiles approaching from either direction; that he started forward, again looked to his left, straight ahead and to his right, as before, and it was then, by a fleeting glance, he first observed the Bledsoe vehicle to his right approximately 15 to 20 feet away, moving rapidly; that at that time the front portion of his own car was just crossing the double white center line of Eighth Street and the defendant's car was approaching in the first lane south of it; that plaintiff did not blow his horn or apply his brakes because he had no time to do so; that the collision occurred and plaintiff's car came to rest at a point about 94 feet from the point of impact after it had crossed over the curb and gone onto the front yard of the property at the southeast corner of this intersection; that the Bledsoe car stopped near the point of impact; that in his opinion the Bledsoe car was coming at a high rate of speed when first observed by him; that after the collision an automobile mechanic examined his car at the request of the investigating officer and found his car to be in low gear; that the impact rendered his

brakes useless and the momentum of the car carried it over the south curb and on to the lawn. In his deposition, on cross-examination, he testified his car was traveling between 15 and 20 miles per hour in low gear at the time of the collision, and he did not speed up because he figured he had plenty of time to get out of the way.

Defendant Love testified that as he was approaching the intersection, i. e., about 450 feet west of it, he was traveling 23 or 24 miles per hour and continued to do so until he was about 40 feet from the intersection; that he then observed the Hansen car "about out" into the intersection from the north, proceeding south in front of him; that when he first observed it the rear wheels were just clearing the north curb line of Eighth Street; that he applied his brakes and skidded 18 feet before the impact took place, and the front of his car turned 6 or 7 feet to the right where it came to rest; that the left front of the Bledsoe car came in contact with the right front fender of plaintiff's car; that at the time he observed the Hansen car he was on his own side of the road driving approximately 2 feet to the right of the double white line; that at all times he was in that lane of traffic up to the point of impact; that the Hansen car appeared to be traveling 15 to 20 miles per hour and that he did not hear any horn or see any signal.

A police officer testified that the Bledsoe vehicle left approximately 18 feet of skid marks before the impact and approximately 6 feet of skid marks after it, stopping approximately 6 feet from the point of impact at a 45-degree angle to the right; that the accident occurred approximately 6 feet east of the west curb line of Pine Street and approximately 24 feet north of the south curb line of Eighth Street. After plaintiff rested his case defendants' motion for nonsuit was denied.

The trial court found that Love drove his car on Eighth Street in a 25-mile per hour zone "at an unsafe speed", and in such a careless and negligent manner that same was caused to collide with plaintiff's

car; that plaintiff sustained general damages in the sum of \$500, sustained cuts and bruises, nervous shock which aggravated an existing heart condition, and was compelled to employ medical services in the sum of \$409.55. Judgment was rendered accordingly. A motion for new trial on all statutory grounds, including insufficiency of the evidence, was denied.

[1] The evidence presented could support a finding that defendant Love was guilty of some negligence in failing to look and to see plaintiff's car which was apparently in the intersection when defendant entered it. *Berlin v. Violet*, 129 Cal. App. 337, 340, 18 P.2d 737; *Evans v. Mitchell*, 2 Cal.App.2d 702, 705, 38 P.2d 437. The evidence might well have supported a finding that plaintiff was also guilty of negligence in "shooting out" from Pine Street in the manner indicated by defendant Love, and in failing to see the approach of defendants' car, which must have been in his vision under the circumstances related. *Soda v. Marriott*, 118 Cal.App. 635, 5 P.2d 675; *Donat v. Dillon*, 192 Cal. 426, 221 P. 193; *Collonan v. Rosellini*, 21 Cal.App.2d 33, 36, 68 P.2d 367; Section 552, Vehicle Code.

While it may be difficult to hold, as a matter of law, that plaintiff was guilty of negligence, the evidence clearly indicates that he was guilty of some negligence. However, in view of the state of the record on this appeal, it becomes unnecessary to determine these issues at this time. The court found that plaintiff suffered \$500 general damages. The general damages sought in the complaint were for \$2,000 for severe shock to his nervous system, an aggravated heart ailment, and special damages of \$436.01 for repair and loss of the use of his car, all totaling \$2,487.67.

[2] The only evidence of plaintiff's claimed injuries, set forth in the settled statement, is that he "was shaken up in the accident and received doctor's care".

While there may have been other testimony produced at the trial on the subject, the only evidence before us indicates that the sum allowed for general damages was not justified.

The finding that by virtue of defendants' negligence plaintiff suffered shock, etc., and was compelled to employ medical services and expend money for drugs and medicines, etc., to his further damage of \$409.55, is likewise unsupported by the statement of the evidence and exhibits before us. The medical bills, although marked for identification, were not received in evidence for the reasons indicated in the settled statement, and there was no other evidence on the subject of medical bills nor was there medical testimony produced. There does appear, as plaintiff's exhibit, a so-called written estimate of the cost of the repair of plaintiff's car, totaling \$409.55. This is the exact amount allowed for medical bills. There is no finding that any particular amount was allowed for repair of the car or that any such damage resulted. While there may have been evidence produced on the subject, it is apparent that the settled statement on appeal does not so indicate. Accordingly, the amount allowed for medical services, etc. is likewise unsupported by the evidence before us.

[3] Since a retrial of the action on the issue of damages is necessary, and since the issues of negligence of the respective parties is a close one, there should be a retrial on all issues. *Leipert v. Honold*, 39 Cal.2d 462, 467, 247 P.2d 324, 29 A.L.R. 2d 1185; *Rose v. Melody Lane*, 39 Cal.2d 481, 488, 247 P.2d 335; *Patterson v. Rowe*, 113 Cal.App.2d 119, 247 P.2d 949; *Wilson v. Rhoades*, 113 Cal.App.2d 14, 247 P.2d 727.

Judgment and order denying a new trial reversed.

BARNARD, P. J., and MUSSELL, J., concur.

Guy BOYD, Plaintiff and Respondent,

v.

John CRESS, Defendant and Appellant.*

Civ. 8495.

District Court of Appeal, Third District,
California.

Jan. 12, 1955.

Hearing Granted March 9, 1955.

Action by automobile passenger against the driver, for damages for personal injuries. From a judgment of Superior Court, Butte County, Dudley G. McGregor, J., in favor of the passenger, the driver appealed. The District Court of Appeal, Schottky, J., held that where the driver had stopped during the course of a 200 mile trip and parked on the highway, apparently to inspect a tire, and the guest got out and was struck by an open door as he stood beside the automobile and as it rolled backward, the accident had occurred "during such ride" within the meaning of the guest statute and that his status as guest had not been interrupted.

Reversed.

1. Statutes ⇨181(1), 184

Statutes must be construed with a view to their intent and purpose and the mischief at which they were aimed.

2. Automobiles ⇨181(1)

Purpose of automobile guest statute was to change rule theretofore adopted that mere invited guest could recover for simple negligence. Vehicle Code, § 403.

3. Evidence ⇨33

District Court of Appeal in automobile negligence case would take judicial notice that in formulating and enacting legislation legislature has assistance and advice of well-trained and very efficient legislative counsel bureau and was therefore aware of controlling judicial decisions and thought that same required amendment of guest statute so as to make it conform to original intent and purpose. Vehicle Code, § 403.

4. Automobiles ⇨181(2)

Where automobile driver stopped automobile on highway during course of 200 mile trip, apparently to inspect tire, and guest got out and was struck by open door

as he stood beside automobile and as it rolled backward, accident occurred "during such ride" within meaning of guest statute and guest's status as guest was not interrupted. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "During Such Ride".

5. Automobiles ⇨181(2)

Purpose of amendment to guest statute whereby words "moving upon" and "while so riding" were eliminated was to avoid interruption of guest status during time when automobile is stopped, providing purpose of stop is part of and incidental to ride or journey. Vehicle Code, § 403.

6. Statutes ⇨189

In construction of a statute, legislative intention controls if it can be reasonably drawn from language used, and more literal construction which would result in inconsistency or absurdity will be rejected.

7. Statutes ⇨223.2(1)

Statute will be construed with reference to full system of which it is a part, and all statutes which relate to same subject matter, i. e., statutes in "pari materia," are to be construed together.

See publication Words and Phrases, for other judicial constructions and definitions of "In Pari Materia".

McDougall & Fitzwilliam, Sacramento, for appellant.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, Chico, for respondent.

SCHOTTKY, Justice.

This is an appeal from a judgment in favor of plaintiff and respondent against defendant and appellant for damages for personal injuries. The question involved turns on a construction of the so-called guest statute, section 403 of the Vehicle Code, which provides as follows:

"No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages

* Opinion vacated 293 P.2d 37.

against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest *during such ride*, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver." (Emphasis added.)

There is no dispute as to the facts, which we shall summarize briefly.

Respondent and appellant were hunting companions and desired to find a place near Chico, their home, to hunt deer. On September 2, 1951, at approximately 10:30 p. m., they left Chico in the appellant's automobile for the purpose of going to Fall River, over 200 miles away, in order to make plans for deer hunting later in the year. It was stipulated at the outset of the trial that the respondent was a guest at the beginning of the trip. At about 2:00 or 3:00 o'clock in the morning of September 3, 1951, appellant pulled over to the side of the road and stopped his car, apparently to check the air pressure in a tire and so that both parties could get out and stretch. Appellant's car was a 1951 Chevrolet two-door sedan and when the doors are pushed open far enough they will "lock" in the open position. Respondent got out of the car on the right hand side and left the door in the open position. He stood right next to the door and was knocked down when the car rolled backward causing the door to hit him. He fell and struck his shoulder on the sharp tip of the front bumper. After the car rolled a few feet appellant stopped it by setting the brake. Appellant had remained sitting behind the steering wheel after he had stopped the car and until the accident occurred. Respondent suffered certain injuries to his shoulder; the extent of the injury and amount of the damages are not here in question. Appellant and respondent got back in the automobile and continued their trip to Fall River and then returned to Chico. Respondent was awarded \$500 general damages and \$1,300 special damages.

Appellant contends that respondent was a guest within the meaning of section 403 of

the Vehicle Code and that for that reason the judgment must be reversed. Respondent contends that he was not a guest at the time of the accident because the accident did not occur "during such ride."

The so-called guest statute was first enacted in 1929 as section 141¾ of the California Vehicle Act, St.1929, p. 1580, and, in so far as here pertinent, read as follows:

"Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways * * * and while so riding * * * receives * * * an injury, shall have no right of recovery against the owner * * *."

The section as it then stood was construed in *Moreas v. Ferry*, 135 Cal.App. 202, 26 P.2d 886, wherein the court analyzed the wording of the section. In that case the plaintiff rode with the defendant to a theater. That theater was crowded. They decided to seek another place of entertainment. The defendant was sitting by the steering wheel and requested the plaintiff to crank the car. The plaintiff cranked the car and the crank kicked, breaking plaintiff's arm. The court held that under such circumstances the injury was not inflicted in any vehicle "moving upon any highway" and was not inflicted upon the guest "while so riding."

Section 141¾ was also construed in *Prager v. Isreal*, 15 Cal.2d 89, 98 P.2d 729, decided after the present section 403 of the Vehicle Code was enacted, but in which the accident occurred while the former section 141¾ was still in effect. In that case, as stated in the opinion, at page 91 of 15 Cal.2d, at page 730 of 98 P.2d:

"On Sunday, June 9, 1935, defendant called at plaintiff's home in San Francisco to take her for a ride in his automobile. They drove about the city for an hour or more, then parked on a widened portion of the public highway overlooking the beach. They moved to the back seat to eat a lunch prepared by the plaintiff. Around 5 o'clock they decided to attend the theater. Plaintiff, who was seated on the right side of the rear seat, started to leave the car on that side, intending to resume her former position in the front seat. At the

same time the defendant alighted on the left side to resume his position as driver. As the plaintiff had one foot on the ground and the other on the running board, the car moved forward, throwing her to the ground. She sustained injuries resulting principally in a fracture of the neck of the left femur."

In affirming a judgment in favor of plaintiff the court said at page 92 of 15 Cal.2d, at page 731 of 98 P.2d:

"The definition of the term 'guest' must be construed with the rest of the section in which it appears. The first paragraph thereof sets forth the conditions under which a guest, so defined, will be denied recovery for injuries. Those conditions are when a guest accepts a ride in any vehicle '*moving upon any of the public highways*', and receives or sustains an injury '*while so riding* as such guest'. It is clear that unless all of those conditions are satisfied, the plaintiff is not such a guest as is denied recovery for her injuries by the terms of the guest statute.

* * * * *

"In this connection it is significant that the phrase '*while so riding*' was used not once, but five times in section 141 $\frac{3}{4}$. It is therefore not to be presumed that its presence therein was due to happenstance or a mere legislative inadvertence.

* * * * *

"Defendant states that 'it would be absurd in the extreme to hold that one who has accepted a ride with another and had thus become his guest, immediately changed to a paying passenger or a mere trespasser as soon as the wheels of the car stopped turning at a highway intersection, or when the parties have voluntarily stopped for gas or lunch or similar conveniences'.

"Be that as it may, it would be equally illogical to say that a car which had been parked for several hours on a widened space in a public highway provided for that purpose, and which thereafter moved a few inches due to defective brakes or their lack of appli-

cation—without a driver behind the steering wheel and without the motor having been started—is '*moving on*' a public highway within the meaning of the statute.

"We are likewise of the opinion that a person alighting from an automobile, who is in a position with one foot on the ground and the other on the running board when it so moves cannot be said to be '*riding*' in said automobile within the meaning of said statute."

In the case of *Harrison v. Gamatero*, 52 Cal.App.2d 178, 125 P.2d 904, 907, the accident arose after the effective date of Section 403. In that case the defendant-host double parked and sent a seven year old child across a busy street to mail a letter for defendant. The child was struck by another car as she endeavored to cross the street and return to defendant's car after mailing the letter for defendant. In rejecting the defendant's claim that the child was a guest, the court cited *Moreas v. Ferry*, supra, and *Prager v. Isreal*, supra, in support of its conclusion that "Certainly plaintiff was not riding in the automobile within the meaning of said section 403 at the time of her injury."

The case of *Smith v. Pope*, 53 Cal.App.2d 43, 127 P.2d 292, also arose after the effective date of section 403. In that case the plaintiff was injured when she started to enter the car. She had one hand on the door handle, one foot on the ground and the other in the air when the car jerked forward, throwing her to the ground. In affirming a judgment in favor of plaintiff, the court in construing the phrase "'during such ride'" stated at page 47 of 53 Cal. App.2d, at page 295 of 127 P.2d, that such phrase "contemplates that such a ride by the guest must have been actually commenced." The court stated further: "In other words, it was not necessary, as it was before under the former section, to show that the vehicle was '*moving upon any * * * highway*,' but only to show that the injury occurred '*during the ride*' which would include in that category all the time elapsed from the time of entering the vehicle, and while so continuing such occupancy, until the journey's end."

The question to be determined in the instant case is whether or not respondent was a guest at the time of the accident, and the determination of that question depends upon whether or not the accident occurred "during such ride." It was stipulated that respondent was a guest at the beginning of the trip and appellant contends that although respondent was outside of the automobile and standing beside it at the time of the accident, he was still a guest within the meaning and intent of Vehicle Code section 403. Respondent argues in reply that "It offends common sense to believe that a person standing on the ground outside of an automobile is 'riding' within an automobile," and that "such a result was not intended by the Legislature or by the Appellate Courts of this State."

Prior to 1929 a person riding in an automobile as the guest of the driver or owner could recover for any injuries received which were caused by the negligence of the driver or owner of the automobile. It was in that year that the legislature adopted a new section of the California Vehicle Act, section 141¾, which provided that "Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways * * * and while so riding * * * receives * * * an injury, shall have no right of recovery against the owner * * *" unless the injury resulted from "the intoxication, wilful misconduct, or gross negligence of such owner [or] driver".

[1,2] As aptly stated in the recent case of *Buckner v. Vetterick*, 124 Cal.App.2d 417, at page 418, 269 P.2d 67, at page 68:

"Statutes 'must be construed with their intent and purpose in view and the mischief at which they were aimed', *Evans v. Selma Union High School Dist.*, 193 Cal. 54, 57, 222 P. 801, 802, 31 A.L.R. 1121, for these often throw light upon the sense in which the language is used. The situation which section 403 was designed to correct is well known and admirably stated in *Crawford v. Foster*, 110 Cal.App. 81, at page 87, 293 P. 841, at page 843, where it is said that, 'As the use of automobiles become almost universal, the

proverbial ingratitude of the dog that bites the hand that feeds him, found a counterpart in the many cases that arose, where generous drivers, having offered rides to guests, later found themselves defendants in cases that often turned upon close questions of negligence. Undoubtedly, the Legislature, in adopting this act, reflected a certain natural feeling as to the injustice of such a situation. * * * Doubtless, the Legislature intended to change the rule heretofore adopted in this state, that a mere invited guest could recover for simple negligence * * *."

In the cases of *Moreas v. Ferry*, supra, and *Prager v. Isreal*, supra, in which the former section 141¾ of the Vehicle Act (the first guest law statute) was considered, it was held that the so-called guest law, being in derogation of the common law, must be strictly construed, and that because the term "while so riding" was used five times in said section 141¾, a person who was not actually riding in the vehicle at the time of the accident could not be held to be a guest within the meaning of said section.

[3] However, in 1935, after the decision in *Moreas v. Ferry*, the legislature amended and revised the so-called guest statute and enacted the present section 403 of the Vehicle Code. We may take judicial notice of the fact that in formulating and enacting legislation the legislature has the assistance and advice of a well-trained and very efficient legislative counsel bureau, and that it was therefore aware of the decision in *Moreas v. Ferry*, and felt that that decision necessitated an amendment of the guest statute so as to make it conform to what was undoubtedly the original intent and purpose of the statute.

That this is so is indicated by the following statement by Mr. Justice Carter in *Prager v. Isreal*, 15 Cal.2d at page 94, 98 P.2d at page 731:

"In addition, it is to be observed that following the decision in *Moreas v. Ferry*, supra [135 Cal.App. 202, 26 P.2d 886], the legislature eliminated from the statute, the phrase 'in any vehicle,

moving upon any of the public highways' and inserted in its stead the words 'in any vehicle upon a highway', and further eliminated entirely the use of the phrase 'while so riding'. * * *

"It was held in *Oakland Paving Co. v. Whittell Realty Co.*, 185 Cal. 113, 195 P. 1058, that the elimination of a statutory clause after the rendition of a decision affecting the law is to be regarded as an indication of legislative intent to change the meaning of the law or to obviate objections to it. It may therefore be inferred that the legislature recognized the correctness of the decision in *Moreas v. Ferry*, supra, in the light of the wording of the statute at that time, and made the above-mentioned changes in order to obviate the necessity of such an interpretation. See *McColgan v. Jones, Hubbard & Donnell, Inc.*, 11 Cal.2d 243, 78 P.2d 1010."

Respondent contends that it offends common sense to believe that a person standing on the ground outside of an automobile is "riding" within an automobile. However, section 403 provides that "No person who as a guest accepts a ride *in any vehicle* upon a highway without giving compensation for such ride * * * has any right of action for civil damages against the driver of such vehicle * * * on account of personal injury to * * * such guest *during such ride* * * *." (Emphasis added.) We believe that the statute cannot reasonably be given the narrow construction that respondent gives it, and that to do so would do violence to the intention of the legislature. In the instant case it was admitted that respondent became the guest of appellant for the purpose of going from Chico to Fall River. The ride commenced in Chico, and, as hereinbefore set forth, several hours later appellant stopped the car, apparently to check his air pressure and for the parties to get out and stretch. It was while respondent was standing by the side of the car that the car rolled backward and the edge of the door struck him. Thereafter both appellant and respondent got back into the car and continued the trip.

[4-7] We believe that when the legislature changed the law in 1935 by eliminating the words "moving upon" and "while so riding", and enacted section 403 in its present form, the legislature intended that a person who as a guest accepts a ride without giving compensation becomes a guest when the ride or journey begins and remains a guest while the car is in motion, and while the car is idle or stopped, where the purpose of the stop is a part of and incidental to the ride or journey. We do not believe that it was the intention of the legislature that the host-guest relationship should be held to have been interrupted under the circumstances present in the instant case. To so hold would in our opinion not only render the changes made in the earlier guest statute meaningless, but would defeat the object that the legislation was intended to accomplish.

The following language of the appellate court of Illinois in a recent case construing a similar statute may well be applied to the instant case. In that case, *Tallios v. Tallios*, 350 Ill.App. 299, at page 304, 112 N.E.2d 723, at page 725, the court said:

"A narrow or literal interpretation of the words 'person riding in a motor vehicle as a guest, without payment for such ride,' limiting the effect of the statute to accidents occurring when a guest is seated in an automobile in motion, would defeat, or at least impair, the purpose of the legislation. To give full effect to the legislative intent a generous owner or driver must be protected at all times that the relation of host and guest exists in connection with the free ride. The beginning and end of that relation is not unlike the beginning and end of the relation of carrier and passenger for hire in a public conveyance. In the latter case the relation begins with the attempt of the passenger to enter the conveyance and ends when he has alighted in safety on completion of the journey. It is not interrupted or terminated by a temporary absence from the conveyance for a reasonable and usual purpose. 10 Am.Jur., Carriers, pages 33, 34, 54 and 56. So,

the relation of host and guest between automobile owner or driver and a passenger riding without payment of compensation begins when the guest attempts to enter the automobile, and ends only when he has safely alighted at the end of the ride. Here the ride had not terminated. Plaintiff was injured before she reached her destination. The stopping of the automobile to permit further search for plaintiff's purse and the act of plaintiff in getting out of the car to more effectively make the search, were usual and customary acts incidental to a normal courtesy to plaintiff as defendant's guest. She did not lose her status as a guest."

In the case of *Castle v. McKeown*, 327 Mich. 518, 42 N.W.2d 733, 734, the plaintiff-guest had ridden with defendant-driver in the latter's automobile from Lansing to Lake Lansing for a picnic. On the return trip to Lansing defendant stopped the car in order to examine a rear tire; plaintiff was ill and she left the car and went to a shed in a nearby field. She returned in a few minutes and when she started to get back into the car she was thrown to the ground and injured as a result of the defendant's negligence. The court said that the "purpose of the guest act is to protect owners and operators of automobiles from liability for ordinary negligence arising during the gratuitous passage furnished to others. * * * In the instant case the journey had not ended. The interruption was not over five minutes and was for purposes directly related to the trip and mutually beneficial to both driver and passenger. Transportation from the lake to plaintiff's home was still in progress at the time Mrs. Castle was injured. She was then a guest being transported within the meaning of the statute." The Michigan statute, Comp. Laws 1948, § 256.29, uses the words "no person, transported by the owner or operator", which is similar in meaning and effect

to our own statute. It is important to note that the court in such situation held that the plaintiff was within the guest statute which required that she be "transported." So in the instant case the trip had not been completed, it was still in progress, and the stop was made for the mutual benefit of both respondent and appellant, so that the air pressure in the tire could be checked and to allow them to stretch their muscles.

As is well said in *McGrath v. Kaelin*, 66 Cal.App. 41, at page 44, 225 P. 34, at page 35:

"* * * it is a rule of statutory interpretation that the intention of the Legislature controls if it can be reasonably drawn from the language used, to the rejection of a more literal construction which would result in inconsistency or absurdity. To find such intent is the object of all interpretation. A statute will be construed, therefore, with reference to the whole system of which it is a part, and all statutes which relate to the same subject-matter, briefly called statutes *in pari materia*, are construed together. They are all compared, and harmonized if possible, to ascertain the legislative intent and to give them effect accordingly."

In view of the foregoing we conclude that the trial court erred in finding that respondent was not a guest of appellant within the meaning of section 403 of the Vehicle Code. Since respondent's complaint did not allege, nor is there any evidence of, wilful misconduct or intoxication on the part of appellant, it follows that since respondent was a guest within section 403 of the Vehicle Code he cannot recover for the injuries sustained as a result of the appellant's ordinary negligence.

The judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

130 Cal.App.2d 169

**Grace A. LAIDLAW, Plaintiff
and Appellant,**

v.

**Louise PEROZZI, Defendant
and Respondent.**

Civ. 8474.

**District Court of Appeal, Third District,
California.**

Jan. 10, 1955

Action for personal injuries sustained by plaintiff, while working in defendant's kitchen by prearrangement between parties to serve as cohostesses. The Superior Court, Shasta County, Richard B. Eaton, J., granted defendant's motion for nonsuit and entered judgment and plaintiff appealed. The District Court of Appeal, Finley, J., held that where plaintiff by mistake opened and stepped through one of two doors, located side by side, which plaintiff thought led to front hallway, but which opened on-to basement stairway, and where plaintiff was only vaguely familiar with layout of premises, plaintiff's contributory negligence was question of fact for the jury.

Judgment reversed.

1. Negligence ⇨32(1)

A higher degree of care is owed to an invitee than to a mere licensee.

2. Negligence ⇨32(2, 2.3)

Distinction between "invitation" and "license" to go on another's premises is that the former is inferred where there is a common interest or mutual advantage and the latter where the object is the mere pleasure or benefit of licensee.

See publication Words and Phrases, for other judicial constructions and definitions of "Invitation" and "License".

3. Negligence ⇨32(2)

A "licensee" is a person whose presence is not invited but merely tolerated.

See publication Words and Phrases, for other judicial constructions and definitions of "Licensee".

4. Negligence ⇨32(1), 33(1)

Generally, owner of premises is under no obligation to keep his premises in safe condition for trespassers or licensees, as

such persons enter at their own risk, and the only duty imposed upon proprietor is to abstain from willful or wanton injury.

5. Negligence ⇨32(1)

Where licensor is aware of licensee's presence, licensor is charged with duty of exercising reasonable care to avoid injuring licensee by any active or overt act of negligence.

6. Negligence ⇨32(1), 52

Owner of land or proprietor of premises must not only abstain from willful or wanton injury to invitee, but he owes such person a duty of maintaining his property in reasonably safe condition, of exercising reasonable care in protecting invitee from injury, and of not exposing invitee to known dangers on premises without giving him adequate warning thereof.

7. Negligence ⇨32(1)

Where plaintiff was upon defendant's premises in mutual undertaking of both parties to serve as cohostesses, it was incumbent upon defendant to commit no overt act to increase hazards of premises to plaintiff while she was there and using that portion of the premises within reasonable contemplation of parties, whether plaintiff be considered an invitee or licensee.

8. Negligence ⇨56(1.14)

Where plaintiff, who was in defendant's kitchen by a prearrangement between parties to serve as cohostesses, was injured when she, in responding to front door bell, by mistake opened and stepped through door leading from kitchen to basement stairway and fell down stairway, which was rendered hazardous by defendant having drawn a bolt on door, defendant's act proximately contributed to accident, and in absence of plaintiff's contributory negligence, rendered defendant liable, whether plaintiff was considered an invitee or licensee.

9. Negligence ⇨136(26)

In action for injuries sustained by plaintiff, who, while working in defendant's kitchen by prearrangement between parties to serve as cohostesses, by mistake opened and stepped through one of two doors, located side by side, which plaintiff thought

led to front hallway, but which opened onto basement stairway, and where plaintiff was only vaguely familiar with layout of premises, plaintiff's contributory negligence was question of fact for the jury.

10. Negligence \Rightarrow 136(15)

In action for injuries sustained by plaintiff, who was working in defendant's kitchen by prearrangement between parties to serve as cohostesses, whether she was an invitee or licensee was question of fact for the jury.

Hugh B. Collins, Medford, Or., & Barr & Hammond by J. Everett Barr, Yreka, for appellant.

Tebbe & Correia, by Joseph P. Correia, Yreka, for respondent.

FINLEY, Justice pro tem.

In this action appellant seeks damages from respondent for personal injuries sustained by appellant when by mistake she opened and stepped through a door leading from respondent's kitchen to a basement stairway and fell down the stairway. The trial court granted respondent's motion for a nonsuit and entered judgment thereon, specifically basing its judgment on the ground that appellant by her own proof had established that she was guilty of contributory negligence as a matter of law. The only question involved is whether the trial court erred in so holding or whether under the circumstances as disclosed by the evidence the question of contributory negligence was one of fact which should have been left to the jury for determination.

Appellant and respondent had known each other for many years, but appellant had been inside respondent's house on only a few occasions. Each had social obligations to fulfill and it was agreed between them that as co-hostesses they would give a luncheon party at respondent's house to which they would invite their respective friends. Respondent admits that according to her understanding they were to divide the cost. Respondent is crippled and has difficulty in walking. It was a part of appellant's obligation as co-hostess to assist in respondent's kitchen in preparing the

refreshments. In the kitchen there are three doorways, two of which are side by side, perhaps a foot and a half or two feet apart, and similar in appearance, although one is somewhat smaller than the other. The larger of the two side by side doors opens outward from the kitchen into a hallway which leads to the front door. The smaller door which is to the left of the larger door as one faces them from the kitchen also opens outward but onto a steep basement stairway with no landing at the top, but which drops abruptly from the threshold of the door to the first step of the stairway. On this door there is, in addition to the customary knob and spring catch, a common type of sliding bolt which at the time that appellant opened the door and fell down the stairway was not engaged so as to lock the door. The evidence shows that shortly before appellant's fall respondent drew this bolt, opened the door and cast some laundry through it either onto the stairway or down into the basement, leaving the bolt unengaged when the door was closed.

At the time of the accident not all of the guests had arrived. While appellant was working in the kitchen there was an alarm at the front door which appellant sought to answer, but by mistake, instead of opening the kitchen door into the hallway leading to the front door, she opened the door leading to the stairway and basement, stepped through it and fell down the stairway, thus sustaining her injuries.

[1-3] Counsel in their briefs discuss at some length the question whether appellant was an invitee or merely a licensee on respondent's premises, the established rule being that a higher degree of care is owed to an invitee than to a mere licensee. The distinction between "invitation" and "license" to go on another's premises is that the former is inferred where there is a common interest or mutual advantage and the latter where the object is the mere pleasure or benefit of the licensee. *Sills v. Forbes*, 33 Cal.App.2d 219, 91 P.2d 246; *Fraters v. Keeling*, 20 Cal.App.2d 490, 67 P.2d 118. A licensee is a person whose presence is not invited but merely tolerated. *Strong v. Chronicle Pub. Co.*, 34 Cal.App.2d

335, 93 P.2d 649; *Colombo v. Axelrad*, 45 Cal.App.2d 439, 114 P.2d 425.

[4-6] It is the general rule that the owner of premises is under no obligation to keep his premises in a safe condition for trespassers or licensees. Such persons enter at their own risk, and the only duty imposed upon the proprietor is to abstain from wilful or wanton injury. *Sheridan v. Ravn*, 91 Cal.App.2d 112, 204 P.2d 644; *Fraters v. Keeling*, *supra*. Where, however, a licensor is aware of a licensee's presence, the licensor is charged with the duty of exercising reasonable care to avoid injuring the licensee by any active or overt act of negligence. *Hamakawa v. Crescent Wharf & Warehouse Co.*, 4 Cal.2d 499, 50 P.2d 803. In case of an invitee on the other hand, not only must an owner of land or a proprietor of premises abstain from wilful or wanton injury, but he owes such person the duty of maintaining his property in a reasonably safe condition, and of exercising reasonable care in protecting the invitee from injury. *Chafor v. City of Long Beach*, 174 Cal. 478, 163 P. 670, L.R. A.1917E, 685. He has a duty not to expose an invitee on the premises to dangers known to him without giving adequate warning thereof to the invitee. *Shanley v. American Olive Co.*, 185 Cal. 552, 197 P. 793; *Sheyer v. Lowell*, 134 Cal. 357, 66 P. 307; *Gastine v. Ewing*, 65 Cal.App.2d 131, 150 P.2d 266. This applies to dangers that are obvious as well as those which might well go unnoticed. *Vitrano v. Westgate Sea Products Co.*, 34 Cal.App.2d 462, 93 P.2d 832; *Jones v. Bridges*, 38 Cal.App. 2d 341, 101 P.2d 91; *Dingman v. A. F. Mattock Co.*, 15 Cal.2d 622, 104 P.2d 26; *Royal Ins. Co. v. Mazzei*, 50 Cal.App.2d 549, 123 P.2d 586.

[7,8] Even though appellant here be considered a mere licensee it was incumbent upon respondent to commit no overt act to increase the hazards of the premises to appellant while she was there and using that portion of the premises within the reasonable contemplation of the parties. Here appellant was in and using respondent's kitchen by prearrangement between the parties. Respondent entered the kitchen while appellant was there engaged in the

duties contemplated by the parties in their agreement to act as co-hostesses, and while appellant was so engaged respondent drew and left drawn the bolt in the cellar door, which door respondent admitted constituted a hazard by reason of its position and the construction of the stairway over which it opened. The very bolt which respondent had caused to be placed on the door as a safety measure respondent actively rendered ineffective during appellant's presence in and while she was using the kitchen. Thus it was respondent's affirmative act which, if not the sole proximate cause, at least proximately contributed to the happening of the accident and, in the absence of contributory negligence on the part of appellant, would render respondent liable for resultant injuries or damage to her whether appellant's status be that of licensee or invitee.

In appellant's opening brief it is stated that: "The trial court, believing he was following an intermediate appellate decision, *Standard Oil Company of Indiana v. Henninger*, 100 Ind.App. 674, 196 N.E. 706, and electing to do so because he knew of no Oregon or California cases in point held it negligence as a matter of law to open the wrong door." This statement is borne out by the trial judge's discussion of respondent's motion for a nonsuit, which discussion appears in the reporter's transcript. *Standard Oil Company of Indiana v. Henninger*, *supra*, is, however, only persuasive authority. Factually, it differs from the present case in material particulars and we do not consider that the principles there discussed and announced are controlling here. In that case the plaintiff *Henninger* drove into defendant's filling station merely for the purpose of securing a road map and for the purpose of using defendant's washroom facilities, but not for the purpose of purchasing any of defendant's products. He secured a map and asked permission to use the washroom which permission was granted by the attendant. Thereupon plaintiff *Henninger* opened a door which he apparently thought led to the washroom and, without looking or investigating to make certain, stepped through it and fell down a stairway into the basement. The court

pointed out that he had never been in the station before; that the door was closed and that respondent was not bound to anticipate that people coming as strangers upon the premises would assume that every door leading from the main part of the station led to a washroom or that persons with ordinary use of their senses would precipitately open doors and enter through without thought as to where they led. Obviously this is sound reasoning, for no person exercising ordinary care for his own safety would in reason be entitled when upon strange premises to assume that in exploring the same he could open just any door he saw and safely pass through it without using his senses to ascertain what lay beyond. Plaintiff Henninger saw nothing to indicate that the door he opened led to the washroom. The opening was purely an exploratory venture on his part regardless of his purpose. It was not a matter of thoughtless mistake or inadvertence any more than it would be such for one to walk briskly in total darkness in an area absolutely new and unfamiliar to him. On the other hand, it might not in reason be considered negligent or acting without due regard for one's own safety to walk briskly in total darkness in an area which one, through reasonable mistake or inadvertence, could have reason to believe to be familiar territory where no known danger lay. Whether the latter act would constitute negligence would undoubtedly be a question of fact depending upon the circumstances. The former would in all probability be reasonably considered so flagrant a disregard for one's own safety as to amount to negligence as a matter of law.

[9, 10] In the Henninger case the defendant did nothing affirmative to constitute the premises more dangerous after the plaintiff was present, whether as a licensee or invitee. In the present case respondent unlocked a previously locked door to an admittedly dangerous doorway after appellant was already on the premises and while she was engaged in performing a portion of her contemplated functions which were admittedly for the common benefit of both parties. True, this act of

unlocking the stairway door was not malicious or for the purpose of wilfully setting a trap for appellant. Nevertheless it did constitute the kitchen a more hazardous room to one who, though not thoroughly familiar with it, was sufficiently familiar to know that of the three doors leading out out of it one led to the dining room and the other to a hallway leading to the front door. It cannot then be said positively and without possibility of reasonable contradiction that appellant was unquestionably negligent if through mistake or inadvertence she opened the stairway door immediately alongside the hallway door, and in her haste and, thinking it was the door to the hallway and relying upon her previous familiarity with the safe condition of the hallway, presumed to hurry through it without the kind of inspection which would reasonably be required where one was *knowingly* entering upon unfamiliar territory. Certainly it is a question upon which reasonable minds might differ and if so it becomes a question of fact for the jury and not one of those instances where the court could say, without possibility of reasonable contradiction, that appellant's conduct constituted negligence as a matter of law.

In *Silvestro v. Walz*, 222 Ind. 163, 51 N.E.2d 629, 632, wherein plaintiff fell down an unguarded stairway the Supreme Court of Indiana, after commenting upon the appellate court's decision in *Standard Oil Company of Indiana v. Henninger* had this to say:

"Contributory negligence as a matter of law is usually a troublesome question and this case is no exception.

* * * But even in door cases of which there are many cited in notes in 20 A.L.R. 1147 and 42 A.L.R. 1098, courts have held that contributory negligence was not shown as a matter of law. * * * 'The plaintiff was entitled to rely to a reasonable extent upon appearances, even though he misjudged the actual situation.' *Skidd v. Quattrochi*, 1939, 304 Mass. 438, 23 N.E.2d 1009, 1011, citing * * *. In a negligence case with quite different facts we referred to 'a twilight zone where reasonable minds may differ up-

on the question of negligence.' Pfisterer v. Key, 1940, 218 Ind. 521, 531, 33 N.E.2d 330, 334. The facts here bring the question of contributory negligence within that zone."

In Helzer v. Wax, 127 Or. 427, 272 P. 556, the plaintiff backed through an open door or gate and fell down an elevator shaft. In Garrett v. Eugene Medical Center, 190 Or. 117, 224 P.2d 563, plaintiff opened an elevator door and stepped through it, falling into the elevator shaft. In Stewart v. Lido Cafe, 13 Cal.App.2d 46, 56 P.2d 553, a patron of the cafe, thinking that he was opening the door to a restroom, mistakenly opened a door upon a stairway and fell to his death. In each of these cases it was held that the question of contributory negligence was a question of fact to be left to the trier of facts, and not a question of law.

We hold that under the circumstances here the question of appellant's contributory negligence, as well as whether appellant was an invitee or licensee, were and are questions of fact for the jury.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



130 Cal.App.2d 91

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

John E. WALZMUTH, Defendant and
Appellant.

Cr. 5279.

District Court of Appeal, Second District,
Division 1, California.

Jan. 4, 1955.

Prosecution for driving automobile wrong way in one way zone while intoxicated and thereby causing injury to another. From judgment of conviction in Superior Court, Los Angeles County, Mildred L.

Lillie, J., and order denying motion for new trial, defendant appealed. The District Court of Appeal, Doran, J., held that evidence sustained conviction.

Judgment and order affirmed.

Automobiles 355(6)

Evidence sustained conviction for driving automobile wrong way in one way zone while intoxicated and thereby causing injury to another. Vehicle Code, § 501.

Percy Drabin, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the order "denying the motion of defendant for a new trial".

Defendant was charged by information with the violation of section 501 of the Vehicle Code. A jury was duly waived and the cause was submitted to the court on the transcript of the preliminary examination.

It was contended at the trial that appellant was driving in the wrong direction on the Arroyo Seco Freeway, a four-lane road, between Los Angeles and Pasadena, and that appellant's act caused a collision of three cars which resulted in the injury of three people.

Briefly, the evidence discloses that at the time of the accident appellant stopped. Following a conversation with two of the witnesses to the accident appellant drove away, still in the wrong direction. The number of appellant's car was obtained and given to the police. The accident occurred about 1:00 a.m.

At about 2:25 a.m. appellant was arrested while driving the same car at Adams and San Pedro Streets in Los Angeles.

Two of the witnesses of the accident and the officers who made the arrest testified that appellant was intoxicated.

Without reciting further details it is sufficient to note that the record does not support appellant's contentions. On the con-

trary, as recited in respondent's brief, "In the case at bar, the evidence clearly established that the defendant and appellant was driving on the wrong side of a freeway zoned for one-way traffic while under the influence of intoxicating liquor, that his manner of driving indicated a willful and wanton disregard for the safety of persons or property, and that his act of driving in such condition proximately caused two other automobiles driven by Miss Lee and Mr. Corso to collide."

The judgment and order are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



130 Cal.App.2d 102

Aubrey GILLIAM, Nils Ophelm, Phillip Ledda, Pedro Bravo, Billit T. Hughes, William Connerney, Glenn Brown, Vernon Mays, and Vincent Butler, Petitioners and Appellants,

V.

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION, James G. Bryant, Michael B. Kunz, C. H. Herbage, Glenn V. Walls and Edward Cain, as members of California Employment Stabilization Commission; California Unemployment Insurance Appeals Board, Michael B. Kunz, Glenn V. Walls and Edward Cain, as members of California Unemployment Insurance Appeals Board, Respondents.

Civ. 16132.

District Court of Appeal, First District,
Division 1, California.

Jan. 5, 1955.

Hearing Denied March 3, 1955.

Proceeding to review a decision of the Unemployment Insurance Appeals Board affirming a decision of the referee denying benefits to plaintiffs wherein the Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., discharged an alternative writ of mandate and entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Bray, J.,

held that seamen entitled under their collective bargaining agreement to take pay in lieu of vacation were not barred from unemployment benefits on the ground that they receive regular wages and that seamen receiving maintenance and cure were not barred from benefits on the ground that they were received under workmen's compensation law or Employers Liability Act of the state or federal government.

Writ issued and judgment reversed.

1. Administrative Law and Procedure ⇨387
Social Security and Public Welfare ⇨540

The Department of Employment has no power to enact a regulation or give a definition contrary to the terms of the Unemployment Insurance Act.

2. Social Security and Public Welfare ⇨540

The term "regular wages" precluding unemployment benefits when the claimant continues to receive his regular wages has not such a definite and understood meaning that the Department of Employment is precluded from enacting regulations defining the term. Gen.Laws, Act 8780d, §§ 11(a)(1), 205, 208.

3. Social Security and Public Welfare ⇨387

In unemployment compensation cases, "vacation pay" is generally considered earned compensation or wages and not a gratuity.

4. Social Security and Public Welfare ⇨387

Where seamen's collective bargaining agreement had the option not to take pay in lieu of the vacation, the vacation pay received by the seamen did not constitute "regular wages" so as to disqualify seamen receiving vacation pay from receiving disability benefits. Gen.Laws, Act 8780d, § 208.

See publication Words and Phrases, for other judicial constructions and definitions of "Regular Wages".

5. Seamen ⇨11(1)

Maintenance and cure is a right given seamen under the general maritime law and is an implied provision in contracts of marine employment.

6. Seamen ⇨11(1)

"Maintenance" and cure are not "wages" under maritime law, but wages con-

stitute one kind of a ship's obligation to the sailors and maintenance is another kind.

See publication Words and Phrases, for other judicial constructions and definitions of "Maintenance" and "Wages".

7. Social Security and Public Welfare ⇐384

Maintenance and cure of seamen whose employment was terminated by illness or accident resulting in disability were not regular wages precluding an award of disability benefits under the Unemployment Insurance Act.

8. Seamen ⇐11(1)

The right to maintenance and cure is conferred by the general maritime law which is not state law but a body of the federal law.

9. Social Security and Public Welfare ⇐291

California in enacting its unemployment benefit laws has the right to determine who shall be entitled to receive benefits.

10. Statutes ⇐199

Where an act of the Legislature refers to "laws", the expression refers to statute law, rather than to common law, unless the context requires a different construction.

See publication Words and Phrases, for other judicial constructions and definitions of "Laws".

11. Statutes ⇐199

Expressions in statutes such as "required by law", "prescribed by law", "regulated by law" refer to statutory provisions only and the expression "liability created by law" refers only to statutory liability and not to liabilities recognized by general law.

See publication Words and Phrases, for other judicial constructions and definitions of "Prescribed by Law", "Required by Law" and "Regulated by Law".

1. Hereafter referred to as "disability benefits."

2. The act was greatly revised and is now the Unemployment Insurance Code, adopted April 21, 1953. However, the law applicable here is Act 8780d, Deering's General Laws, 1949 pocket supplement.

12. Social Security and Public Welfare

⇐384

Benefits received by seamen consisting of maintenance and cure under collective bargaining agreement and whose employment was terminated by illness or accident resulting in disability were received under the general maritime law and were not benefits received under a workmen's compensation law or employers' liability law of the state or federal government, so as to preclude an award of benefits under the Unemployment Insurance Act. Gen.Laws, Act 8780d, § 207(b)

Gladstein, Andersen & Leonard, Lloyd E. McMurray, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw, Deputy Atty. Gen., Vincent P. Laferty, Deputy Atty. Gen., for respondent.

BRAY, Justice.

In a proceeding in the superior court brought under section 1094.5, Code of Civil Procedure, to review a decision of the Unemployment Insurance Appeals Board affirming a decision of a referee for the Department of Employment denying benefits to plaintiffs, the court discharged an alternative writ of mandate and entered judgment in favor of defendants. Plaintiffs appeal.

Questions Presented.

1. Are seamen who, under their collective bargaining agreement, have an option to take pay in lieu of vacation, entitled also to unemployment compensation disability benefits¹ under the Unemployment Relief and Insurance Act, Act 8780d, Deering's General Laws,² § 11 (a) (1), and Title 22, Cal.Adm.Code, § 261 (i) ?

2. Are seamen who receive "maintenance and cure"³ provided for in said agreement entitled to such benefits?

ing's General Laws, 1949 pocket supplement.

3. "Maintenance and cure" refers to the traditional payments required by maritime law of shipowners to be paid seamen who are injured or become sick

Records.

Plaintiffs are seamen employed under collective bargaining agreements between Pacific Maritime Association⁴ and National Union of Marine Cooks and Stewards, and whose employment was terminated by reason of illness or accident resulting in disability. Each plaintiff applied to the department for unemployment compensation disability benefits and his application was refused by the examiner because of receipt of either pay in lieu of vacation or maintenance and cure, and in Ledda's case, receipt of both. Plaintiffs appealed to the Division of Appeals, Department of Employment. A hearing before the referee resulted in a decision adverse to plaintiffs. On appeal to the Appeals Board from the referee's decision, said decision was affirmed with modification. Plaintiffs then obtained an alternative writ of mandate from the superior court. The cause was submitted on the certified administrative record and briefs. Judgment was entered affirming the decision of the Appeals Board. The effect of the decision is to hold that seamen, who become disabled and who receive maintenance and cure, or who, having the option of taking pay in lieu of vacation, receive pay in lieu of vacation, are disqualified from receiving disability benefits pro tanto. The act provides benefits to be paid to a disabled individual for "each full day during which he is unemployed." § 205. The bargaining agreement provides for vacation with pay to stewards having six months or more continuous service in accordance with a detailed plan. Section 208 provides: "No individual shall be paid unemployment compensation disability benefits with respect to any week if he continues to receive his *regular wages*, or any part thereof; * *." (Emphasis added.) The court found that vacation pay constitutes "wages" under section 11 (a) (1) of the act, which provides: "* * * the term 'wages' means: (1) All remuneration payable for personal services, whether by private agreement

or consent or by force of statute, including commissions and bonuses, and the cash value of all remuneration payable in any medium other than cash"; also under section 261 (i), Title 22, Cal. Adm. Code, which provides: "(i) 'Regular Wages' as that term is used in Section 208 of the act means compensation paid entirely by an employer directly to his employee as a full or partial payment of his remuneration during a period of disability."

Is In Lieu Vacation Pay
"Regular Wages"?

It should be pointed out that there is a decided conflict in the findings of both the board and the court in this: both found that plaintiffs' vacation pay was not "regular wages" and yet that plaintiffs were receiving wages as defined in section 11(a) (1) and section 261(i) Adm. Code. The latter section by its terms refers to section 208 only, and defines the "regular wages" mentioned in that section. It has no relation to "wages" or section 11(a) (1). Thus the findings, in effect, find that plaintiffs' vacation pay was not "regular wages" and yet were "wages" as defined in section 261(i) Adm. Code, which only defines "regular wages." We can disregard this conflict, as even though plaintiffs were receiving "wages" as defined in section 11(a) (1), they still would be entitled to disability benefits unless they were receiving the "regular wages" mentioned in section 208 defined by section 261(i). Section 151(a) provides that should there be a conflict between the provisions regarding unemployment compensation, art. 1 to 9, inclusive, of the act, and those regarding unemployment compensation disability benefits, art. 10, the latter provisions shall prevail with respect to such benefits. So the question we are to decide is, "Is vacation pay 'regular wages'?"

[1, 2] Plaintiffs contend that "regular wages" in section 208 has a definite meaning, namely, the wages the disabled workman was regularly receiving during his employment up to the time of disability, and

or disabled while in the service of the ship. "Maintenance" is the payment to provide food and shelter to the seamen during the period when he cannot

work. "Cure" is the cost of doctor's services, medicines, etc.

4. Which filed an amicus curiae brief.

that, having such meaning, the power given the Department of Employment by section 90 of the act, to promulgate regulations, of which section 261(i) Adm.Code is a part, does not include the power to define "regular wages" so as to extend its definite meaning, and therefore "regular wages" can mean nothing except the claimed definite meaning. We agree with plaintiffs that the department would have no power to enact a regulation or give a definition contrary to the terms of the act, but we do not agree that the term "regular wages" as used in section 208 has such a definite and understood meaning that it does not need defining. It is an ambiguous term and requires defining. We find no conflict between section 208 of the act and section 261(i) Adm. Code.

[3] In determining whether the vacation pay here is "regular wages" as used in section 208, as defined by section 261(i) Adm. Code, there are two matters to be considered: (1) Is vacation pay "remuneration" and (2) is it such "during a period of disability." (1) In unemployment compensation cases vacation pay⁵ is generally considered earned compensation or wages and not a gratuity. *Jones v. California Employment Stabilization Comm.*, 120 Cal.App. 2d 770, 262 P.2d 91; *Shand v. California Employment Stabilization Comm.*, 124 Cal. App.2d 54, 268 P.2d 193; *In re Wil-low Cafeterias*, 2 Cir., 1940, 111 F.2d 429.

The bargaining agreement provided that after six months' employment, the employee "shall be granted vacation, or in lieu thereof, vacation pay in accordance with the following schedule:" In other states it has been held that where, under the union contract of employment, the employee has the option of taking pay in lieu of vacation, such pay is considered a "bonus" rather than wages or compensation in cases involving unemployment compensation. *Renown Stove Co. v. Michigan Unemployment Compensation Comm.*, 1950, 328 Mich. 436, 44 N.W.2d 1, 2. There the employer laid off the plaintiffs indefinitely for lack of work. There were two classes of employees: (1) Those whose employment con-

tract provided for vacation with pay for the period July 5 to 18, without any provision for payment in lieu of vacation. The Michigan law provided that an employee was disqualified for unemployment compensation benefits for any week with respect to which he received "vacation with pay." The court held these employees to be so disqualified. (2) Those whose union employment contract gave them the option to either take a vacation or pay in lieu thereof. The court held that these employees taking pay in lieu of vacation were not receiving "vacation with pay" but were receiving a bonus and hence not disqualified from unemployment compensation benefits. In *Hubbard v. Michigan Unemployment Compensation Comm.*, 1950, 328 Mich. 444, 44 N.W.2d 4, 6, the contract provided payments "in lieu of vacation" which it referred to in one place as "a bonus in lieu of vacation" and other places as "compensation in lieu of vacation." It made no provision for taking vacation. The court held the payment to be a "bonus" and not "vacation with pay."

Grobe v. Board of Review of Department of Labor, 1951, 409 Ill. 576, 101 N.E.2d 95, is not contrary to the above decisions. In the *Grobe* case the contract provided for vacation with pay, and that any employee who had not received his vacation during the year (the employer retained the right to fix vacation dates which must not interfere with plant operations) would receive vacation pay on the first Friday in December. In case a department closed down the employees would receive vacation pay immediately. This did not preclude an employee from requesting a vacation at some other time. The plant closed down to enable all employees to have vacations. *Grobe* contended that thereby he was involuntarily unemployed and entitled to unemployment compensation benefits and that his vacation pay was a bonus. The court held that the designated vacation period was voluntary unemployment provided for in the contract and that the contract itself designated his compensation as "pay" for that period and therefore it was "wages" under the Illinois act making receipt of wages a disqualification for unemployment compensation.

5. As distinguished from in lieu vacation pay, hereafter discussed.

In *Hamlin v. Coolerator Co.*, 1949, 227 Minn. 437, 35 N.W.2d 616, 617, a previous contract between the employer and the union had provided that when an employee desired to forego his vacation “* * * said vacation shall be taken in the form of a bonus * * *.” The contract in effect at the time the employer shut down the plant to compel the employees to take their vacations, contained no such provision but did provide for vacation with pay. The court held that the payment for this period was not a bonus, but a “vacation allowance” which under the Minnesota act disqualified the employee from receiving unemployment compensation.

In *Kelly v. Administrator, Unemployment Compensation Act*, 1950, 136 Conn. 482, 72 A.2d 54, the contract provided for vacations with pay to be taken at a time to be arranged between the employer and the employee. The company shut down the plant to give all employees a vacation during the week of July 4th. The contract provided that the company might shut down during that week and if it did such week should be deemed a week of vacation. Because of receiving pay for this week the plaintiffs were denied unemployment compensation benefits under the Connecticut act.

There is no California case expressly discussing the situation concerning in lieu vacation pay. The nearest approach to a discussion is in *Jones v. California Employment Stabilization Comm.*, supra, 120 Cal. App.2d 770, 262 P.2d 91. There the contract provided that all employees entitled to vacation with pay would within 30 days of May 1st receive “vacation pay,” “regardless of when, during that year, they may elect to take time off.” 120 Cal.App.2d at page 772, 262 P.2d at page 92. They also had “the option of not taking time off during the succeeding 12 months.” 120 Cal.App.2d at page 773, 262 P.2d at page 93. Apparently all the parties assumed that this pay was “wages.” The court without amplification says “it is obvious that the vacation pay which he received constituted wages and was not a gratuity.” 120 Cal.App.2d at page 772, 262 P.2d at page 92. Later there appears this significant language, 120 Cal.App.2d at page 773, 262 P.2d at page 93: “Petitioner em-

phasizes the fact that an employee who is entitled to an annual vacation and receives a vacation paycheck following the computation date has the option of not taking time off during the succeeding 12 months. What the effect, if any, would be on the allocation of an employee’s check for annual vacation pay if he elects not to take time off is not before us and has no bearing on the instant case since the agreement does not give an employee who is laid off because of lack of work *any option* relative to vacation or vacation pay. It simply provides that he shall be given pro rata ‘vacation pay’ computed as of the date of termination in the same manner as annual vacation pay.” (Emphasis added.) Also the court said, 120 Cal.App.2d at page 773, 262 P.2d at page 93: “* * * petitioner could not realize upon his vacation pay while he was earning it, *nor could he then take time off.*” (Emphasis added.) In view of this language, the assertion, without discussion, that the vacation pay there constituted wages, and the cases cited in the opinion which likewise did not discuss the option feature, it would appear that the attention of the court had not been called to the authorities which hold that where the contract gives the employee the in lieu option, vacation pay is not wages but a bonus.

In *Shand v. California Employment Stabilization Comm.*, supra, 124 Cal.App.2d 54, at page 57, 268 P.2d 193, at page 195, the court said: “Although the right to vacation pay is earned by the employee’s labor in a preceding period the vacation pay is not allocable to that period *as the employee cannot at his choice take the pay during that period without taking vacation*, Jones case, supra, 120 Cal.App.2d at page 773, 262 P.2d at page 92, 93. The contract does not entitle the employees to a certain amount of extra pay independent of vacation, but only to ‘vacation with pay’ and this right of theirs is in no way impaired.” (Emphasis added.) Thus the court was not considering the effect of a contract giving the employee a vacation pay in lieu option. Significantly, the decision holds not in point a certain decision of the California Unemployment Insurance Appeals Board because in the latter case “the employees were according

to their contract always entitled to a 'bonus in lieu of vacation pay' without taking any vacation. It was therefore held that such payment was a bonus fully earned in and allocable to the period during which the employee worked for it." 124 Cal.App.2d at page 57, 268 P.2d at page 195.⁶ There is a considerable difference between a situation where an employee can receive no pay in lieu of vacation unless his employment terminates and one where he has the option of working without vacation and receiving pay in lieu thereof. In the first instance normally he takes a vacation and receives his usual wages for the vacation period, so that at the end of a year's work he has received but 52 weeks pay. In the second instance, if he exercises his option of taking no vacation he receives his 52 weeks pay plus additional pay, depending upon the amount of vacation due him. This additional pay is not earned either in the sense that he is working beyond the time for which he has already been paid, or is pay for time off. In effect, it is a gratuity or bonus given for not taking time off. Being a bonus, it necessarily relates to the period in which it accrues and is payable during the year earned. The fact that his employment terminates does not change this situation. In such event he is entitled to his bonus immediately, and it cannot be allocated to subsequent days. This is the holding in *Renown Stove Co. v. Michigan Unemployment Comp. Comm.*, supra, 44 N.W. 2d 1; *Hubbard v. Michigan Unemployment Comp. Comm.*, supra, 44 N.W.2d 4. While in *Jones v. California Employment Stabilization Comm.*, 120 Cal.App. 770, 262 P.2d 91, *Shand v. California Employment Stabilization Comm.*, 124 Cal.App.2d 54, 268 P.2d 193, *Hamlin v. Coolerator Co.*, 35 N.W. 2d 616, *Grobe v. Board of Review of Department of Labor*, 101 N.E.2d 95 (all

supra), it was held that under their respective contracts vacation pay on termination of employment should be allocated to the period following the termination, those cases are not in point for the reason that as heretofore shown they were not dealing with an in lieu vacation pay situation.

Bennett v. Hix, W.Va.1953, 79 S.E.2d 114, cited by defendants, dealt with a provision of the West Virginia Unemployment Compensation Act which provided, in effect, that a worker who is unemployed because of his request, or that of his agent, for vacation at a specified time and who receives vacation pay, is disqualified from receiving unemployment compensation benefits. It was held that those employees who made no request for vacation at that time, but were required to take it because the companies closed down for mass vacations, and who received partial or no vacation pay, were entitled to benefits. Those employees who either directly, or through their union, had requested vacations with pay at this particular time, were denied benefits. There is no similar provision in the California act, so the decision is not applicable here.

All of the cases we have discussed under either rule dealt with unemployment compensation benefits. None of them dealt with unemployment compensation disability benefits. We can see no reason, however, why those rules should not be applied in defining vacation pay and in lieu vacation pay in disability benefit cases.

Article 10 of the act, dealing with Unemployment Compensation Disability Benefits, was adopted in 1946. It was based upon the Rhode Island Temporary Disability Insurance Act, chapter 1200, Laws of 1942.⁷ Originally that act provided "'Wages' is

6. In analyzing the *Jones* case, supra, it should be borne in mind that it was dealing only with unemployment compensation, and that section 9.2 disqualifies from that type of benefit any employee receiving "wages" which are defined in section 11(a) (1) as "All remuneration * * * including commissions and bonuses" whereas the only disqualification from the receipt of disability benefits is "regular wages" as defined in section 261(i) Adm.Code, herein discussed.

In the *Shand* case, supra, the claim of McIver (a coplaintiff) was for disability benefits. However, the court, without considering section 208, treated the two claims, *Shand* for unemployment compensation and *McIver* for disability benefits, exactly the same, seeming to assume without discussion that the act also treated the two situations the same.

7. See 2 Stan.L.Rev. 348; 22 Cal.State Bar Journal, 132.

hereby declared to have the same definition as contained in the unemployment compensation act, as amended." § 2(14). But chapter 1367, Laws of 1943, amended that section to provide that disability benefits would not be denied because of receipt by the employee, under a previous employer and employee agreement, of regular wages, or parts thereof, during incapacitation. California did not accept this provision. On the contrary, section 208 as heretofore shown, provides that receipt of regular wages disqualifies. It would appear that if our Legislature intended the receipt of moneys other than "regular wages" to disqualify, it would have provided that the definition of wages should be the same as contained in the Unemployment Insurance Act, section 11(a) (1), which defines them as "All remuneration payable for personal services * * * including commissions and bonuses * * *."

It is significant, too, that section 208 states "if he [an employee] *continues* to receive his regular wages, or any part thereof * * *." (Emphasis added.) It could hardly be said that in receiving vacation pay an employee is *continuing* to receive anything. Such pay is a payment made once or twice during a year and not a payment that continues to be made.

[4] In view of the in lieu vacation pay option clause of the contract, the vacation pay received by plaintiffs did not constitute "regular wages" under section 208 of the act as defined in section 261(i) Adm.Code, and hence those plaintiffs receiving vacation pay were not thereby disqualified from receiving disability benefits.

Maintenance And Cure.

Both the Appeals Board and the court held that maintenance and cure constitutes "regular wages" under section 208 of the act and section 261(i) of Title 22, Adm. Code. The bargaining agreement provides: "Crew members who are entitled to maintenance under the general maritime law doctrine of wages, maintenance and cure, on account of injury or illness incurred in the service of the ship, shall be paid maintenance at the rate of \$6.00 per day."

[5-7] Maintenance and cure is a right given seamen arising under the general maritime law, and goes back to ancient times. *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 63 S.Ct. 930, 87 L.Ed. 1107. " * * * this obligation has been recognized consistently as an implied provision in contracts of marine employment." *Id.* at p. 730, 63 S.Ct. at page 933. Maintenance and cure is not wages. "Wages constituted one kind of the ship's obligation to the sailors. Maintenance is another kind." *Agnew v. American President Lines*, 9 Cir., 1949, 177 F.2d 107, 110. In *Newman v. United Fruit Co.*, 2 Cir., 141 F.2d 191, 193, it was held that under an act of Congress entitling a seaman to "wages and provisions" seamen who were improperly discharged while entitled to one month's wages were not entitled to maintenance also. State courts "must determine the rights of the parties under the maritime law as a 'system of law coextensive with, and operating uniformly in, the whole country.'" *Intagliata v. Shipowners & Merchants etc. Co.*, 26 Cal.2d 365, 371, 159 P.2d 1, 6. Nor can maintenance and cure be considered "regular wages" as defined in section 261(i), Adm.Code. It is in no sense "a full or partial payment of his remuneration during a period of disability." It is a payment *because* of disability. Logically, maintenance and cure is not wages. Uniformly, wages are tied to some period of work, as hourly, weekly, etc. But maintenance and cure is unrelated to such criteria. Take the extreme example of an apprentice merchant seaman who is injured during his first hour of employment. He is entitled to full maintenance and cure benefits.

In *Harden v. Gordon*, 11 Fed.Cas. p. 480, No. 6,047, Circuit Justice Story stated that seamen in case of sickness were entitled to be "healed at the expense of the ship" and that their right in that respect "constitutes, in contemplation of law, a part of the contract for wages, and is a material ingredient in the compensation for the labour and services of the seamen." 11 Fed.Cas. at page 481. This was in 1823. The court was not considering the question in issue

here, but the primary question of whether admiralty had jurisdiction of such a claim. For the purpose of giving admiralty jurisdiction, the claim was considered a part of the compensation due a seaman. But the later case of *Agnew v. American President Lines*, supra, 177 F.2d 107, considered the specific question. "It is further contended that because maintenance is part of the compensation to a sailor it is part of his wages * * * maintenance is due as an added part of the wage." 177 F.2d at page 110. The case then definitely held that maintenance was not a part of wages. Both the Appeals Board and the trial court erred in holding maintenance and cure to be "regular wages."

[8] However, it is contended that plaintiffs' right to benefits is denied by section 207(b) which provides in effect that the disabled employee is not entitled to benefits during such time as he shall receive with respect to his disability "benefits under a workmen's compensation law, or employer's liability law of this State, or of any other state, or of the Federal Government * *." (Emphasis added.)

Are "maintenance and cure" benefits, then, received under a federal workmen's compensation or employer's liability law? In *Doucette v. Vincent*, 1 Cir., 194 F.2d 834, 838, it is said: "The right to maintenance and care [sic] is conferred by general maritime law, and general maritime law is not state law but a body of federal law. And under federal law the right is contractual in the sense that it is attached as an incident to, and has its origin in, the contract of employment." 194 F.2d at page 838. As stated in *Aguilar v. Standard Oil Co.*, supra, 318 U.S. 724, 63 S.Ct. 930, the right to maintenance and cure is a right given seamen under maritime law and if not written into the employment contract, is nevertheless implied therein.

Owens v. Hammond Lumber Co., D.C. N.D.Cal.S.D., 8 F.Supp. 392, held that state workmen's compensation and federal maintenance and cure are substitutes for each other. In that case, the Federal District Court held that a seaman receiving California workmen's compensation is not eligible to receive maintenance. The court said,

8 F.Supp. at page 392: "The compensation award given by the laws of California is a substitute for either the admiralty indemnity or damages under the Jones Act, and includes the amounts recoverable under maintenance and cure. In fact, it is much closer in its theory to maintenance * * *."

In *Occidental Indem. Co. v. Industrial Accident Comm.*, 24 Cal.2d 310, 149 P.2d 841, it was held that a seaman suffering injuries arising out of his service on a ship has two remedies open to him: (1) "the ancient liability imposed by admiralty law upon shipowners for maintenance and cure", 24 Cal.2d at page 312, 149 P.2d at page 842, and (2) an action under the Jones Act. "The two foregoing remedies are each independent and cumulative of the other * * *." 24 Cal.2d at page 312, 149 P.2d at page 843. The court then goes on to hold that generally the California workmen's compensation laws are not applicable to such a situation; that the two remedies above mentioned generally are exclusive of any rights under state laws. However, it refers to *Davis v. Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246, which held that there is a twilight zone in which a state's compensation laws could apply and "that the remedies provided by the Jones Act or the maritime law of cure and maintenance are exclusive of state laws with the qualification that there may be borderline cases where that is not true * * *." 24 Cal.2d at page 314, 149 P.2d at page 844. It is doubtful whether there is a conflict between the District Court's holding in the *Owens* case that a seaman cannot recover maintenance and cure if he has received an award under the California workmen's compensation laws and the holding in the *Occidental* case above mentioned. In the *Owens* case the seaman was injured while his ship was in dock, which situation may have brought the case into the twilight zone above mentioned where the state could have jurisdiction. We are not concerned with that question. There is no conflict, however, between the two cases in the holding in the *Owens* case that workmen's compensation, where given, is, in effect, "a substitute for either the admiralty indemnity or damages under the Jones Act,

and includes the amounts recoverable under maintenance and cure." 8 F.Supp. at page 392. There is nothing in the Occidental case which conflicts with the following from the Owens case, 8 F.Supp. at page 392: "In a suit, either for indemnity in admiralty or under the Jones Act, all of the elements of loss recoverable under maintenance and cure are included in the damages, and, if a seaman recover on either of such causes of action, he may not recover in addition for maintenance and cure. If he fail to recover for indemnity or under the Jones Act, he may still recover for maintenance and cure * * *."

[9] We are here concerned with the question of whether maintenance and cure is a benefit under an employer's liability law of the federal government. California in enacting its unemployment benefit laws has the right to determine who shall be entitled to receive benefits. Here, it has said that persons receiving benefits under workmen's compensation or employer's liability laws of either state or federal government shall not receive disability benefits, or if the latter would be greater than the former the disability benefits shall be reduced pro tanto. There is no conflict between the state and the federal government involved. The only question is whether maintenance and cure is paid under either a federal workmen's compensation or employer's liability law.

There is no element of workmen's compensation in it. As pointed out, maintenance and cure is in nowise a statutory obligation of the employer but is a common law liability. While in a sense it is the payment of a liability by an employer, it is not paid under what is commonly considered an employer's liability law.

[10, 11] It is a general law of statutory construction that where an act of the Legislature refers to "laws," the expression will be held to refer to statute law, rather than to the common law, unless the context requires a different construction. In *Southern Bell Tel. & Tel. Co. v. Beach*, 1911, 8 Ga.App. 720, 70 S.E. 137, 138, the Georgia statute provided for attorney's fees in actions for damages for injury due to the failure of a common carrier to perform any

act required by "any law" of the state. Referring to the act which the telephone company had failed to perform, the court said, "In a broad sense, it was a violation of the law of the state of Georgia, for the common law is a part of the law of the state of Georgia * * *." The court then referred to the rule of statutory construction above mentioned and pointed out that in *Brinckerhoff v. Bostwick*, 99 N.Y. 185, 1 N.E. 663, "it is held that expressions in statutes, such as 'required by law,' 'prescribed by law,' 'regulated by law' etc., refer to statutory provisions only; and the expression 'liability created by law,' as used in the Code of Procedure, was held to refer only to statutory liability, and not to liabilities recognized by the general law." Constitutional provisions that the attorney general shall perform such duties as may be prescribed by "law" means statute law. *State ex rel. McKittrick v. Missouri Public Service Comm.*, 352 Mo. 29, 175 S.W.2d 857; *Shute v. Frohmiller*, 53 Ariz. 483, 90 P.2d 998.

The constitutional provision that no act shall be passed which shall provide that any existing "law" shall be applicable except by inserting it in such act, refers to other statute law. *State v. Masnik*, 123 N.J.L. 335, 8 A.2d 701. The word "laws" as used in the federal statute denouncing conspiracies to commit offenses against the laws of the United States means statutory laws. *United States v. Thomas*, 8 Cir., 145 F. 74, 79. "Law," as used in a statute relating to things "exempt from attachment by law" means exempt by statute. In *re Keene*, 15 R.I. 294, 3 A. 418, 419. See also 24 Words and Phrases, Law, 334 et seq., and Cumulative Annual Pocket Part.

[12] While in a broad sense the payment of maintenance and cure is an employer's liability, there is nothing in the context of section 207(b) which would require an application of anything but the general rule in interpreting the section. Particularly is this so as "workmen's compensation law" is coupled with "employer's liability law." There never was any workmen's compensation at common law, nor in the strict sense was there any employer's liability. When one uses either of these

terms, "workmen's compensation law," "employer's liability law", one thinks only of statutory law. In interpreting section 207(b), section 11(c) (2) should be borne in mind. It excludes from the definition of "wages" which bar an employee from receiving unemployment compensation benefits "The amount of any payment made to, or on behalf of, an employee under a plan or system established by an employer which makes provision for his employees * * * on account of * * * sickness or accident disability * * *." Surely, unless the context requires it, this court should not read into section 207(b) a disqualification from receiving disability benefits which would not be a disqualification as to unemployment compensation benefits. We hold that section 207(b) does not apply in this case.

It is obvious that the writ of mandate should have issued. The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; EDMONDS, SCHAUER and SPENCE, JJ., dissenting.



130 Cal.App.2d 58

Clara P. DE MOTA, E. O. Erickson and E. O. Erickson, as Trustee, Petitioners,
v.

The SUPERIOR COURT of the State of CALIFORNIA, In and for the COUNTY OF CALAVERAS, Respondent.
Civ. 8671.

District Court of Appeal, Third District California.
Jan. 3, 1955.

Rehearing Denied Jan. 25, 1955.

Hearing Denied March 3, 1955.

Prohibition proceeding to restrain Superior Court from proceeding in action against trustee and beneficiary to have certain notes and deeds of trust adjudged satisfied and discharged. The District Court of Appeal, Peek, J., held that failure to bring action to trial within five years after

action had been filed, required dismissal as to defendant who had continually resided in the state during that time, but not as to co-defendant whose continued absence from the state had kept the five year period from running.

Writ of prohibition granted as to defendant trustee but denied as to defendant beneficiary.

1. Stipulations ⇨1

Under statute providing for mandatory dismissal of civil action not brought to trial within five years after plaintiff has filed action unless party stipulates in writing to extension, letter indicating willingness to stipulate, did not constitute a stipulation. Code Civ.Proc. § 583.

2. Dismissal and Nonsuit ⇨60(2)

Under statute providing for mandatory dismissal of civil action not brought to trial within five years after plaintiff has filed his action, pleadings, filed after action had been filed, are not sufficient by themselves to restrain the application of the provision for mandatory dismissal. Code Civ.Proc. § 583.

3. Dismissal and Nonsuit ⇨63

Failure to bring action to trial within five years after action had been filed, required dismissal as to defendant who had continually resided in state during that time, but not as to co-defendant whose continued absence from state had kept five year period from running. Code Civ.Proc. § 583.

4. Mortgages ⇨311

Trustee under deeds of trust securing notes was not necessary party to action against beneficiary to have documents adjudged satisfied and discharged, and plaintiffs could proceed against beneficiary alone, notwithstanding the action against trustee had been dismissed for want of prosecution. Code Civ.Proc. § 583.

Jones, Lane, Weaver & Daley, Stockton, Jerome Politzer, San Francisco, for petitioners.

Cornish & Cornish, Berkeley, for real party in interest.

PEEK, Justice.

Petitioners seek to restrain the respondent superior court from further proceeding in action number 3098 entitled "Harry Sears and Harry Sears, as Trustee, Nevada Investment and Finance Corporation, a corporation, as Trustee, Calaveras Central Mining Corporation, a corporation, and Calaveras Central Gold Mining Co., Ltd., a corporation, Plaintiffs, versus Clara P. De Mota, E. O. Erickson, and E. O. Erickson, as Trustee, First Doe, Second Doe, Richard Roe Company, and John Doe Company, Defendants" now pending in said court.

By their action plaintiffs sought to have certain promissory notes and deeds of trust, wherein Erickson was named as trustee and De Mota was named as beneficiary, adjudged satisfied and discharged and plaintiffs' title to the trust deeded lands quieted as against the claims of said defendants. On March 23, 1954, petitioners herein filed their notice of motion to dismiss said action for lack of prosecution. The motion was denied on June 3, 1954, and on the same day respondent court set the cause for trial. Thereafter petitioners sought relief by prohibition in this court, alleging that approximately nine years and seven months had elapsed since said action number 3098 was filed on December 9, 1944; that during all of said time, except for the period from September, 1942, to October, 1945, when he was in the Armed Forces of this country, Erickson has been a practicing attorney, maintaining his offices in this State; that he was served with process in said action on October 14, 1947, and that he entered his appearance on September 19, 1949; that the time elapsing between the date of the service on him and the filing of said petition in prohibition has been six years and approximately seven months; that at all times since the filing of said action 3098 De Mota has been a resident of the Dominican Republic; that she was served by publication of summons which was completed on November 28, 1947; that she first appeared by demurrer on September 19, 1949; that it has been six years and seven months since completion of service of process upon her by publication;

that it has been four years and approximately 10 months since her appearance in said action to the date of the filing of said petition for prohibition; and that at all times since the last mentioned date she has been represented by an attorney of record. The petition further alleged that the parties had filed no stipulation in writing extending the time for trial and that the failure to proceed to trial has been caused solely by a lack of due diligence on the part of plaintiffs. Petitioners also charge that the same issues were raised and the same relief is being sought in said action number 3098 as were sought in two previous proceedings, one of which was dismissed and the other of which proceeded to final determination in the Supreme Court. *Roesch v. De Mota*, 24 Cal.2d 563, 150 P.2d 422. That in said last mentioned case said notes were adjudged to be valid and not subject to cancellation but that the interest was usurious and the court ordered the same reduced. The pertinent portion of the applicable statute, section 583 of the Code of Civil Procedure, is as follows:

"The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after action is filed to bring such action to trial, except where it be shown that defendant has been absent from the State or concealed therein and his whereabouts unknown to plaintiff and not discoverable to said plaintiff upon due diligence, in which event said period of absence or concealment shall not be part of said two-year period. When, however, such defendant has, or has had, an attorney of record for a sufficient time to enable the action to have been tried if the plaintiff had acted with due diligence, such period of absence or concealment shall be a part of said two-year period. Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by

the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended and except where it be shown that the defendant has been absent from the State or concealed therein and his whereabouts unknown to plaintiff and not discoverable to said plaintiff upon due diligence, in which event said period of absence or concealment shall not be a part of said five-year period. * * *

As the court held in *Hibernia Savings & Loan Soc. v. Lauffer*, 41 Cal.App.2d 725, at page 729, 107 P.2d 494, at page 496,

"The purpose of said section 583, as indicated in *Romero v. Snyder*, supra, at page 219 of 167 Cal., at page 1003 of 138 P. was 'to fix: (1) A minimum period within which mere delay is not deemed to be sufficient cause; (2) an immediately ensuing interval of three years, during which the court, in its discretion, may adjudge it sufficient; and (3) a maximum period of five years, upon the expiration of which, the delay is declared to be sufficient as a matter of law and the dismissal is made mandatory.' The dismissal was entered here after two years had elapsed and before five years had elapsed from the time of the filing of the action and therefore within the period in which the court admittedly had the power to dismiss the action in the exercise of its discretion."

[1] Respondent contends that although the statutory time has run as to the petitioner Erickson, nevertheless by a stipulation made June 14, 1949, said period was extended as to the said Erickson thereby bringing the case within the stated statutory exceptions. Our examination of the record has disclosed no stipulation of any kind in writing or having been filed with the clerk, extending the time for trial. All that we have found is a photostatic copy of a letter appearing in respondent's return to the petition addressed to respondent's counsel from Erickson's attorney stating that he would be willing to so stipulate;

however, nothing appears to have been done pursuant to that offer.

[2,3] Respondent, in an endeavor to come within one or more of the exceptions to the mandatory provisions of said section, refers to the numerous pleadings which have been filed in this case, delay in the giving of notices, etc. However, since the amendment to section 583 in 1933 such matters standing alone are insufficient. In *De Roode v. County of Placer*, 112 Cal. App.2d 859, 247 P.2d 390, where a like contention was made, this court held that if the period could be extended by the filing of amended or supplemental pleadings, a party could keep the action alive indefinitely thereby completely nullifying the purpose of the act—to prevent avoidable delay for a too long period of time. *Rose v. Knapp*, 38 Cal.2d 114, 237 P.2d 981, 983. The court in the *Rose* case, quoting from the earlier case of *Christin v. Superior Court*, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153, noted that the act was not designed to arbitrarily close the proceeding at all events in 5 years, and is subject to certain exceptions such as where it was impossible to proceed to trial or where such would be impracticable and futile. But as the court therein held, "What is impossible, impracticable or futile must, of course, be determined in the light of the facts of the particular case." Plaintiffs have not shown facts sufficient to bring themselves within the exceptions noted in the cited cases, and hence the application of the five-year provision becomes mandatory as regards the petitioner Erickson, and the order of the trial court as to him must be reversed. 38 Cal.2d 114, 237 P.2d 981.

However, since the five-year period had not run as to the petitioner De Mota, the order of the trial court as to her must be sustained unless it can be said that such order was abuse of the discretion lodged with the court by virtue of the provisions of section 583.

The uncontradicted facts as regards De Mota show that the five-year period had not run at the time of the filing of said petition in prohibition. But petitioners, in support of their contention that the trial court did abuse its discretion, contend that

plaintiffs could have had complete relief against Erickson as trustee alone since he was present in the State and available for trial for longer than the statutory period, therefore plaintiffs did not proceed with diligence and the motion should be granted as to De Mota. Furthermore they contend that the failure of plaintiffs to serve De Mota in one of the previous cases and the fact that the litigation has been continuous for more than 20 years makes it more and more difficult to have witnesses available, hence the lack of due diligence on the part of plaintiffs was amply established.

[4] It is also the petitioners' contention that if, as they insist, the action must be dismissed as to Erickson, then such dismissal disposes of the entire proceeding since no action may be maintained against the beneficiary alone. We do not construe the cases relied upon by petitioners to so hold. It is true our courts have held that an action to set aside a deed of trust may be maintained against a trustee alone and a determination as to the validity of the trust instrument will be binding on the

beneficiary even though not a party to the action. Thus while it may be true that plaintiffs could have had complete relief against Erickson, we do not believe it necessarily follows that they were compelled so to do, nor has counsel cited any authority so holding.

If, as the court held in *Pacific States Savings & Loan Co. v. North American, etc., Co.*, 37 Cal.App.2d 307, 99 P.2d 355, 356, a trustee under an ordinary deed of trust is not a "trustee at all in a technical sense" but is more of a "common agent of both parties" and if he "possesses no powers and no interest which are beyond the reach of the parties creating the same" or of their successors in interest, then we can perceive no valid reason why in the present case Erickson is a necessary party and why the action could not proceed against De Mota alone.

The writ is granted as to the defendant Erickson and denied as to the defendant De Mota.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Lowell LYONS, Petitioner,
v.

SUPERIOR COURT of State of California,
IN AND FOR COUNTY of LOS
ANGELES, Respondent.

L. A. 23241.

Supreme Court of California.
In Bank.

Jan. 14, 1955.

Rehearing Denied Feb. 10, 1955.

Certiorari proceeding seeking annulment of order of Superior Court adjudging petitioner guilty of a direct contempt of court. The Supreme Court, Schauer, J., held that failure of petitioner, who had no valid excuse, to be present in court at announced hour for resumption of trial following a recess constituted a direct contempt of court.

Judgment affirmed.

Carter, Shenk and Traynor, JJ., dissented.

Prior opinion, 269 P.2d 143.

1. Contempt ☞10

Failure of alleged contemner, who had no valid excuse, to be present in court at announced hour for resumption of trial, thus interrupting the trial and interfering with court proceedings, constituted a direct contempt which court was empowered to punish summarily. West's Ann.Code Civ.Proc. §§ 16, 128, 1209, 1211, 1212, 1217; Pen.Code, §§ 7, subd. 1, 21.

2. Attorney and Client ☞32

An attorney has the duty, lacking a valid excuse, to be present at all times during trial of a case in which he is sole counsel for a party, and as officer of the court he is bound to respect and comply with its pertinent and lawful orders given in open court in his presence.

3. Contempt ☞30

The power to adjudicate a direct contempt is necessarily of an arbitrary nature, and should be used with great prudence and caution. West's Ann.Code Civ.Proc. §§ 128, 1209.

A. Brigham Rose, Los Angeles, for petitioner.

278 P.2d—43½

Harold W. Kennedy, County Counsel, John B. Anson, David D. Mix and William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

SCHAUER, Justice.

In this certiorari proceeding petitioner seeks annulment of an order of respondent superior court adjudging him guilty of a direct contempt of court and sentencing him to serve "five 24-hour days" in the county jail. We have concluded that, contrary to petitioner's contention, the court correctly held petitioner's acts to constitute a direct, rather than an indirect, contempt, and that the judgment should be affirmed.

The record shows that petitioner was sole counsel for defendant in a felony prosecution entitled *People v. Pardini*, Los Angeles County number 160665. Trial of the case before respondent court with a jury commenced on February 23, 1954. Petitioner was present at the trial on that day and on the morning of February 24. At noon on the 24th the court announced a recess until 2 p. m. of the same day. At the appointed hour of two o'clock everyone except petitioner was present and ready to resume the trial. Petitioner did not appear until 2:45 p. m., at which time the court forthwith orally ordered him to show cause why he should not be punished for contempt. He stated that "Actually, I have no excuse, because I was asleep. * * * I have had a very bad cold. * * * I had left word with the answering service in my office to call me at a quarter to 2:00. They said they did. Apparently I didn't hear. * * * I didn't get too much sleep last night." The court thereupon declared "I don't consider that an excuse. This is the second time in this identical case that you've done the same thing," found petitioner in contempt, and sentenced him to serve "five 24-hour days" in the county jail. Execution of the sentence was stayed until termination of the criminal trial.

As grounds for annulment petitioner urges there was no contempt, but that if any occurred it was indirect, that is, that it was not committed in the immediate view and presence of the court, and could there-

fore be punished only after affidavit, notice, and hearing, as provided for in sections 1211, 1212, and 1217 of the Code of Civil Procedure.

Section 1209 of the Code of Civil Procedure declares that "The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

"1. * * * contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial. * * *

"3. Misbehavior in office, or other wilful neglect or violation of duty by an attorney, counsel * * *, or other person, appointed or elected to perform a judicial or ministerial service; * * *.

"5. Disobedience of any lawful * * * order * * * of the court; * * *.

"8. Any other unlawful interference with the process or proceedings of a court * * *."

Section 128 of the Code of Civil Procedure provides that "Every court shall have power: 1. To preserve and enforce order in its immediate presence; 2. To enforce order in the proceedings before it * * *; 3. To provide for the orderly conduct of proceedings before it * * *; 5. To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto * * *."

The rules above quoted are in substance but restatements of principles which have been recognized and enforced since the dawn of modern jurisprudence. As stated in *In re Terry* (1888), 128 U.S. 289, 9 S.Ct. 77, 80, 32 L.Ed. 405, the power immediately to punish an offender for a direct contempt is, and from "almost immemorial antiquity" has been, accepted as an inherent power of courts upon the recognition and enforcement of which "depend the existence and authority of the tribunals established to protect the rights of the citizen, whether of life, liberty, or property, and whether assailed by the illegal acts of the government or by the lawlessness or violence of indi-

viduals. It has relation to the class of contempts which, being committed in the face of a court, imply a purpose to destroy or impair its authority, to obstruct the transaction of its business, or to insult or intimidate those charged with the duty of administering the law. Blackstone thus states the rule: 'If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination * * *.'" (See also *Blodgett v. Superior Court* (1930), 210 Cal. 1, 10, 290 P. 293, 72 A.L.R. 482; *People ex rel. Field v. Turner* (1850), 1 Cal. 152, 153.)

The duty of an attorney punctually to present himself in court and diligently to continue with a trial he had undertaken and not to unduly delay it for any personal matter reasonably within his control is clear; likewise it is clear that when an attorney who is the sole counsel appearing for a defendant in a felony case absents himself from the trial, he interrupts and effectively blocks, for the period of his absence, all proceedings in that trial. The written "Commitment on Contempt" made by the court in the present case, after reciting the facts as to the pendency of the trial, the proceedings therein, petitioner's failure to appear in the courtroom until the hour of 2:45 p. m. and his statement that he had been asleep, continues, "That said statement was not supported by any evidence or testimony and which statement the Court declined to believe. That on not less than ten prior occasions the said Lowell Lyons [petitioner] has either been substantially late or wholly failed to attend said Court in Department 43 at times when cases in which he was counsel of record were set for trial or other proceedings when his presence was necessary and that on October 28, 1953, said Lowell Lyons was adjudged guilty of contempt of court for failing to appear in said Court, in a trial in which he was counsel of record and which was set for trial at 9:30 a. m. until the hour of 9:55 a. m. and for which contempt said Lowell Lyons was sentenced to serve twenty-four hours in the County Jail of said County, which sentence was suspended,

with an admonition against a repetition of such conduct.

"Therefore, It Is Ordered And Adjudged That said Lowell Lyons is guilty of contempt of Court and sentenced to serve five days of twenty-four hours each in the County Jail of this County." The factual elements of the commitment above set forth are not challenged.

[1] The commitment order thus establishes that the court concluded that petitioner had had the ability to appear punctually at two o'clock and that his failure or neglect to appear was wilful, i. e., with "a purpose or willingness to commit the act, or make the omission." (See Pen.Code, §§ 7 (subd. 1) and 21; Code Civ.Proc. § 16; *In re Trombley* (1948), 31 Cal.2d 801, 807-809, 193 P.2d 734.) It follows that petitioner's failure to be present in court at the announced hour for resumption of the trial in which he was engaged, thus interrupting the trial and interfering with the court proceedings, constituted contempt of court since, as petitioner himself stated, and as the court found, he had no valid excuse. (Cf. *In re Mackay* (1934), 140 Cal.App. 400, 35 P.2d 385; *In re McHugh* (1908, 152 Mich. 505), 116 N.W. 459; 59 A.L.R. 1272-1273.) Although as hereinafter mentioned in relation to another aspect of the case it may be true that some weakness or illness contributed in a measure to petitioner's failure to appear punctually, and that his misconduct was not a deliberately and maliciously planned dereliction of duty, nevertheless upon the record there appears to have been a remissness and failure in performance of duty on his part, coupled with ability to perform, which the court was warranted in finding to constitute contempt.

We are likewise satisfied that petitioner's conduct constituted "a contempt * * * committed in the immediate view and presence of the court"—i. e., a direct contempt—which the court is empowered to punish summarily under the provisions of section 1211 of the Code of Civil Procedure. It is clear that the trial and the attorney's participation in it are in the court's immediate view and presence and, obviously, petitioner's obstruction of the trial by absenting

himself from the court is just as directly within the view and presence and knowledge of the court as would be any other conduct by him during, and directly affecting, the trial. If, in truth, the absence with its ensuing interruption of the court proceedings is occasioned by some cause not reasonably within the attorney's control, the duty of explanation is but part and parcel of his duty to be present, and the burden of producing the exculpatory facts to the court properly falls upon the attorney. The latter, not the judge, is the officer of the court who under those circumstances owes a duty of proceeding. The effect of a contrary holding would be to absolve the defaulting attorney from any burden of explanation of his absence, no matter how flagrant and often repeated, unless the judge takes the burden of filing a charge and instituting formal proceedings. This would make of the judge not a judicial officer carrying out the responsibilities of his office, but a complaining witness in an adversary proceeding. Such a rule, we think, would not only be contrary to long established law but would not best serve the administration of justice.

[2] It has been directly held in this state that failure of a sheriff to produce in court the body of one in his custody (*Ex parte Sternes* (1888), 77 Cal. 156, 163, 19 P. 275), or failure of a parent to produce in court a minor child of which such parent has custody (*In re Carr* (1944), 65 Cal. App.2d 681, 685-686, 151 P.2d 164), when properly ordered so to do, constitutes a direct contempt which may be summarily punished. On the point here material the court in the *Sternes* case said (p. 163 of 77 Cal., p. 277 of 19 P.): "The failure of *Sternes* to produce the body of Ah Fong, as the court found he had the power to do, before the court, in obedience to the writ, was a contempt committed in the face of the court, and no affidavit of the facts constituting the contempt was necessary to give the court knowledge thereof." In the *Carr* case the District Court of Appeal quoted from and followed the *Sternes* case. (See also *In re Robb* (1884), 64 Cal. 431, 1 P. 881; 12 Am.Jur. 390-392.) Manifestly an attorney at law, under the circumstances

shown here and in the absence of a showing to the contrary, may be inferred to have at least as much control in respect to presenting or absenting himself at court as can a sheriff or parent have in relation to producing or sequestering a third person. Likewise manifest, as has already been shown, is the duty of an attorney, lacking a valid excuse, to be present at all times during the trial of a case in which he is sole counsel for a party, and as an officer of the court he is bound to respect and comply with its pertinent and lawful orders given in open court in his presence.

It is vigorously urged that the severity of the sentence imposed upon petitioner in this case gives weight to the contention that it is unwise to permit the judge before whom a contempt is committed to himself mete out the punishment. (See *Offutt v. United States* (1954), 348 U.S. 11, 75 S.Ct. 11.) This contention, however, does not lead to the conclusion that the sentence in this case is void. The record shows that the following took place when petitioner finally appeared in the courtroom at 2:45 p. m.:

"The Court: The record will show, in this case, that the Court took a recess at 12:00 o'clock p. m.; that everybody was here at the hour of 2:00 o'clock except defense counsel, Lowell Lyons, who has just appeared here at a quarter of 3:00.

"The Court at 2:35 issued a warrant for the apprehension of the said counsel, but counsel appeared before the warrant was served.

"The Court finds that cause exists for issuing the warrant, and that the defendant's counsel should show cause why he should not be punished for contempt.

"Mr. Lyons: May I be heard at this time?

"The Court: Yes.

"Mr. Lyons: Yes. At this time, if your Honor pleases, I would like to point out that I did intend to be here at 2:00 o'clock. I was across the street in my office.

"Actually, I have no excuse, because I was asleep. I just awoke. I have had a very bad cold. I overslept an hour.

"I had left word with the answering service in my office to call me at a quarter to 2:00. They said they did. Apparently I didn't hear, your Honor.

"I didn't get too much sleep last night. Apparently I needed sleep. I overslept for that reason.

"I know of no other reason, your Honor. There was no cause preventing me from appearing other than the fact I was asleep in my office.

"Those are the facts. I have been there all the time. I just awoke, and I came over immediately.

"The Court: I don't consider that an excuse.

"This is the second time in this identical case that you've done the same thing.

"Mr. Lyons: In this instance, your Honor, I wasn't physically able to be here, that's the reason. There wasn't anything wilful about it.

"The Court: No reason why you shouldn't be here.

"In the former trial, we had exactly the same situation, and we took a recess in the afternoon, and after the recess you had entirely disappeared and couldn't be found on the floor anywhere; and after waiting some time you finally showed up without offering any excuse.

"People vs. Sirianni, that was on September 2, 1953, the case was on the trial calendar and you failed to show up at any time during that day. We discovered that you were trying a case in the Municipal Court.

"There are a number of instances of your being late, failing to be present at a time when you should be present. And on October 27 of 1953, we had a case of *People vs. Streeter* which went over to October 28 at 9:30. You were not present. An effort was made to locate you unsuccessfully. You finally showed up at 9:55 at your place at counsel table and made no excuse or explanation. You were informed you were in contempt of court, and the Court at that time found you in contempt.

"This has been such a chronic, habitual situation, the Court finds that you are now in contempt.

"It is the judgment and sentence of this Court for said contempt you be imprisoned in the County Jail for five 24-hour days."

[3] As expressly stated in the commitment the court did not—and it was not bound to—believe petitioner's unsworn statement that he failed to appear at the appointed hour for resumption of the trial because he had been asleep. Nevertheless, the very character and extent of petitioner's derelictions as found in the commitment seem to indicate that perhaps his misconduct may have been contributed to by illness of some form. Whether such misconduct was on the one hand deliberately and maliciously calculated or, on the other hand was materially contributed to by illness or other mitigating condition, is a matter of substantial moment to the petitioner and to the court. As carefully pointed out by this court when it first gave consideration to the subject (*People ex rel. Field v. Turner* (1850), *supra*, 1 Cal. 152, 153) and as has never been doubted, the power to adjudicate a direct contempt "is necessarily of an arbitrary nature, and should be used with great prudence and caution. A judge should bear in mind that he is engaged, not so much in vindicating his own character, as in promoting the respect due to the administration of the laws; and this consideration should induce him to receive as satisfactory any reasonable apology for an offender's conduct." Likewise, even where the finding of contempt appears essential to the proper conduct of the court's business no class of offense occurs to us in which the court should more readily search out and give effect to mitigating circumstances than in cases of direct contempts. Whether grounds exist upon which execution of the punishment here imposed should be remitted in whole or in part is a question which can be inquired into by the trial court on a proper application by petitioner. (See *City of Vernon v. Superior Court* (1952), 38 Cal.2d 509, 520, 241 P.2d 243; *City of Vernon v. Superior Court* (1952), 39 Cal.2d 839, 843, 250 P.2d 241.)

For the reasons above stated, the judgment of contempt is affirmed.

GIBSON, C. J., and EDMONDS and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I agree that the failure of an attorney to attend court at the appointed time for trial of a criminal case, when he is representing a client whose case is being tried, may be contempt of court if he has no valid excuse and the judicial processes are obstructed. *Ex parte Clark*, 208 Mo. 121, 106 S.W. 990, 15 L.R.A.,N.S., 389; *In re McHugh*, 152 Mich. 505, 116 N.W. 459; *Wise v. Commonwealth*, 97 Va. 779, 34 S.E. 453; *People v. McDonnell*, 307 Ill.App. 368, 30 N.E.2d 80, affirmed 377 Ill. 568, 37 N.E.2d 159; *Nelson v. Wergland*, 104 N.J.Eq. 334, 146 A. 32; *Vincent v. Vincent*, 108 N.J.Eq. 136, 154 A. 328; *Appeal of Levine*, 372 Pa. 612, 95 A.2d 222; *Klein v. United States*, 80 U.S.App.D.C. 106, 151 F.2d 286; see *In re Walker*, 275 App.Div. 688, 86 N.Y.S.2d 726; *In re Mackay*, 140 Cal.App. 400, 35 P.2d 385; *Sellers v. Whaley*, 84 Ga.App. 715, 67 S.E.2d 241. However, I cannot conceive how such contempt would be direct. The statute specifically requires that for a contempt to be direct it must involve conduct in the "immediate view and presence of the court". Code Civ.Proc. § 1211. Such contempt may be punished summarily because the conduct concerned, and all of it, took place where the court heard and saw it, hence the court is in a position to act summarily, as all the facts involved are within his cognizance, and there exists a need for quick action to prevent the continuance of actions which will bring the court in disrepute and obstruct the judicial process. Here such conditions do not exist. The only fact that the court knew about was that petitioner did not appear at the trial. It did not know whether that failure was due to circumstances beyond petitioner's control or was inexcusable neglect or wilful refusal to attend the trial. Without those facts, all of which occurred away from the court, and out of its

sight and hearing, it was not in a position to ascertain whether there was contempt.

The majority opinion has little to say upon this subject except to express its firm belief that petitioner was guilty of contempt. It says: "The latter, not the judge, is the officer of the court who under those circumstances owes a duty of proceeding. The effect of a contrary holding would be to absolve the defaulting attorney from any burden of explanation of his absence, no matter how flagrant and often repeated, unless the judge takes the burden of filing a charge and instituting formal proceedings. This would make of the judge not a judicial officer carrying out the responsibilities of his office, but a complaining witness in an adversary proceeding. Such a rule, we think, would not only be contrary to long established law but would not best serve the administration of justice." This is wholly beside the point. Even if we assume petitioner should have the burden of excusing his failure to appear, still it should be after affidavit and hearing because the basis of any excuse for his conduct could not be known to the court. In fact no great burden is cast upon the judge because the fact of the failure to appear would ordinarily not be disputable while the main issue, the existence of an excuse, would involve events away from the court. In *Klein v. United States*, supra, 151 F.2d 286, 288, the question presented, *exactly the same as here*, was whether the failure of an attorney to appear was direct or indirect contempt. The court held the contempt indirect, stating: "'* * * The petitioner (contemnor) himself was absent. His acts ad interim were likewise absent. His doings went with him. It would seem like an exquisite and palpable contradiction of terms to complain in one breath that the petitioner (contemnor) and his acts were absent, and in the next breath to say that such absence constituted a presence; that is, a contempt committed in the presence of the court.'" The *same issue* was presented in *Ex parte Clark*, 208 Mo. 121, 106 S.W. 990, 997, 15 L.R.A., N.S., 389, and the same result reached and the court said: "The complaint made and recited of the petitioner was his intentional absence from

the courtroom to the delay and embarrassment of a trial in which the petitioner was engaged as counsel, 15 minutes at one time and 55 at another. The petitioner himself was absent. His acts ad interim were likewise absent. His doings went with him. It would seem like an exquisite and palpable contradiction of terms to complain in one breath that the petitioner and his acts were absent, and in the next breath to say that such absence constituted a presence; that is, a contempt committed in the presence of the court. The absence of an attorney, a jurymen, a witness, an officer (including even a member of the bench himself), from the courtroom at the precise time due there may be susceptible of many innocent explanations. Each and every of these absences are of a kind and, hence on a level, and none of these explanations are within the mere eyesight or earshot of any court of ordinary mortal endowments. These explanations can only come to the court by evidence aliunde his eye or ear, so that it would seem that absence ought not to be dealt with as essentially in the same class as things that happen in the view or hearing of the court. We think that is the more gracious and the better view, comporting with the good sense of the thing, comes well within the quoted definition of an indirect contempt, and is sustained by the reasoning of well-considered cases." The *same was held* in *State v. Winthrop*, 148 Wash. 526, 269 P. 793, 795, 59 A.L.R. 1265, the court saying: "It is plain, we think, by this record, that appellant's conduct, viewed by the court as contemptuous, consisted in his inexcusable absence from the court when the case of *Lynch v. Page* was called for trial. We are unable to see how such absence on the part of appellant occurred in the presence or view of the court." To the same effect is *Ex parte Hill*, 122 Tex. 80, 52 S.W.2d 367, 368, where the court said: "It affirmatively appears therefrom that the district court has attempted to enter a summary final order adjudging relator in contempt for an alleged act of contempt, which, if it occurred at all, occurred outside the presence of the court. It is true that the judgment recites 'said actions were committed and done in

the presence of the Court,' etc., but the judgment also affirmatively shows that the offense relator was accused of was the act of being thirty minutes late in attending court. In other words, the alleged act of contempt was for being absent from court. Obviously the offense of being absent from court could not take place in the presence of the court. We therefore take it that the statement in the judgment to the effect that the contempt occurred in the presence of the court is an erroneous legal conclusion not justified by the facts found, but utterly repugnant thereto.

"We do not think that the fact that when the relator did appear in court he attempted to offer the court an explanation for his alleged tardiness meets the rules of due process required to give the court power to punish him for contempt." Indeed, where the precise question here presented has been involved and the matter discussed there is a unanimity of agreement that the contempt is indirect. Yet this court chooses a contrary course without reason and in face of the principle that contempt is a serious matter and should not be dealt with summarily unless the conduct is clearly within the immediate view and presence of the court. It relies upon two cases, *Ex parte Sternes*, 77 Cal. 156, 19 P. 275, and *In re Carr*, 65 Cal.App.2d 681, 151 P.2d 164, which do not involve the question here presented, are not in point and are of doubtful validity. In the *Sternes* case the person found guilty of contempt was a deputy sheriff who failed to produce his prisoner in habeas corpus proceedings. The court was primarily concerned with whether he could attack the court's contempt judgment. There was a hearing on the very question of whether the deputy had the ability to produce the prisoner. The court said [77 Cal. 156, 19 P. 276]: "The first inquiry before the superior court upon the return made by the respondent *Sternes* [deputy] therein was to determine the issue as to whether said Ah Fong was or was not in his custody or under his control at the time of the issuance of or service of said writ upon him, said *Sternes*. It appears from the judgment that the judge proceeded to take testimony as to

said matter; and found as a fact that said Ah Fong was in the custody and under the control of said *Sternes* at the time of the issuance and service upon him of said writ, and that it was within the power of said *Sternes* to produce the body of said Ah Fong in obedience to the writ at the time of service of the writ upon him. This is the record of the court, acting within its legitimate powers, and that record must be considered as speaking the truth, and as *conclusive* until it has been in some way set aside or vacated." (Emphasis added.) While the court did thereafter say that the deputy's failure to produce the prisoner was a direct contempt, it did so for the reason that: "An order to show cause or notice of a motion for an attachment would not have served *Sternes* any useful purpose. He had an opportunity, as shown by the judgment, to explain the circumstances of his failure to obey the writ, and the court was not in duty bound to accept as true his return to the writ. The court may have erred in its proceedings subsequent to the issuance and service of the writ, and, by a misapprehension of the facts or misconstruction of the evidence, have done the petitioner here a great injustice; but, so long as that court permits its record to remain as it is, other courts must treat it as the action of that court, and as conclusive upon all the matters decided by it and essential to its judgment." *Ex parte Sternes*, supra, 77 Cal. 156, 163, 19 P. 275, 277. In other words, notice and hearing were had. In the *Carr* case the order was for a mother to produce her child, and she had been so ordered while she was in court and the matter was continued at her request and accordingly the District Court of Appeal stated [65 Cal.App.2d 681, 151 P.2d 167]: "* * * petitioner had an opportunity before the order was made to explain the reasons of her failure to obey" it. The real holding in those cases is that the requirement of an affidavit may be waived rather than that the contempt was direct. Such holding is, of course, contrary to the law. *Phillips v. Superior Court*, 22 Cal.2d 256, 137 P.2d 838; *Frowley v. Superior Court*, 158 Cal. 220, 110 P. 817; *In re Davis*, 31 Cal.2d 451, 189 P.2d 283. More-

over, it has been held that such conduct is an indirect contempt. In *re Rose*, 90 Cal. App.2d 299, 202 P.2d 1064; *Hughes v. Moncur*, 28 Cal.App. 462, 152 P. 968.

The subject has been analyzed: "A direct contempt being an open insult to the person of the judges *while presiding* or a resistance to the powers of the court *in its presence*, while a constructive contempt is an act done, not in the presence of the court, but at a distance; which resists the court's authority, as, for instance, disobedience to process or an order of the court such as tends in its operation to obstruct, interrupt, prevent, or embarrass the administration of justice. *Direct contempts* include only those acts of which the court itself has personal knowledge; which takes place in the presence of the court or so near physically as to impede the proceedings. *Indirect contempts* consist of all contemptuous acts which occur *out of the presence of the court*, and of which the court itself has no personal official knowledge." Dangel, Contempt, § 14.

The majority opinion states: "As expressly stated in the commitment *the court did not—and it was not bound to—believe petitioner's unsworn statement that he failed to appear at the appointed hour for resumption of the trial because he had been asleep*. Nevertheless, the very character and extent of petitioner's derelictions as found in the commitment seem to indicate that perhaps his misconduct may have been contributed to by illness of some form. Whether such misconduct was on the one hand deliberately and maliciously calculated or, on the other hand was materially contributed to by illness or other mitigating condition, is a matter of substantial moment to the petitioner and to the court." (Emphasis added.) But it must be remem-

bered that petitioner had no opportunity to present evidence in support of his excuse for being late. He had been found guilty of contempt even before he arrived in court after the noon recess. The situation would not have been different if petitioner had stated that his automobile had broken down on his way to court, or that the public transportation system, which he was using, failed to function. In either case, according to the majority view, the court was not bound to believe petitioner or accord him an opportunity to furnish proof of the truth of his statement. In other words, his mere absence from court at the time fixed for his appearance is conclusive proof of his guilt, and he is accorded no opportunity of showing that his failure to appear was wholly blameless.

The situation here presents an ideal case for the application of the rules which must be applied in cases of indirect contempt. The alleged contemptuous conduct does not take place in the presence or hearing of the court, and notice and hearing must therefore be had to give the court jurisdiction.

Under the holding of the majority here, whenever an attorney is late for a court session, the judge can find him guilty of contempt and sentence him to five days in jail without complaint, hearing or evidence, regardless of any excuse or justification the attorney may have to offer. In my opinion such a holding is out of harmony with both the statutes of this state and the great weight of authority in state and federal jurisdictions.

For the foregoing reasons I would annul the judgment of contempt here imposed.

SHENK and TRAYNOR, JJ., concur.

Rehearing denied; SHENK and CARTER, JJ., dissenting.

43 Cal.2d 779

M. F. GELHAUS et al., Plaintiffs;

A. F. Gelhaus et al., Appellants,

v.

NEVADA IRRIGATION DISTRICT, an
Irrigation District, and public utility,
Respondent.

Sac. 6473.

Supreme Court of California.

In Bank.

Jan. 14, 1955.

Action to recover for loss of fish caused by failure of irrigation district to provide a continuous flow of water necessary for operation of fish hatchery. The Superior Court, Nevada County, Arthur Coats, J., granted defendant's motion for judgment notwithstanding the verdict, and plaintiffs appealed. The Supreme Court, Traynor, J., held that under written agreement to supply continuous flow of water for irrigation purposes, irrigation district was under no duty to supply water for other purposes and could not be held liable for damages resulting from failure to provide service adequate for a fish hatchery.

Judgment affirmed.

Carter and Shenk, JJ., dissented.

Prior opinion 265 P.2d 530.

1. Waters and Water Courses ⇨266

A water company is not liable for damages resulting from failure to supply water for a particular use in absence of a specific undertaking to supply water for such use.

2. Waters and Water Courses ⇨261

Provision in rules of irrigation district that purchaser of water acquired no proprietary right therein and no right to use water for a purpose other than that for which purchaser applied for water limited the risks assumed by irrigation district to those flowing from failure to supply water for the purpose stated in application for water.

3. Waters and Water Courses ⇨254

An irrigation district serving a mountainous country by means of many miles of open canals and ditches could properly limit its undertaking by providing in its

rules and regulations that no purchaser of water acquired any proprietary right therein or right to use water for a purpose other than that for which purchaser applied for water.

4. Waters and Water Courses ⇨261

Where written application requested irrigation district to supply continuous flow of water for purpose of irrigating 20 acres of pasture and provided that application was made subject to rules and regulations of district which provided that no purchaser of water acquired right to use it for a purpose other than that stated in application, irrigation district was under no duty to supply water to applicant for other than irrigation purposes and could not be held liable for damages resulting from failure to supply a constant flow of water necessary for operation of a fish hatchery, though district knew that applicant and others used water supplied by district primarily for such purpose.

5. Waters and Water Courses ⇨254

Agreement by irrigation district to supply continuous flow of water for the irrigation of 20 acres of crops could not be construed as an undertaking by district to supply constant flow of water for purpose of operating a fish hatchery, though district knew that water was desired and being used for such purpose.

6. Waters and Water Courses ⇨254

Where irrigation district by written contract limited its undertaking to the obligation to supply water for irrigation purposes, fact that district on various occasions had restored service after interruptions at user's request, knowing that he was in immediate need of water for his fish hatchery, did not indicate any admission by district of an obligation to provide service adequate for hatchery purposes or estop district from relying on stated purpose of its service as a limitation upon the liability assumed by district.

Floyd H. Bowers, Roseville, and Thomas F. Sargent, Auburn, for appellants.

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Vernon F. Gant, Modesto, Ronald Harris, Fresno, Harry W. Harton, El Centro, and Rutherford, Jacobs, Cavaleiro & Dietrich, Stockton, for respondent.

TRAYNOR, Justice.

Plaintiffs A. F. Gelhaus and Elvera H. Gelhaus appeal from a judgment entered after the granting of defendant's motion for judgment notwithstanding the verdict in an action brought to recover damages for breach of a contract to supply water. Stated most favorably to plaintiffs, the facts are as follows: In May, 1950, defendant irrigation district's ditch tender Huber took the application of A. F. Gelhaus, hereinafter referred to as plaintiff, for ten miner's inches continuous flow of water, knowing that plaintiff would run it through his fish hatchery located on land owned by him. It was understood that after the water was run through the hatchery it would be used by plaintiff's son to irrigate 20 acres of pasture land farmed by the latter. Plaintiff signed a written application for water prepared on a form supplied by defendant. The application was also signed by Huber and approved by defendant's main office. It provided that "The Applicant requests you to supply water for *Irrigation* purposes * * *. Continuous flow of *10* miner's inches * * *. To be used on the property owned by *A. F. Gelhaus* * * *. Acres irrigated: Orchard, Garden, Pasture *20*, Crop Acreages *20*. Service of water to be in accordance with conditions printed on the back of this application * * *." (The italicized parts were written in on the printed form.) Although plaintiff's son signed the application in the place provided for the applicant's signature, plaintiff also signed it in the blank following the words "Collect from" with the understanding that he was to be a party to the contract. It was provided on the back of the application that it was made "under and subject to the By-Laws, Rules and Regulations, and rates of tolls and charges adopted or to be adopted by the Board of Directors" of defendant, and a copy of the rules and regulations was given to plaintiff. On the morning of Sep-

tember 4, 1950, plaintiff discovered that the fish in his hatchery were dead or dying owing to a water failure. No water was running from defendant's ditch into plaintiff's ditch, and plaintiff's reservoir, which could hold a two-day supply of water, was empty. Although at the trial defendant introduced evidence that there was no water shortage on September 4th and that an adequate supply was being delivered to the ditch that supplied plaintiff, plaintiff and another witness testified that defendant's superintendent told them the day after the fish were lost that the water had been shut off. On the basis of the foregoing facts the jury returned a verdict in favor of plaintiffs for \$9,416, the value of the fish lost.

[1-4] Defendant contends that the trial court properly granted its motion for judgment notwithstanding the verdict on the ground that the written contract precludes imposing liability for the loss of fish. It relies primarily on Rule 15 of its Rules and Regulations, which provides that "No purchaser of any water from the District acquires any proprietary right therein by reason of such use, nor does such purchaser acquire any right to re-sell such water, or to use it for a purpose other than that for which it was applied, nor to use it on premises other than as stated at the time of making application." It has been held in this state that a water company is not liable for damages resulting from a failure to supply water for a particular use in the absence of a specific undertaking to supply water for that use. *Hunt Bros. Co. v. San Lorenzo, etc., Co.*, 150 Cal. 51, 59, 87 P. 1093, 7 L.R.A.,N.S., 913; *Niehaus Bros. v. Contra Costa, etc., Co.*, 159 Cal. 305, 318, 113 P. 375, 36 L.R.A.,N.S., 1045; see *San Leandro v. Railroad Commission*, 183 Cal. 229, 233, 191 P. 1. It would appear that one purpose of Rule 15 was to insure the applicability of the foregoing holdings and thus limit the risks assumed by defendant to those flowing from a failure to supply water for the purpose stated in the application. Moreover, it was entirely reasonable for defendant to limit its undertaking. Defendant is an irrigation district serving a mountainous county. Most of its water is

supplied through open canals and ditches. Thus the water supplied to plaintiff had to flow through 50 miles of mountain ditches and flumes before it reached the Sontag ditch from which plaintiff was supplied. The Sontag ditch itself was $2\frac{1}{2}$ miles long, and plaintiff's outlet was the last of 14 on that ditch. Defendant's experience demonstrated that it was impossible to prevent interruptions in service at the end of such a ditch system with the personnel available to it. Despite these difficulties, however, defendant was in a position to supply adequate service for irrigation purposes. Temporary interruptions in such service would ordinarily be harmless and the shortages so caused could be made up by supplying additional water after service was restored. A fish hatchery, on the other hand, requires a constant flow of water to supply oxygen to the fish, and an undertaking to supply water adequate for hatchery purposes would involve duties defendant was not in a position to discharge. Accordingly, by providing in its contract that plaintiff acquired no right to use the water for other than irrigation purposes, defendant made clear that it was under no duty to supply water for other purposes, and it cannot therefore be held liable for damages occasioned solely by the inadequacy of its service to satisfy such purposes.

[5] Plaintiff contends, however, that use of the water for a fish hatchery was not excluded by the terms of the contract but was included within the meaning of the provision for the irrigation of 20 acres of crop. He points out that in the fish-raising business it is common to refer to fish as a crop and to measure production in terms of so many fish or pounds of fish per acre. He also relies on the extrinsic evidence that Huber knew he wanted the water for his hatchery; that other water users operated hatcheries with water supplied by defendant under the same contract provision; and that on 16 occasions defendant restored service after interruptions at his request knowing that he was in immediate need of water for his hatchery. When the provision for the irrigation of 20 acres of crop is considered in the light

of all of the surrounding circumstances, however, it is not reasonably susceptible of the interpretation contended for by plaintiff, and the extrinsic evidence relied upon by him does not support his position.

The stated purpose for which the water was applied aptly described the use to be made of it by plaintiff's son, who signed the contract as applicant. Plaintiff's son had leased 20 acres of pasture from plaintiff on which he raised clover, and he used the water supplied by defendant to irrigate this land. There is no suggestion in the language of the contract that another unspecified purpose was included within its terms, and there was no evidence that plaintiff understood the provision for water for irrigation of 20 acres of crop to mean water for his hatchery. The surface area of the water in the hatchery was not more than a fraction of an acre, and plaintiff testified that he did not use the water for irrigation thus indicating that he did not understand that word in the sense for which he now contends. Moreover, the only purpose for which plaintiff wanted the water was to run it through his hatchery, and it is hardly conceivable that had he intended to have the right to do so secured by the terms of his written contract, he would have left it to be inferred from the provision that on its face deals only with his son's needs.

[6] The fact that defendant knew that plaintiff and other subscribers under similar contracts used its water for raising fish or wanted it primarily for that purpose is not evidence that by contracting to supply water for irrigation it assumed the obligation to provide service adequate for a hatchery. The operation of a fish hatchery requires a constant flow of water to supply the fish with adequate oxygen. Irrigation needs, on the other hand, may be met with much less regular service, and shortages may be made up by additional service after temporary stoppages. By contracting to supply a continuous flow for irrigation purposes defendant assumed only those risks of damages that would ordinarily result from temporary interruptions in the supply of water for irrigation. On the other hand, it was of no concern to defendant that its

subscribers might run its water through their hatcheries so long as defendant was not required to provide service adequate for that use. Moreover, the record makes clear that defendant did not at any time render adequate service to plaintiff for the supply of his hatchery and that in the past plaintiff had governed his operations accordingly. He maintained a reservoir with a two-day capacity, which he checked daily, and on three-hours notice he could arrange to supply his hatchery with water from another source. It does not appear from the record why these precautionary measures failed to prevent plaintiff's loss in this case. Another of defendant's subscribers testified that he had storage capacity for a week's supply of water because he knew of the difficulties defendant had in supplying water. On 16 occasions before the water failure of September 4th plaintiff had to notify defendant of a water shortage and on one of these occasions he lost some of his fish. Since defendant was obligated to supply water for irrigation purposes, however, the fact that it responded to plaintiff's calls by restoring service on these occasions does not indicate any admission on its part of an obligation to supply water for hatchery purposes.

There is likewise no merit in plaintiff's contention that defendant's conduct after the contract was executed estops it from relying on the stated purpose of its service as a limitation upon the liability it assumed. Thus, as stated above, defendant at no time led plaintiff to believe that he could rely on its service for the supply of his hatchery, and the most that he could expect on the basis of past experience was that service would be restored a few hours after complaint was made. Plaintiff testified, however, that by the time he discovered the water failure of September 4th, it was too late to save his fish within the time ordinarily required to restore service.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The majority opinion does not give proper effect to the extrinsic evidence which the jury found adequate in construing the contract as requiring that water be supplied for a fish hatchery.

When this case was before the District Court of Appeal, Third Appellate District, Mr. Justice Schottky of that court prepared a very able and learned opinion which adequately disposes of all of the issues in this case, which opinion was concurred in by Presiding Justice Van Dyke and Mr. Justice Peek of that court. The District Court of Appeal in said opinion held that the trial court erred in granting respondent's motion for judgment notwithstanding the verdict. It reversed the judgment with directions to the trial court to enter judgment on the verdict. The opinion of the District Court of Appeal is reported in 265 P.2d 530. I am in full accord with the views expressed by the District Court of Appeal in said opinion and I adopt the same as my dissent.

SHENK, J., concurs.



43 Cal.2d 785

In the Matter of the ESTATE of Ethel C. QUINN, also known as Ethel Costello Quinn, Deceased.

Edmund G. BROWN, Attorney General of the State of California, Appellant,

v.

Preston HATCH, substituted in the place of F. O. Hatch, as Guardian of the Estate of John Owen McDonald, Incompetent, Respondent.

S. F. 18964.

Supreme Court of California.

In Bank.

Jan. 14, 1955.

Proceeding upon attorney general's petition to determine heirship. Heir, who would inherit estate in event of intestacy, objected to petition. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., denied petition, and attorney

general appealed. The Supreme Court, Spence, J., held that, where testatrix had left money "in trust" to her husband and another and "at their deaths * * * to charity", but had not named either a specific charity nor a trustee, and both legatees predeceased testatrix, attorney general was not authorized to initiate proceedings for determination of the heirship issue.

Order affirmed.

Prior opinion, 273 P.2d 47.

1. Charities ⇨49

Where testatrix had left money "in trust" to her husband and another and, "at their deaths * * * to charity", but had not named either a specific charity nor a trustee, and both legatees predeceased testatrix, attorney general was not authorized to initiate proceedings for determination of the heirship issue. Probate Code, § 1080.

2. Courts ⇨125

The Superior Court is a court of general jurisdiction.

3. Courts ⇨202(1)

Probate proceedings are purely statutory and, therefore, special in their nature.

4. Courts ⇨198

In probate proceedings, the Superior Court is circumscribed by provisions of statute conferring such jurisdiction and may not competently proceed in manner essentially different from that provided. Probate Code, § 1080.

5. Charities ⇨49

Executors and Administrators ⇨314(6)

When one of authorized persons, such as heir, files initial heirship petition, attorney general can properly appear and urge claim that will has created a public charitable trust, and, it would be appropriate, in event that distribution should be sought, for attorney general to appear and seek an adjudication of the same matters. West's Ann.Code Civ.Proc. § 387; Probate Code, §§ 1080, 1233

Robert E. Hatch, San Francisco, for respondent.

SPENCE, Justice.

This is an appeal by the attorney general from an order denying his petition to determine heirship. Probate Code, § 1080. He previously attacked this ruling in a mandamus proceeding, contending that the superior court sitting in probate had erroneously failed to take jurisdiction of the heirship issue. We held that the court had acted in disposition of that issue when it determined that the "attorney general [had] no standing to petition as an heir"; and we further held that his remedy lay in an appeal from the adverse order. Attorney General of California v. Superior Court, 41 Cal.2d 249, 259 P.2d 1.

[1] The testatrix by her will left certain money "in trust" to her husband and another, and "at their deaths * * * to charity," naming neither a specific charity nor a trustee. Both legatees predeceased the testatrix. The will was admitted to probate. Thereafter the attorney general filed his "petition for the determination of interest in the estate," alleging that the will created a public charitable trust, which would not be allowed to fail for want of a trustee, In re Estate of DeMars, 20 Cal. App.2d 514, 516, 67 P.2d 374; In re Estate of Clippinger, 75 Cal.App.2d 426, 434, 171 P.2d 567; see 14 C.J.S., Charities, § 27, p. 460, and that he, acting for the state as *paterfamilias*, sought to protect that trust. People ex rel. Ellert v. Cogswell, 113 Cal. 129, 136, 45 P. 270, 35 L.R.A. 269; see 5 Am.Jur. § 17, p. 246; notes 62 A.L.R. 882; 124 A.L.R. 1237, with cases cited. Respondent, an heir who would inherit the estate in the event of intestacy, objected to the attorney general's petition on the ground that he was not authorized to initiate such proceeding for the determination of the heirship issue. We have concluded that respondent's position was well taken, and that the court's order denying the attorney general's petition must be affirmed.

Probate Code, section 1080, provides: "When the time to file or present claims against the estate has expired, and a petition for final distribution has not been filed,

Edmund G. Brown, Atty. Gen., W. R. Augustine and Wayne D. Hudson, Deputy Atts. Gen., for appellant.

the executor or administrator, or any person claiming to be an heir of the decedent or entitled to distribution of the estate or any part thereof may file a petition setting forth his claim or reason and praying that the court determine who are entitled to distribution of the estate."

[2-4] "Probate proceedings being purely statutory, and therefore special in their nature, the superior court, although a court of general jurisdiction, is circumscribed in this class of proceedings by the provisions of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided. *Smith v. Westerfield*, 88 Cal. 374, 379, 26 P. 206." In re Estate of Strong, 119 Cal. 663, 666-667, 51 P. 1078, 1079; see, also, *McPike v. Superior Court*, 220 Cal. 254, 258, 30 P.2d 17; *Bales v. Superior Court*, 21 Cal.2d 17, 24, 129 P.2d 685; 13 Cal.Jur.2d § 10, p. 463. In view of these basic principles, the attorney general cannot prevail in his claim that he is authorized by statute to initiate the heirship proceeding. He is not the "executor or administrator" nor one "claiming to be an heir * * * or entitled to distribution," and therefore he is without the class of persons authorized by statute to file the initiating petition. Probate Code, § 1080.

[5] However, this conclusion does not mean, as the attorney general suggests, that he would thereby be deprived of the opportunity to litigate the merits of his claims as to the validity of the charitable trust and the required appointment of a trustee for purposes of its administration. In the event that one of the authorized persons, such as an heir, should file the initial heirship petition, the attorney general might properly appear and urge the claim which he attempts to have litigated here. Likewise it would be appropriate, in the event that distribution should be sought, for the attorney general to appear and seek an adjudication of these same matters. The intervention of the attorney general in such circumstances would be proper under the broad language permitting the intervention of anyone "who has an interest in the matter in litigation". Code Civ.Prac. § 387; see Probate Code, § 1233;

In re Los Angeles County Pioneer Society, 40 Cal.2d 852, 257 P.2d 1. But no such broad language is found in section 1080 of the Probate Code, where the authority to initiate the heirship proceeding is strictly limited as above indicated. We therefore conclude that the attorney general had no authority to initiate this proceeding.

The order is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.



43 Cal.2d 769

Robert W. BEVERAGE and Katherine H. Beverage, husband and wife, Plaintiffs and Appellants,

v.

CANTON PLACER MINING COMPANY, a corporation, Seth T. Heney, et al., Defendants and Respondents.

Sec. 6455.

Supreme Court of California.
In Bank.

Jan. 14, 1955.

Action for specific performance of contract to convey land. The Superior Court, Plumas County, Wm. M. Macmillan, J., granted vendor's motion for judgment on pleadings, and denied purchaser's leave to amend complaint. Purchasers appealed. The Supreme Court, Spence, J., held that where description in contract of land purchased was not definite and certain, and complaint contained no supplementary allegations in aid of such description, complaint was vulnerable to objection for insufficiency of description, but since it was possible that by proper amendment to complaint, evidence would have been admissible to identify the property within the statute of frauds, amendment to complaint should have been allowed.

Judgment reversed with directions.

Prior opinion, 266 P.2d 545.

1. Appeal and Error Ⓒ916(1)

In determining propriety of granting a defendant's motion for judgment on pleadings, ruling should be reviewed in same manner as would be a judgment of dismissal following sustaining of a general demurrer to complaint.

2. Pleading Ⓒ344

Trial court may not summarily enter a judgment on pleadings in favor of defendant without first according to plaintiff leave to amend, if such leave is requested and it appears probable that plaintiff can amend to remedy alleged defects in complaint.

3. Frauds, Statute of Ⓒ110(1)

Memorandum affecting the sale of realty should disclose a description which is definite and certain, however a description fulfills the test of reasonable certainty if it furnishes means or key by which description may be made certain and identified with a location on the grounds. West's Ann. Code Civ.Proc. § 1973; West's Ann. Civ.Code, § 1624.

4. Frauds, Statute of Ⓒ110(1)

Where description in deposit receipt for sale of land stated land sold was 7½ acres more or less, to south of state highway at Chambers Creek, between certain engineer's stations, and being part of Canton Placer Claim, although description was not preferred description, and was not definite and certain by itself, it could not be concluded that description did not furnish a means or key to identification of the land. West's Ann. Code Civ.Proc. § 1973; West's Ann. Civ.Code, § 1624.

5. Frauds, Statute of Ⓒ110(1)

In determining if description of property, which is of itself not definite and certain, furnishes a means or key to identify the property, applicable principle is that that is certain which can be made certain by additional allegations and parol evidence in proof thereof, admitted not for purpose of furnishing a description but for purpose of applying given description to earth surface and thereby identifying the property. West's Ann.Code Civ.Proc. § 1973; West's Ann.Civ.Code, §§ 1624, 3538.

6. Vendor and Purchaser Ⓒ61

Courts are most liberal in construing executory contracts for sale of realty and seek to give effect to the intention of the parties in applying descriptions to property.

7. Frauds, Statute of Ⓒ148(1)

In action for specific performance of contract to convey land, where description of premises purchased in the deposit receipt was defective, complaint containing no supplementary allegation in aid of the defective description was vulnerable to objection for insufficiency of description of the land purchased. West's Ann.Code Civ.Proc. § 1973; West's Ann.Civ.Code, § 1624.

8. Vendor and Purchaser Ⓒ22

Reference in contract for sale of realty to a well known creek, brook or other feature or place of the locality in which the land lies renders unimportant the failure to specify the city or county in which the land lies.

9. Vendor and Purchaser Ⓒ22

A description or designation of realty in itself of meagre and doubtful character may be deemed sufficient on its being made to appear by proper allegation and proof that at the place indicated the vendor owned premises answering to its terms and owned at that place no other such property.

10. Vendor and Purchaser Ⓒ22

Where land purchased was described in deposit receipt as being 7½ acres more or less in size, size could be made certain according to application of other boundary marks contained in the deposit receipt.

11. Specific Performance Ⓒ117

In action for specific performance of contract for sale of land, where land purchased was described as being part of a larger tract owned by vendor, purchaser had burden by allegations and proof of segregating the particular acreage intended to be sold.

12. Vendor and Purchaser Ⓒ21

Deposit receipt for purchase of land which stated \$500 was paid, that balance of \$1,000 was to be paid on issuance of preliminary title report, that title fees were to be

paid by grantee, and that property was to be free of taxes and incumbrances, definitely expressed the terms of payment and conditions of title to be met by the vendor preliminary to conveyance.

13. Specific Performance ⇨90, 97(1)

To be entitled to specific performance a party must have performed, offered to have performed, or proved sufficient excuse for not performing, all the conditions required of him by the agreement, however when one party repudiates the contract and indicates that he is not bound thereby, a tender is unnecessary. West's Ann.Civ. Code, § 3392.

14. Contracts ⇨279(1)

Formal tender of performance of conditions required by contract is excused by other party's refusal in advance to accept performance owing to him. West's Ann. Civ.Code, §§ 1440, 1511, 3532.

15. Specific Performance ⇨114(4)

Where purchasers' complaint alleged that vendor refused to execute a conveyance despite purchasers' repeated demand, and that purchasers stood ready, willing and able to pay balance due on contract, failure to allege payment or tender of balance of purchase price did not preclude purchasers from obtaining specific performance. West's Ann.Civ.Code, §§ 1440, 1511, 3392, 3532.

16. Equity ⇨72(1)

Mere lapse of time does not constitute laches unless accompanied by circumstances showing prejudice to the opposing party.

17. Specific Performance ⇨105(3)

In action for specific performance of contract to convey land, where nothing in pleadings indicated that vendor suffered any prejudice by reason of purchasers' delay in bringing action for two years and six months from time of execution of deposit receipt, purchasers were not barred by laches.

18. Specific Performance ⇨114(2)

In action for specific performance of contract to convey land, allegations in complaint that consideration named in contract was fair and reasonable value of the prop-

erty at the time of the agreement, were sufficient to establish the adequacy of consideration and the fairness and reasonableness of the contract. West's Ann.Civ.Code, § 3391.

19. Pleading ⇨350(3)

Where facts in pleading indicated that purchasers may have had a good cause of action for specific performance, but that it was defectively or imperfectly pleaded, trial court should not have granted surprise motion for judgment which attacked the pleadings for first time at time of trial without first giving purchasers opportunity to elect whether they would stand on their pleadings or amend them.

20. Pleading ⇨350(3)

Where vendor failed to give purchasers notice of its intention to attack complaint for specific performance prior to the trial, purchasers were excused for failure to go to trial armed with amendments to offer to court in event pleadings were unexpectedly attacked by motion for judgment.

21. Pleading ⇨238(1)

That purchasers' motion to amend complaint for specific performance was defective in that it was in the nature of a motion to amend to conform to proof, did not vitiate the power to permit an amendment. West's Ann.Code Civ.Proc. § 472c.

22. Pleading ⇨238(1)

Where trial court stated that complaint for specific performance could not be amended to state a cause of action, purchasers were excused from failure to formally move to amend complaint. West's Ann.Code Civ.Proc. § 472c.

Goldstein, Barceloux & Goldstein, J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein and Reginald M. Watt, Chico, for appellants.

H. W. Glensor and Hilary H. Crawford, San Francisco, for respondents.

SPENCE, Justice.

Plaintiffs appeal from a judgment on the pleadings in an action to enforce specifically defendant mining company's contract to convey certain real property and to quiet the

adverse claim of defendant Heney. Defendants' objections to the introduction of evidence and their motion for judgment on the pleadings were based on the following grounds: (1) the complaint failed to state a cause of action because of insufficiency of the property description in the alleged contract to satisfy the statute of frauds (Civ. Code, § 1624; Code Civ.Proc. § 1973); (2) the complaint failed to allege a tender of the balance of the purchase price as a condition precedent to performance by the vendor; (3) the complaint affirmatively showed laches in the prosecution of the alleged claim; and (4) the complaint failed to allege that the consideration for the agreement was adequate and as to defendant company, that the agreement was just and reasonable. (Civ.Code, § 3391.)

[1,2] In determining the propriety of the action of the trial court in granting defendants' motion for a judgment on the pleadings, its ruling should be reviewed in the same manner as would be a judgment of dismissal following the sustaining of a general demurrer to the complaint. *Rannard v. Lockheed Aircraft Corp.*, 26 Cal.2d 149, 151, 157 P.2d 1; *Gill v. Curtis Publishing Co.*, 38 Cal.2d 273, 275, 239 P.2d 630. In either case the reviewing court should apply the rule that the trial court may not summarily enter a judgment in favor of defendant without first according to plaintiff leave to amend if such leave is requested and it appears probable that plaintiff can amend to remedy the alleged defects in the complaint. See *MacIsaac v. Pozzo*, 26 Cal.2d 809, 815-816, 161 P.2d 449. Here plaintiffs were denied leave to amend, and under the circumstances shown by the record, we have concluded that the judgment must be reversed.

Plaintiffs allege in their complaint that defendant Canton Placer Mining Company owned certain real property in Plumas County, described by metes and bounds; that on September 29, 1947, plaintiffs and the company "entered into an agreement in writing, wherein * * * plaintiffs agreed to buy and defendant company agreed to sell" the described property for \$1,500.00; that "plaintiffs then and there paid over unto defendant company the

sum of \$500.00 in cash to apply on said purchase price, and undertook and agreed to pay the balance of \$1,000.00 upon the issuance of a preliminary title report"; that defendant company's attorney acting as its authorized agent "then and there made, executed and delivered to plaintiffs a writing * * * incorporated herein" and accepted from plaintiffs the \$500 paid "on account of the agreed purchase price"; that a preliminary title report was issued showing title to the property to be vested in the vendor "but that no request was made then or at any other time for payment by plaintiffs of said balance of the agreed purchase price; plaintiffs have repeatedly demanded the conveyance of the said real property but the defendant company has not executed such conveyance, and has failed, refused, and neglected and does still fail, refuse and neglect to do so"; and that "ever since said day * * * plaintiffs have been and now are ready, willing, and able to [pay] over to defendant company the balance of said purchase price."

The incorporated writing reads as follows:

Sacramento, Calif.

"Sept. 29, 1947

"Received from Katherine H. Beverage and Robert W. Beverage of Paxton, Plumas Co. Calif. \$500.00 deposit on purchase price of seven and one-half (7½) acres, more or less, to south of State Highway at Chambers Creek, (between highway Engineer Stations 561 + 58.51 \pm to 577 \pm) being part of Canton Placer Claim.

"Balance of \$1000.00 to be paid upon issuance of preliminary title report.

"Title fees to be paid by grantees.

"Property to be delivered by grantor free and clear of taxes and incumbrances.

"Lincoln V. Johnson
for Canton Placer Mining Co."

Without interposing any demurrer, defendants answered, admitting ownership of the property particularly described in the complaint but denying generally all other allegations. When the case was called for trial and following plaintiffs' opening statement, defendants objected to the in-

roduction of any evidence on the ground that the complaint did not state a cause of action. The main point in controversy was the claim of insufficiency of the property description contained in the pleaded agreement, by reason of the requirements of the statute of frauds. Civ.Code § 1624; Code, Civ.Proc., § 1973. Over defendants' objection, the court permitted plaintiffs to introduce evidence directed primarily to showing the sufficiency of the assailed property description in the memorandum agreement or deposit receipt. Thereafter the court granted defendants' motion to strike such evidence in its entirety, and granted defendants' motion for judgment on the pleadings.

[3] To satisfy the statute of frauds, the memorandum affecting the sale of real property must so describe the land that it can be identified with reasonable certainty. 37 C.J.S., Frauds, Statute of, § 184, p. 669; *Allen v. Stellar*, 106 Cal.App. 67, 70, 288 P. 855; *Roberts v. Lebrain*, 113 Cal.App.2d 712, 715, 248 P.2d 810. This is one of the most essential parts of such an agreement. *Craig v. Zelian*, 137 Cal. 105, 106, 69 P. 853; *Gordon v. Perkins*, 108 Cal.App. 336, 339, 291 P. 644. Preferably, the writing should disclose a description which is itself definite and certain. Alternatively, however, a description fulfills the test of reasonable certainty if it furnishes the "means or key" by which the description may be made certain and identified with its location on the ground. *Gordon v. Perkins*, supra, 108 Cal.App. 336, 340, 291 P. 644.

[4-6] It is obvious in the instant case that the description in the deposit receipt is not a preferred description; by itself it is not definite and certain. See, e. g., *Craig v. Zelian*, supra, 137 Cal. 105, 69 P. 853. However, it may not be concluded that the description does not furnish a "means or key" to identification. See, e. g., *Preble v. Abrahams*, 88 Cal. 245, 26 P. 99. The applicable principle is that that is certain which can be made certain Civ.Code, § 3538; *Preble v. Abrahams*, supra, 88 Cal. at page 251, 26 P. 99; also *Tuck v. Gudnason*, 11 Cal.App.2d 626, 630, 54 P.2d 88; *Mancuso v. Krackov*, 110 Cal.App.2d 113, 115, 241 P.2d 1052, by additional allega-

tions, *Marriner v. Dennison*, 78 Cal. 202, 207, 20 P. 386; see also *Russell v. Ramm*, 200 Cal. 348, 369-370, 254 P. 532; *Wright v. L. W. Wilson Co., Inc.*, 212 Cal. 569, 575, 299 P. 521, and parol evidence in proof thereof, admitted not for the purpose of furnishing or supplying a description, *Gordon v. Perkins*, supra, 108 Cal.App. 336, 291 P. 644, but for the purpose of applying the given description to the earth's surface, thereby identifying the property. *Marriner v. Dennison*, supra, 78 Cal. at page 208-209, 20 P. 386; *Simpson v. Schurra*, 91 Cal.App. 640, 648, 267 P. 384. Courts have been most liberal in construing executory contracts for the sale of real estate and have sought, as far as is consistent with the above established rules, to give effect to the intention of the parties in applying descriptions to property. *Johnson v. Schimpf*, 197 Cal. 43, 48, 239 P. 401; *United Truckmen, Inc., v. Lorentz*, 114 Cal.App.2d 26, 29, 249 P.2d 352.

[7] Since the complaint contained no supplementary allegations in aid of the defective description, it furnished the court with no basis for ruling on the admissibility of evidence offered to identify the property the parties had in mind. *Marriner v. Dennison*, supra, 78 Cal. 202, 210, 20 P. 386. Accordingly, plaintiffs' complaint was vulnerable to objection for insufficiency of the property description. This rule of pleading governed in the cases of *Eaton v. Wilkins*, 163 Cal. 742, 746, 127 P. 71; *Allen v. Stellar*, supra, 106 Cal.App. 67, 69-70, 288 P. 855; and *Gordon v. Perkins*, supra, 108 Cal. App. 336, 342, 291 P. 644, on which defendants rely.

However, it might well be that with proper amendment evidence would be admissible to explain the description according to "the situation of the parties and the surrounding circumstances" when the deposit receipt was given and so identify with reasonable certainty the particular property intended. *Preble v. Abrahams*, supra, 88 Cal. 245, 251, 26 P. 99; *Towle v. Carmelo L. & C. Co.*, 99 Cal. 397, 399, 33 P. 1126. The description possibly may be supplemented by extrinsic evidence showing its application to the particular property to the exclusion of all other property. (49 Am.Jur. §

349, p. 658.) This proposition is illustrated in the case of *Preble v. Abrahams*, supra, 88 Cal. 245, 26 P. 99, where the land mentioned in the agreement to convey was designated simply as "forty acres of the eighty-acre tract at Biggs" but the description was held sufficient when aided by parol evidence showing that the vendor owned such a tract and by contemporary agreement had sold the other forty acres to a third person.

[8] The body of the deposit receipt fails to locate the property in any particular state or county. Although such omission has been regarded as fatal in some instances *Allen v. Stellar*, supra, 106 Cal.App. 67, 70, 288 P. 855; *Gordon v. Perkins*, supra, 108 Cal.App. 336, 339, 291 P. 644, such is not the invariable rule. The deposit receipt was dated at "Sacramento, Calif.," from which it could reasonably be assumed that the property was located in this state. However, it could also be assumed that it was "in or adjacent to" the designated city, *Sacramento*, *McKevitt v. City of Sacramento*, 55 Cal.App. 117, 128, 203 P. 132, which latter identification would defeat the jurisdiction of the Superior Court of Plumas County, wherein this action was commenced. Const. art. VI, § 5. But there was other specific matter recited in the deposit receipt which is opposed to the inference arising from the city designation in the date line. The receipt mentions particular engineer stations on a state highway at Chambers Creek and states that the property was part of "Canton Placer Claim" lying south of the highway. Reference to a well-known creek, brook or other feature or place of the locality in which the land lies has been held to render unimportant the failure to specify the city or county. See Annotation 23 A.L.R.2d 10, 24. It might be that such named creek between the mentioned engineer stations is found only in Plumas County. Likewise plaintiffs' residence is stated as "Paxton, Plumas Co. Calif.," indicating their interest in property in that county.

[9, 10] A description or designation in itself of meagre and doubtful character may be deemed sufficient on its being made to appear by proper allegation and proof that at the place indicated the vendor owned

premises answering to its terms and owned at that place no other such property. See 37 C.J.S., *Frauds*, Statute of, § 185, p. 672; *Eaton v. Wilkins*, supra, 163 Cal. 742, 745-746, 127 P. 71; *Joyce v. Tomasini*, 168 Cal. 234, 238-239, 142 P. 67. While the deposit receipt stated that the land was "to south of State Highway at Chambers Creek" without specifying how far south, it might be that the reference to the engineer stations and the highway, coupled with the designation of the land as "part of Canton Placer Claim," would suffice to permit a competent surveyor to identify the property with reasonable certainty. 12 Cal.Jur. § 81, p. 913; *McKevitt v. City of Sacramento*, supra, 55 Cal.App. 117, 127, 203 P. 132. The property is described in size as "7½ acres, more or less," which latter phrase, flexible in meaning like the word "about" or "approximately," might be made certain according to the application of other boundary marks contained in the writing. *United Truckmen, Inc., v. Lorentz*, supra, 114 Cal.App.2d 26, 32-33, 249 P.2d 352; see 27 Words and Phrases, *More or Less—Realty*, p. 578.

[11, 12] Considering that the property is obviously "part of Canton Placer Claim" and the vendor is defendant Canton Placer Mining Company, an ambiguity is created which would indicate that the land constituting the subject matter of the deposit receipt was part of a larger tract owned by the company; and it would be incumbent on plaintiffs to segregate by appropriate allegations and proof the particular acreage intended. *Preble v. Abrahams*, supra, 88 Cal. 245, 251, 26 P. 99. The deposit receipt definitely expressed the terms of payment and the conditions of title to be met by the vendor preliminary to conveyance. See *Bruggeman v. Sokol*, 122 Cal.App.2d 876, 881-882, 265 P.2d 575. In connection with evidence of defendant company's ownership and other related matters as above noted, the description in the deposit receipt, considered with appropriate pleading of extrinsic facts, might prove sufficient to meet the requirements of the statute of frauds. See *United Truckmen, Inc., v. Lorentz*, supra, 114 Cal.App.2d 26, 249 P.2d 352.

[13-15] Defendants further contend that plaintiffs are not entitled to a decree of specific performance because of their failure to allege payment or tender of the balance of the purchase price, a condition precedent to plaintiffs' right to demand its conveyance. They rely on the rule that "to entitle a party to specific performance, he must have (a) performed, (b) offered to have performed, or (c) proved a sufficient excuse for not performing, all the conditions required of him" by the agreement. *Reyburn v. Young*, 11 Cal.App.2d 476, 477, 54 P.2d 87; Civ.Code, § 3392. However, where a vendor repudiates a contract and indicates that he is not bound thereby, a tender is unnecessary. *Ray Thomas, Inc., v. Cowan*, 99 Cal.App. 140, 146, 277 P. 1086. While the language of the complaint seems to preclude an allegation of tender, it is not inconsistent with an allegation of repudiation of the contract by the defendant company as vendor. Thus, plaintiffs alleged the company's continued refusal to execute a conveyance of the property despite plaintiffs' repeated demands therefor, and that plaintiffs stand "ready, willing and able" to pay the balance due. The law does not require the performance of an idle act, and a formal tender of performance is excused by the refusal in advance of the party to accept the performance owing. Civ.Code, §§ 1440, 1511, 3532; *Woods-Drury, Inc., v. Superior Court*, 18 Cal. App.2d 340, 348, 63 P.2d 1184.

[16, 17] Defendants raise the point of laches in bar of plaintiffs' claim for specific performance. They point to the fact that two years and six months elapsed between the execution of the deposit receipt and the filing of this action. However, mere lapse of time does not constitute laches unless accompanied by circumstances showing prejudice to the opposing party. *McGibbon v. Schmidt*, 172 Cal. 70, 74, 155 P. 460. So far as appears from the pleadings, there is nothing to indicate that defendants suffered any prejudice by reason of plaintiffs' delay in bringing this action.

[18] Defendants finally contend that the complaint failed to state a cause of

action in that there were insufficient allegations of fact to establish the adequacy of the consideration and the fairness and reasonableness of the contract. Civ.Code, § 3391; 23 Cal.Jur. §§ 52, 53, pp. 493-498; *Joyce v. Tomasini*, supra, 168 Cal. 234, 237, 142 P. 67; *Magee v. Magee*, 174 Cal. 276, 281, 162 P. 1023. Plaintiffs alleged that the "consideration named in the said writing * * * was the fair and reasonable value of said property at the time of the said agreement * * *." Similar allegations that property is reasonably worth a certain sum set forth in the agreement sought to be enforced, have been held sufficient. *Walter G. Reese Co. v. House*, 162 Cal. 740, 745, 124 P. 442; *Minaker v. Sunset Building etc. Co.*, 25 Cal.App. 771, 773, 145 P. 542; *Boro v. Ruzich*, 58 Cal. App.2d 535, 540, 137 P.2d 51. It thus appears that there is no merit in this contention.

[19-22] The facts stated in the pleadings indicate that plaintiffs may have a good cause of action but that it has been defectively or imperfectly pleaded. Defendants did not call attention to these claimed defects either by demurrer or by duly noticed motion for judgment on the pleadings, although they had long known the condition of the pleadings preceding the trial. Under such conditions the trial court should not have granted the surprise motion, which attacked the pleadings for the first time at the time of trial, without first giving plaintiffs an opportunity to elect whether they would stand on their pleadings or amend them. *MacIsaac v. Pozzo*, supra, 26 Cal.2d 809, 815, 161 P.2d 449. Defendants' failure to give plaintiffs notice of their intention to attack the pleadings prior to the trial also excuses the failure of plaintiffs to go to the trial armed with formal amendments to offer to the court in the event that the pleadings are unexpectedly attacked. *MacIsaac v. Pozzo*, supra. And the fact that plaintiffs' motion to amend was defective in that it was more in the nature of a motion to amend to conform to the proof does not vitiate the power to permit an amendment. Civ.Proc. § 472c; *MacIsaac v. Pozzo*, supra, 26 Cal.2d at page 816, 161 P.2d 449.

In addition there is some justification for the failure of plaintiffs to formally move to amend. Defendants constantly took the position that the pleadings could not be amended to state a cause of action. The trial court adopted defendants' view and repeatedly stated that the complaint could not be so amended. Faced with this attitude plaintiffs apparently were convinced, and were justified in assuming, that a formal offer to amend would have been futile.

Plaintiffs should be permitted to amend their complaint to meet, if possible, the deficiencies in their pleadings as above noted.

The judgment is reversed, with directions to the trial court to permit plaintiffs to amend their complaint.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.



130 Cal.App.2d 196

ESTATE of Marlan Mercer JONES, sometimes known as Marlan M. Jones, and M. M. Jones, Deceased.

CROCKER FIRST NATIONAL BANK, as Trustee under the Last Will and Testament of Marlan Mercer Jones, Deceased; and The Regents of the University of California, Appellants,

v.

ST. LUKE'S HOSPITAL, a corporation, Respondent.
No. 16029.

District Court of Appeal, First District,
Division 1, California.

Jan. 14, 1955.

Rehearing Denied Feb. 11, 1955.

Hearing Denied March 9, 1955.

Proceeding on petition by hospital, in which hospital room was endowed under testamentary trust, for an order instructing trustee and construing and endowment

agreement. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered an order from which trustee and residuary beneficiary appealed. The District Court of Appeal, Bray, J., held, inter alia, that where will which created testamentary trust gave trustee absolute discretion to determine amount of endowment, and did not confer power to make continuing payments to increase the endowment, trial court, which had previously approved contract executed by hospital and trustee upon establishment of endowment, had no power to order trustee to make additional payment to hospital.

Order reversed in part and affirmed in part.

1. Wills ⇨439

Duty of court is first to ascertain and then, if possible, to give effect to testator's intent.

2. Wills ⇨706

Where determination of testatrix's intent and construction of will were based solely upon will itself, without aid of evidence, reviewing court was not bound by construction given by trial court, but was required to make final determination in accordance with applicable principles of law.

3. Wills ⇨683

Will which authorized trustee to use such amount as he should deem proper to endow a room in hospital was intended to provide for an endowment in one payment rather than one which should be added to from time to time as necessary.

4. Trusts ⇨271½

Order made upon trustee's petition for instructions as to manner of establishment of endowment and testamentary trust became a final determination of the matters adjudged.

5. Trusts ⇨271½

A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, and may be controlled by court if not reasonably exercised, but where an absolute discretion is clearly conferred, it cannot be controlled by a court

on considerations going to the soundness of the discretion so exercised.

6. Trusts ⇨271½

Where will which created testamentary trust gave trustee absolute discretion to determine amount of endowment of hospital room, and did not confer power to make continuing payments to increase the endowment, trial court, which had previously approved contract executed by hospital and trustee upon establishment of endowment, had no power to order trustee to make additional payment to hospital.

7. Trusts ⇨271½

Where trial court in probate proceeding had approved contract, which was executed by testamentary trustee and hospital wherein hospital room was endowed and which contained provision that beneficiaries should be chosen by an old ladies home, trial court had no authority, on hospital's petition for increased endowment, to order that hospital should choose beneficiaries, even though will might have intended that hospital should choose beneficiaries, only giving preference to occupants of the home.

8. Trusts ⇨217(4)

Probate court was within its equity power in directing that hospital, wherein hospital room was endowed under testamentary trust, could change securities held from stocks to stocks and bonds.

9. Trusts ⇨217(3)

Where contract executed by testamentary trustee and hospital wherein hospital room was endowed gave hospital full power to sell, invest and otherwise deal in securities as if they were its own property, so long as such action was taken for purposes of endowment, hospital had right to reinvest in such type of securities as it deemed for best interests of fund.

10. Wills ⇨707(2)

Where a will making bequests to charity has to be judicially construed to clear up ambiguities, expenses of suit, including an attorney's fee for defeated party, are to be paid out of testator's estate.

11. Wills ⇨707(2)

Where litigation, instituted by hospital wherein hospital room was endowed under testamentary trust, was a benefit and service to trust, in that it determined whether payment in establishment of endowment was final or whether additional payments might be made, hospital, although it was defeated party, was entitled to attorney's fees.

John U. Calkins, Jr., and Maurice E. Gibson, San Francisco, for appellant Regents of the University of California.

Charles Albert Adams, Henry C. Clausen, San Francisco, for appellant, Crocker First Nat. Bank, as trustee under the last Will and Testament of Marian Mercer Jones, deceased.

Myrick & Deering & Scott, San Francisco, for respondent St. Luke's Hospital.

BRAY, Justice.

After a hearing on the petition of respondent as beneficiary of a trust created in the will of Marian Mercer Jones, deceased, an order instructing successor trustee as to administration of trust and construing endowment agreement was entered. From this order Crocker First National Bank, as successor trustee, and the Regents of the University of California, as residuary beneficiary, appeal.

Questions Presented.

1. The construction of the will as to the endowment provided therein for St. Luke's Hospital and particularly whether said endowment was or was not to be increased from time to time. This includes the question of whether prior court orders are res judicata of this subject. 2. Did the court have the power to instruct respondent concerning the selection of the beneficiaries of the endowment? 3. Was respondent entitled to attorney's fees?

Record.

February 14, 1949, a decree of distribution was filed in said estate distributing to the then testamentary trustee pursuant to the terms of the will of said decedent all of

her estate. Said trustee then petitioned the superior court for instructions and advice as to the endowment to respondent provided in said will. Thereupon the court made its decree authorizing and directing payment of endowment to St. Luke's Hospital. In this order the court directed the trustee to pay respondent \$150,000 in cash or securities for the endowment provided in the will and to execute a contract with respondent in form satisfactory to him to effect such endowment. The trustee transferred to respondent securities of the said value and entered into the contract with respondent dated May 18, 1950, hereafter discussed. June 9, 1950, the then trustee filed his first report and account reporting the transfer of said securities and the execution of said contract and asking court approval thereof. June 23, 1950, said account and the execution of said contract were approved by the court. June 10, 1953, the order in controversy here was made. It found that to effectuate the intention of the testatrix as to the endowment for respondent the trustee must keep the fund for it "sufficient"; that the fund is now insufficient; that it would be proper for the hospital to be given sufficient additional sums to enable it to diversify the investments of said fund to maintain a ratio of approximately 50 per cent in stocks and 50 per cent in bonds and to obtain a return of \$11,000 per year; that this would require an endowment fund of \$274,000; that the intention of the testatrix was that the hospital was to furnish free service to such women in reduced circumstances as the hospital might select provided it recognized the preferential rights of members of the Protestant Episcopal Old Ladies' Home; that the hospital attorneys should be awarded \$4,000 fees from the preferential trust, and that neither the prior court decrees nor the contract prevent subsequent augmentation during the existence of the preferential trust (life annuitants). Judgment was entered accordingly.

Terms of Trust.

The portions of the will important here follow. The trustee was to pay out of income and if necessary, corpus, specified sums monthly to specified persons. The

trust was to continue until the last of these specified persons died or until annuities had been purchased for all of said persons, in the event the trustee elected to purchase them. When the trust terminated the balance of capital fund and income then in the hands of the trustee should be transferred to the trust provided in provision sixth and be disposed of as therein provided. The trustee was empowered from time to time to determine "and said Trustee's determination shall be final" whether there was a surplus in the capital fund beyond that which was necessary to insure the payments above mentioned, and if the trustee should determine there was such surplus, it should be transferred to the trust provided in provision sixth and be disposed of as provided therein.

Provision sixth provided a second trust subordinate to the payments above mentioned and to others not relevant here. It first provided for the trustee to have installed a stained glass window at such cost as the trustee might determine in Grace Cathedral and St. Luke's Church. Secondly, it provided that the trustee endow three rooms in the Protestant Episcopal Old Ladies' Home, and to pay from the trust estate such amount as in the opinion of the trustee might be necessary to endow said three rooms, to be used in accordance with the rules of said institution, each room to be named as provided in the will.

Then follow the provisions most necessary to be construed in this controversy. After the trustee shall have installed the windows and endowed the rooms above mentioned, "I authorize and empower said Trustee to use such amount of said trust estate as he shall deem proper to endow a room in *St. Luke's Hospital*, in San Francisco, California, for the free use by women in reduced circumstances (preferably members of the Protestant Episcopal Old Ladies' Home) in accordance with the rules and regulations of said hospital, which endowment I desire named after my mother and to be known as the 'Margaret J. Jones Endowment.'

"(5) I authorize and empower said trustee, at any time and from time to time during the term of said trust, to determine,

and his determination shall be final, whether there is more property in said trust estate than is necessary to insure the carrying out of the foregoing provisions of this paragraph 'Sixth', and if he shall determine that there is an excess he is authorized and empowered thereupon to transfer and deliver to the *Regents of the University of California* such excess of said trust property, free and clear of said trust, for an endowment fund named for my father and mother * * * "to be used for loans to students as therein set forth.

It is the position of both appellants that under the will and particularly paragraphs 4 and 5 of provision sixth that it was the intention of the testatrix that an endowment of a single sum be made, while respondent contends it was her intention that the endowment be a continuing one. Additionally, appellants contend that the testatrix intended that the power to determine the amount of the endowment was vested solely in the trustee, that he exercised that power, that the court later approved his determination and thereby the power became functus officio. Respondent negatives this contention.

The Contract.

In it the trustee agreed to transfer to respondent securities of the value of \$150,000 and respondent "agrees to accept the same pursuant to and in fulfillment of said provision of said will * * *"¹ Respondent agrees to provide a room in its hospital "continuously, for the free use by women in reduced circumstances (preferably members of the Protestant Episcopal Old Ladies Home)" and "to furnish continuously and perpetually to such persons, who are to be women selected and designated by the Protestant Episcopal Old Ladies Home, the full services of the hospital * * *

"3. Except as hereinafter provided, said securities shall be owned and held by

Second Party, and the net income therefrom shall be used in accordance with the rules of Second Party to maintain the said room and care for such patients as aforesaid, in perpetuity; and in the event that Second Party shall hereafter find that it is impossible for it to maintain said room and care for such patients, as aforesaid, from the net income of said trust as herein provided, or for any other reason it is unable or unwilling to perform its obligations under paragraph 2 of this agreement, it may, upon written notice to First Party herein and said Protestant Episcopal Old Ladies Home and the Regents of the University of California, apply to the Superior Court of the State of California, in and for the City and County of San Francisco, for appropriate relief; and Second Party shall continue to perform its obligations as above provided to the extent that the income from such fund shall permit until said court shall determine what relief shall be granted in said action; provided that if the relief granted by said court in said action shall be inadequate or unsatisfactory in the opinion of the Board of Trustees of Second Party, then Second Party shall have the right to terminate this agreement and the fund shall then be disposed of as directed by said Superior Court; provided always that the provisions of said Last Will and Testament of said decedent (including the provision thereof relating to said preferential rights of said Protestant Episcopal Old Ladies Home) shall be carried out and effectuated as far as practicable under the then existing conditions."²

In 1950 the average cost of a hospital room per patient day was about \$19.62 and the income from the stocks transferred to respondent by the trustee was adequate to meet the then situation. By 1953 the estimated cost per patient day was \$30. Early in 1952 the attorney for the hospital wrote the trustee requesting that steps be

1. Unless otherwise noted, all emphasis added.
2. Randolph V. Whiting, the trustee appointed by the will, functioned as such until his death, which was after the exe-

cution of the contract with respondent and the transfer of the securities to the latter. Thereupon, under the terms of the will, appellant Crocker Bank became and now is the successor trustee.

taken "to insure the carrying out" of the will, in view of the "alarming increase of cost of hospital care." (Emphasis not added.) The trustee declined to do anything. The endowment fund has increased to \$198,519, producing an annual yield of \$10,125.97 in 1952. Of that year there was a surplus of \$11,656.52 which respondent had not used, because it was uncertain whether under the contract it could be used to aid women other than members of the Old Ladies Home, nominated by it. Under the "prudent man rule" respondent desired to change the endowment corpus from all stocks (as now) to approximately equal amounts of stocks and bonds, and to receive from the trustee additionally approximately \$70,000. This sum together with the present endowment fund, if invested in stocks and bonds yielding 4 per cent, would produce approximately \$11,000, a sum sufficient to take care of one patient per year at the present cost of \$30 per day.

The preferential trust consists of cash and securities appraised at \$542,428.90 and a surplus of \$25,986.58. In the subordinate trust (provision sixth trust) there are stocks appraised at \$198,519.

1. Intention of Testatrix.

[1,2] Did she intend that the endowment made to respondent was to be one payment or was it to be added to during the existence of the preferential trust? " * * * the duty of the court is to first ascertain and then, if possible, give effect to the intent of the maker" of the will. Estate of Gump, 16 Cal.2d 535, 548, 107 P.2d 17, 24. As the determination of the testatrix's intent and the construction of the will are based solely upon the will itself, without the aid of evidence, this court is not bound by the construction given by the trial court, and is required to make the final determination in accordance with the applicable principles of law. Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825.

In her will the testatrix first provides that the trustee shall pay certain persons monthly sums, from the income of the capital fund left for that purpose, and if

necessary from the capital itself. The trustee may, if he sees fit, purchase annuities for all or any of said persons. If annuities are purchased for all, then, or at the death of the last annuitant, this trust (called preferential) terminates and all funds, either capital or income, go to the trust provided in the sixth provision (called the subordinate trust), which includes the endowment to respondent, to "be disposed of as therein provided for the disposal of assets" in that trust. The trustee may from time to time in his absolute discretion determine if there is a surplus in the preferential trust beyond the moneys necessary to take care of the annuitants, and may transfer such surplus to the subordinate trust to be disposed of as provided for the disposal of assets in the latter trust. The subordinate trust must take care of two matters before proceeding to the endowment for respondent: (1) It must install a stained glass window in each of two churches. (2) It must "endow" three rooms in the Old Ladies' Home in the names of certain persons. (There is no provision or restriction as to the use of these rooms.) Then the trustee shall "use such amount * * * as he shall deem proper to endow a room in *St. Luke's Hospital* * * * for the free use by women in reduced circumstances * * *" " * * * at any time and from time to time during the term of said trust" the trustee may determine, in his absolute discretion "whether there is more property in said trust estate than is necessary to insure the carrying out of the foregoing provisions of this paragraph 'Sixth', and if he shall determine that there is an excess" he is authorized to transfer such excess to the Regents.

Under provision sixth the necessary expenditures for the first two matters contained therein were required to be over and done with before the trustee could act on the endowment. Taking the language in paragraph 4 of provision sixth "to endow a room * * * for the free use by women in reduced circumstances" alone requires the conclusion that it meant one

sum only.³ However, it is contended that when taken in conjunction with provision third giving the trustee the power from time to time to transfer surplus from the preferential trust to the subordinate trust and with the authority given the trustee in paragraph 5 of provision sixth, "at any time and from time to time" during the term of the preferential trust, to determine if there is more property in the provision sixth trust than is necessary to do the three things required of the trust, and if so, to give such excess to the Regents, a different conclusion must be reached. Thus it is claimed that if the endowment was to be but a single payment there would be no necessity for the trustee as provided in paragraph 5 of provision sixth to ascertain if there is a surplus beyond that which "is necessary to insure" the payments required by the preferential trust, in order to give that surplus to the Regents. This reasoning, however, overlooks the fact that although the construction of the church windows and the endowment of the three rooms at the Old Ladies' Home had preference over the endowment to respondent, and all three had preference over payments to the Regents, nevertheless if in the judgment of the trustee there were sufficient funds to insure the accomplishment of these three requirements, this clause would permit the trustee to pay any surplus to the Regents before completing the three projects.

Moreover, paragraph 5 is in nowise dispositive. Nor is paragraph 3 of provision third, which authorizes the trustee from time to time to transfer surplus beyond that necessary to insure the payment of the annuitants, from the preferential trust to the subordinate trust, and which paragraph respondent contends, like paragraph 5 of provision sixth, indicates the testatrix's intention to make the hospital endowment a

continuing one. Both of these paragraphs deal with the handling of the trust funds and the determination of whether surplus is available to be transferred from one fund to another. The only clause providing for any disposition to respondent is paragraph 4 of provision sixth.

It is significant that in paragraph 3 testatrix *directed* the trustee in endowing the three rooms in the Old Ladies' Home to pay such amount as in his opinion "shall be necessary to endow," while in paragraph 4 the trustee is not *directed* but authorized, in endowing the room in St. Luke's Hospital, to use such amount "as he shall deem proper." At the time of making her will the testatrix could not be sure as to how long it would take the trustee to negotiate the endowments and therefore provided in effect that the trustee might transfer excess to the Regents before completing the endowments. This very provision for payment of excess to the Regents is another evidence that testatrix contemplated a one payment endowment. If it were contemplated that the endowment was to be a continuing one, dependent upon the fluctuation of income on investments handled not by the trustee but by the hospital board, it is doubtful if the trustee would ever before the termination of the trust be in a position to determine what would be the requirements of the endowment and hence whether or not there was any excess in the fund.

Moreover, the trust would never terminate. Even after the termination of the preferential trust, the trustee would have to keep funds on hand to meet the possibility of hospital costs continuing to increase from time to time, requiring more funds to be given respondent. Although he had the discretion to make a determination, he might feel that he could not reasonably do so.

3. "Endow: To furnish with money or its equivalent, as a permanent fund for support; * * * as, to endow a hospital, or scholarship." (Webster's New International Dictionary, 2d ed.) "The term 'endowment,' therefore, has received a rather definite meaning from the Courts, to wit, that it is a bestowment of moneys as a permanent fund, the income of

which is to be used for a proposed work, and 'to endow' is, of course, to create or provide an endowment. The common and ordinary meaning of the words 'to endow a room' would therefore be 'to provide a permanent fund, the income of which is to be used to maintain a room.'" In re Pelton's Will, 190 Misc. 624, 74 N. Y.S.2d 743, 746.

[3] The construction of the will which we have given was the construction given by the trial court in its previous orders and by the trustee and respondent in the contract. In the "Petition * * * for Instructions and Advice as to St. Luke's Hospital Endowment" the trustee stated that he held certain described stocks "available for use for the creation of said endowment" and that stocks of the aggregate value of \$150,000 "are necessary and reasonable for such purpose," asked that he be authorized to select stock in that amount "and transfer the same to *St. Luke's Hospital for the endowment above set forth*" and that he be authorized to execute a "proper contract to effect such endowment * * *" The "Decree Authorizing and Directing Payment of Endowment to St. Luke's Hospital" stated that the trustee had petitioned for instructions and advice "as to St. Luke's Hospital endowment," and then provided that "pursuant to said Will" the trustee was authorized and directed to select securities of the aggregate value of \$150,000 and transfer them to respondent "for the endowment above set forth" and to execute a contract "to effect such endowment." While it is nowhere stated in the petition or order that this is to be a one payment endowment, no other construction is reasonable or logical. The same is true of the contract thereafter drawn and the order expressly approving it and the transfer to respondent of the securities. In the "First Report and Account of Testamentary Trustee," the latter reported the transfer of the securities and the execution of the contract, copy of which was annexed. This agreement sets forth paragraph 4 of provision sixth of the will, and then states that the trustee holds certain described stock of the aggregate value of \$150,000 "for use for the creation of said *St. Luke's Hospital endowment*" and that said stocks "are necessary and reasonable for such purpose and have been selected by him for said endowment * * *" Respondent then agrees to accept the transfer of said stock "pursuant to and in fulfillment of said provision of said will," and to provide a room in its hospital continuously. It agrees "to furnish continuously and *perpetually*" to the women entitled thereto the full

services of the hospital, etc. The stock is to be owned and held by respondent and the net income therefrom to be used to maintain the said room and care for such patients *in perpetuity*.

The contract provides, also, that respondent will keep separate from all other property of respondent, in a fund to be known as the "Margaret J. Jones Endowment" said securities "and any other property which shall hereafter be acquired *in the place thereof*, and the income therefrom." If it were contemplated by the parties or the court in approving the contract, that additional funds might be given respondent for the endowment, it seems reasonable to assume that this clause would not have limited the Margaret J. Jones Endowment Fund to the securities and property to be acquired in their place, and the income, but there would have been an additional clause similar to "and other property or funds which hereafter may be given for this purpose."

Then comes a most interesting provision, in view of respondent's contention that a continuing endowment was contemplated,—if respondent shall hereafter find it to be impossible to maintain said room and care from the net income of the trust provided in the agreement, or for any other reason is unable or unwilling to perform its obligations it may apply to the superior court for appropriate relief, and if the relief granted *by the court* is inadequate or unsatisfactory, respondent may terminate the agreement and the fund shall then be disposed of as directed by the court, provided always that the provisions of the will shall be effectuated as far as practicable *under the then existing conditions*. There is no provision for further moneys from the trustee. Moreover, in case the corpus of the fund being given respondent is insufficient for the purposes of the trust thereby created, respondent must look, not to the trustee who would be the logical one to give relief if the will contemplated further donations from the trustee, but to the court whose only power would be to allow a reduction in the services to be rendered or to apply some form of *cy pres*. The "Decree Approving and Settling First Report and Account of Testamentary Trustee" approves the account and report as filed,

and the agreement with respondent. The only reasonable interpretation of these court orders under the circumstances is that the court as well as the trustee and respondent, construed the will as we do, namely, that the endowment was not to be one in which continuing payments were to be made. The trustee was to use such "amount" (not "amounts"), as he "shall deem proper."

[4] The trial court made a finding that at no time during the proceedings in which the prior orders were made were the provisions of paragraph 5, provision sixth, urged, raised or considered, nor were they necessary to any decision and that consideration of them would have been premature. That they were not raised in so many words is true, but they must have been considered. Their consideration would not have been premature, because, in passing upon the trustee's petition for advice and permission to transfer the securities which petition referred "particularly to the Will," as well as in the later order passing upon the contract, the court would be required to know whether a full payment was being made or merely a part payment. While the court orders did not spell this out in so many words, such is the effect of the orders. Continuing payments are completely inconsistent with the determination in these orders that the transfer of the \$150,000 securities was pursuant to and in fulfillment of the terms of the will. As was the order made upon the trustee's petition for instructions in *Re Estate of Keet*, 15 Cal.2d 328, at page 333, 100 P.2d 1045, at page 1048, each order "became a final determination of the matters adjudged * * *." See also *Smith v. Williams*, 66 Cal.App.2d 543, 152 P.2d 465. *Griffen v. Keese*, 1907, 187 N.Y. 454, 80 N.E. 367, is not in point. There the testator created a number of annuities and directed that his executors set apart and invest " * * * a fund sufficient to produce the several annuities * * *." 80 N.E. at page 368. The court held that a prior decree holding that the amount set apart to produce these annuities was proper and sufficient at that time, would not bar either a raising or lowering of the fund at a later date, as it was clear from the terms

of the will that the testator did not intend to create "a fixed and immutable fund."

In *Merriam v. Merriam*, 1900, 80 Minn. 254, 83 N.W. 162, the will required the trustees to set aside sufficient securities to produce an annual net income of at least \$8,000 to be paid the testator's wife as long as she lived. The trustees set apart securities that produced that income. However, as time went on, their yield did not produce that income. The court held that the intention of the testator was not to provide an unchangeable fund, but that the fund was to be kept sufficient to provide the designated income. *Merritt v. Merritt*, 1887, 43 N.J. Eq. 11, 10 A. 835, and *In re McKenna's Estate*, 1940, 173 Misc. 579, 18 N.Y.S.2d 482, were cases similar to the *Merriam* case. In each the will required the trustees to invest sufficient funds to produce and pay specified yearly amounts to the beneficiaries. Obviously such situations are different than in our case as in those cases it definitely appeared that the particular testator required the payment of the specified sums annually which could not be done if the fund from which the income came were not increased when necessary.

[5] Respondent cites *In re Estate of Ferrall*, 92 Cal.App.2d 712, 207 P.2d 1077, seemingly to support its contention that the court could order, as it did here, the trustee to increase the amount of the endowment. Were this a continuing endowment and the trustee refused arbitrarily to act, that case might support respondent's contention. But this is not a continuing endowment, and no contention has been made that the trustee acted in bad faith in making the single payment. The *Ferrall* case supports the action of the trustee here, 92 Cal.App.2d at pages 715-716, 207 P.2d at page 1079: "Section 2269 of the Civil Code provides: 'A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but may be controlled by the proper court if not reasonably exercised, unless an absolute discretion is clearly conferred by the declaration of trust.' An absolute discretion, as to the amounts to be paid from the corpus, was conferred by the trust provisions herein. An absolute discretion, ex-

exercised in good faith by a trustee, cannot be controlled by a court on considerations going to the soundness of the discretion so exercised."

[6] Under the terms of the will, the trustee, in his absolute discretion had the power to determine the amount of the endowment. Having done so, and no power being granted to the trustee in the will to continue making payments to respondent, the court had no power to order any additional amounts to be given respondent. In view of our holding in this respect it becomes unnecessary to consider whether the decree is ambiguous as to the amounts to be paid respondent by the trustee, and other questions raised.

2. Instructions to Hospital.

[7] In its order the court found that it was the intention of the testatrix, and so instructed respondent, that the income from the endowment is to be used to furnish hospital services to such women in reduced circumstances as respondent may select, provided that at all times it recognize the preferential right of members of the Protestant Episcopal Old Ladies' Home to receive such services. Appellant trustee contends that this instruction is inconsistent with the provisions in the contract which the court previously approved, and that such approval is *res judicata* of the question of selection. We agree with this contention. Paragraph 2 of the contract provides that respondent agrees to provide a room in St. Luke's Hospital for the use "by women in reduced circumstances (preferably members of the * * * Old Ladies Home) * * *" It then goes on to say that respondent agrees to furnish perpetually "to such persons, *who are to be women selected and designated by the * * * Old Ladies Home*, the full services of the hospital * * * including a one-bed private room of a type that shall be *satisfactory to said Home*." In approving the contract in that form the court construed the terms of the will to require the selection of the women to benefit from the endowment to be made by the Old Ladies' Home. The trial court on the

hearing of the present petition had no power to again determine that question, even though it might be that the will intended only that women from the home be given preference and not that the home was to select the other women to be benefited in case there were no women from the home needing hospital care. See *Estate of Keet*, supra, 15 Cal.2d 328, 100 P.2d 1045.

[8,9] The instruction by the court to the hospital that it might change the securities held by it from stocks to stocks and bonds was a matter within the equity power of the court. We doubt, however, if it was necessary for respondent to obtain such instruction. Under the contract respondent was expressly given full power to sell, invest and otherwise deal with said securities as if they were its own property, as long as such action was taken for the purposes of the endowment. This would give respondent the right to reinvest in such type of securities as it deemed for the best interests of the endowment fund.

3. Attorney's Fees.

The award of attorney's fees to respondent here comes within the principle set forth in an annotation in 9 A.L.R.2d 1132, pages 1182-1183: "It is sometimes expressly recognized that where the provisions of the will are actually ambiguous and the commencement of a suit for construction is necessitated thereby or, at least, constitutes a perfectly reasonable step, an allowance for costs or attorneys' fees may be made either to the trustee or to the complainant beneficiary." This proceeding is different from the one in *Re Estate of Marré*, 18 Cal.2d 191, 114 P.2d 591, where the beneficiary of the trust sought additional sums from the trust for his own support, maintenance and education. Here respondent sought additional sums, and clarification of rights, not for itself but for a class which testatrix desired to favor,—women in reduced circumstances.

[10] "* * * whenever a will making bequests to charity has to be judicially construed to clear up ambiguities, the expenses of the suit, including an attorney's fee for

the defeated party, are to be paid out of the testator's estate." 11 C.J., 370, Charities, § 98, 14 C.J.S., Charities, § 65.

[11] Until the question of the nature of the endowment provision of the will was determined, the trustee would never be able to determine whether he could start paying surplus to the Regents. Therefore, this litigation was "a benefit and a service to the trust" which in *Dingwell v. Seymour*, 91 Cal.App. 483, at page 513, 267 P. 327, at page 339, was deemed to be "the underlying principle which guides the court in allowing * * * attorneys' fees * * *."

Those portions of the order authorizing respondent to diversify the investment of the endowment funds and allowing respondent attorney's fees are affirmed. In all other respects the order is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.



130 Cal.App.2d 265

Erwin HEISE, Plaintiff and Appellant,

v.

Irma Heise MYRON, Defendant and Respondent.

Civ. 20594.

District Court of Appeal, Second District,
Division 1, California.

Jan. 17, 1955.

Rehearing Denied Feb. 14, 1955.

Hearing Denied March 16, 1955.

Action by divorced husband for declaration that former wife held a certain lease in trust for husband. The Superior Court of Los Angeles County, Clarence E. Johns, J. pro tem., rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, White, P. J., held that all fiduciary relationship between the spouses was terminated by property settlement agreement, and hence wife could obtain lease of property, to begin after expiration

of lease assigned to husband under the property settlement agreement.

Affirmed.

1. Appeal and Error ⇨882(8)

A divorced husband, suing to enforce trust against former wife, who did not object to introduction in evidence of records of divorce suit, but stipulated thereto, could not complain of findings based in part upon sworn statements in affidavits contained in such record.

2. Husband and Wife ⇨14(1), 279(1) Trusts ⇨102(1)

A property settlement agreement reciting intent to extinguish spouses' personal and property rights, and that each spouse conveyed all interest in community property, joint tenancy, tenants in common or otherwise, terminated whatever special position wife occupied as husband's partner; and hence, after expiration of lease which was assigned to husband under the agreement, wife was not a cotenant with husband, or a trustee for him, with respect to lease obtained by her on same property, especially where there was evidence that husband had rejected landlord's offer of new lease on similar terms.

3. Landlord and Tenant ⇨4

Fact that original lease, assigned to husband under property settlement, was still in effect did not preclude lessor from entering into a new lease to wife, to take effect upon expiration of existing lease.

4. Landlord and Tenant ⇨4

A landlord is not required to wait until a former lease has expired and tenant has surrendered possession before he can make a valid lease of same property.

Kenny & Morris, Robert W. Kenny, Los Angeles, for appellant.

Wallace & Wallace, W. W. Wallace, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff and defendant in this proceeding were formerly husband and wife. On April 7, 1951, a final decree of divorce was

entered in favor of defendant and against plaintiff herein by the Superior Court of Los Angeles County. On March 22, 1950, the parties herein entered into a property settlement agreement. The agreement in question provided in part as follows:

"1. The parties hereto, and each of them, may live separate and apart from the other, free of all marital domination or interference on the part of the other, and each party hereto shall have the right to engage in such business or social activities as he or she shall desire without any interference of any nature or kind whatsoever on the part of the other party hereto.

"2. Each of the parties hereto agrees not to molest the other or to interfere with his or her social or business activities, directly or indirectly."

In the property settlement agreement plaintiff received as his sole and separate property, a lease on all of the second floor of a two-story building located at 1024 South Grand Avenue, Los Angeles, California, on a property known as the Grand Ballroom. The lease commenced October 1, 1950, and will expire September 30, 1955. Pearl Rose was the owner of the real property and the lessor in said lease.

In the division of the properties in accordance with the property settlement agreement, defendant herein was given the Colonial Ballroom, being a ballroom located at the southwest corner of Venice Boulevard and Flower Street in the city of Los Angeles, California. Both plaintiff and defendant executed the necessary papers to transfer their respective properties, so that each held the property so received as separate property.

The lease on the Grand Ballroom which plaintiff received provided for a rental of \$500 per month.

The foregoing assignment by defendant to plaintiff of the lease just referred to, contains the following language:

"This assignment is intended to and shall be construed to assign, transfer, and convey any and all interest therein which I have had, now have or may in the future claim to have as community property, joint tenancy, tenants in common, or otherwise;

and this assignment shall entitle the assignee to any and all benefits to be derived from said lease or any options, extensions or renewals of the same."

In March, 1951, defendant herein entered into a lease of the Grand Ballroom with plaintiff's lessor for a period of five years to commence October 1, 1955 (the day following the expiration of plaintiff's lease), at a monthly rental of \$600.

The present action was instituted by plaintiff to obtain a judgment declaring that defendant holds this last mentioned leasehold interest in the Grand Ballroom from October 1, 1955, to September 30, 1960, in trust for plaintiff.

By her answer defendant alleged in part that she entered into the lease now engaging our attention only after she had been informed by the lessor's agent that he had offered plaintiff a lease for five years to commence at the expiration, on September 30, 1955, of the existing lease, at an increase of \$100 in the monthly rental. That plaintiff refused to enter into such a lease and that upon being so informed, defendant accepted the offer of the lessor's agent and did enter into a lease to commence at the expiration of the one then held by plaintiff.

The trial court found that it was only after plaintiff had refused to enter into a lease to commence at the expiration of the existing one, that defendant executed the lease here in controversy, and judgment was entered in her favor declaring that she does not hold said leasehold interest in trust for plaintiff. From this judgment plaintiff prosecutes this appeal.

Appellant first challenges the finding of the court that respondent entered into the new lease only after the former had been offered such a lease and had refused the same. Appellant complains that the only basis for such finding is an ex parte affidavit by the lessor's agent which was filed in another action. In that regard it appears that before commencing the present action, appellant secured an order to show cause in the original divorce action in an attempt to compel respondent to deliver the controversial lease to appellant. In this proceeding many affidavits were filed, including the

one by the lessor's agent substantiating respondent's contention that the lease had first been offered to appellant and that it was only after his refusal to accept the same that respondent executed the lease.

[1] In the instant proceeding this entire Superior Court file was introduced into evidence by reference. Appellant had notice of the contents of the Superior Court record, and made no objection to its introduction into evidence. On the contrary, stipulated thereto. If he desired to controvert the evidence therein contained he had opportunity so to do. Having failed to object to the file being put into evidence, appellant cannot now complain of findings based in part upon the sworn statements made by witnesses in affidavits therein contained.

Appellant next contends that the fiduciary obligations of a co-tenant and former spouse constituted respondent a trustee for him.

[2] We cannot agree with appellant that at the time the new lease was executed, respondent was a co-tenant with him. Contained in the property settlement agreement above mentioned was the following clause:

"This agreement is intended as and for a full, complete and final settlement, *extinguishment and termination of the personal rights and property rights of the parties hereto, or either of them, as regards the other.*" (Emphasis added.)

[3, 4] In respect to the old lease, whatever special position respondent occupied by virtue of which she owed a duty toward appellant as a partner was extinguished and terminated by the explicit language of the property settlement agreement and assignment made thereunder. Furthermore, there was testimony contained in the above mentioned Superior Court file, and introduced into evidence, that before the landlord offered the new lease to respondent, she made a similar offer to appellant who rejected the same. The fact that appellant's original lease was in effect did not preclude the lessor from entering into a new lease to take effect upon the expiration of the existing one. A landlord is not required to wait until a former lease has expired and

the tenant has surrendered back to him the possession before he can make a valid lease of his property. *Rice v. Whitmore*, 74 Cal. 619, 623, 16 P. 501.

Whatever fiduciary relation existed between the parties was terminated by the property settlement agreement which contained the following provision:

"Each of the parties hereto further agrees that they may engage in any trade, occupation, profession or business which he or she sees fit to engage in, and any earnings or profits or losses derived or resulting therefrom shall be for the sole benefit or responsibility of the party earning the same or sustaining the losses, and the other party hereto shall not be entitled to any benefit or be subject to any liability for losses therefrom."

The conclusion seems inescapable that the parties intended to and did effect a complete severance of their reciprocal marital obligations insofar as property rights or business activities were concerned. Each went his own way and dealt with his or her property as their own. Following execution of the property settlement agreement and delivery of the various assignments and documents therein provided for, each party conveyed to the other the respective properties they received, as recited in the assignment, " * * * all interest therein which I have had, now have or may in the future claim to have *as community property, joint tenancy, tenants in common, or otherwise;* and this assignment shall entitle the assignee to any and all benefits to be derived from said lease or any options, extensions or renewals of the same." (Emphasis added.)

Upon the execution of the foregoing documents, the fiduciary relationship was terminated, and it became a case of each party for himself.

For the foregoing reasons the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

130 Cal.App.2d 270

WOODBIDGE REALTY, a California corporation, Plaintiff and Respondent,

v.

PLYMOUTH DEVELOPMENT CORPORATION, a Nevada corporation, and P. N. Alexander, Henry Brandstad, Verni H. Seekate, Louis Del Barba, and Andrew Rebollo, Directors and Trustees of Plymouth Development Corporation, a Nevada corporation, Defendants and Appellants.

Civ. 8482.

District Court of Appeal, Third District, California.

Jan. 17, 1955.

Action by brokers' assignee against purchasers for real estate brokers commissions allegedly due. The Superior Court, San Joaquin County, George F. Buck, J., entered judgment for plaintiff, and vendors appealed. The District Court of Appeal, Van Dyke, P. J., held that, where brokers had accomplished their duty, under agreement with vendors, to bring vendors and purchaser to a meeting of minds, vendors could not thereafter, by refusing to go further in way of formalizing the consensus, defeat brokers' right to be paid for their services.

Judgment affirmed.

1. Brokers ⇨43(3)

Under the statute of frauds, essential part of contract to employ real estate broker is provision pertaining to matter of the employment, and contract, which shows that broker is authorized to find purchaser ready, willing, and able to buy or exchange or purchaser with whom sale or exchange is actually consummated, which describes property to be sold with sufficient certainty to identify it, and which is signed by party to be charged, is sufficient.

2. Brokers ⇨43(3)

Agreement, which was signed by vendors, and which provided that brokers were authorized to sell, in one block, certain lots for \$1,000 per lot for stated commission and that all lots were to be approved according to F.H.A. specifications, constitut-

ed sufficient memorandum to satisfy the statute of frauds.

3. Brokers ⇨52

For broker to recover a commission, it is not always necessary that binding contract be shown to have been executed between buyer and seller.

4. Brokers ⇨54

Where agreement between vendors and brokers provided that, for stated commission, brokers were authorized to sell, in one block, certain lots at certain price, brokers, to be entitled to their commission, had only to find purchaser who was ready, willing, and able to purchase, and who would offer to purchase on terms acceptable to vendors.

5. Brokers ⇨61(1), 63(1)

Where vendors and purchaser fully understand just what is intended and what is orally agreed upon, and vendor does not back out of deal because of any uncertainty in purchaser's offer of any material variance from the authorization to brokers or because formal agreement could not have been and would not have been readily prepared for execution because of any lack of certainty as to terms and conditions, brokers are entitled to their compensation regardless of whether sale is prevented from failure to perfect title or by mere will of vendors.

6. Brokers ⇨52

Where vendors were satisfied with proposal of purchaser produced by vendors' brokers and with purchaser's character and ability, and terms of purchase had been made sufficiently definite so that draftsman could be given instructions to proceed with the contract document, and both purchaser and vendors had orally agreed upon the terms, vendors' refusal to go forward with the sale could not affect brokers' right to compensation they had earned.

7. Brokers ⇨86(1)

In action by real estate brokers against vendors for commissions allegedly due, evidence was sufficient to sustain trial court's finding that sole reason why binding contract of sale between vendors and purchaser

was not executed was refusal of vendors to proceed.

8. Brokers ⇨52

The law requires of vendor good faith and the refraining from any intentional act to discourage, embarrass, or prevent completion of purchase.

9. Brokers ⇨19

Vendor and broker do not deal at arm's length, but engage to deal fairly and reasonably, one with the other.

10. Brokers ⇨52

Where brokers did not have authority to sign binding contract on behalf of principals, it behooved principals to act honestly and fairly and to cooperate with brokers in matter of consummating the proposed bargain by execution of binding agreement if such was desired.

11. Brokers ⇨51

Where agreement between brokers and vendors authorized brokers to sell, in one block, certain lots for stated price and stated commission, purpose and duty of brokers was to bring vendors and purchaser to a meeting of minds.

12. Brokers ⇨52

Where brokers had accomplished their duty, under agreement with vendors, to bring vendors and purchaser to a meeting of minds, vendors could not thereafter, by refusing to go further in way of formalizing the consensus, defeat brokers' right to be paid for their services.

Blewett, Blewett, Macey & Garretson, and Mazzera, Snyder & DeMartini, Stockton, for appellants.

Warmke, Arbios, Woodward & MacKillop, Stockton, for respondent.

VAN DYKE, Presiding Justice.

This action was brought by plaintiff and respondent as assignee of licensed real estate brokers to recover a commission from defendants. Judgment was given as prayed for in the complaint and the defendants appeal.

The trial court found as follows: That plaintiff's assignors were licensed real estate brokers; that on March 9, 1950, Plymouth Development Corporation, which was then the owner of real property near Stockton, executed and delivered to plaintiff's assignors a document containing the following:

"We hereby issue Woodbridge Realty One Hundred Twenty (120) day authorization to sell in one block, all lots known as Plymouth Village (Corner of Alpine and Plymouth Road) County of San Joaquin, State of California, for One Thousand and No/100 (\$1000.00) per lot. All lots to be approved according to F.H.A. Specifications.

"We also agree to pay Woodbridge Realty a commission of Fifty and No/100 a lot if sold to any person with whom Woodbridge Realty has negotiated and notified us in writing of such negotiation within five (5) days after expiration of this authorization.

"It is expressly understood that this authorization to sell is non-exclusive."

The court further found that Plymouth Village consisted of property, a legal description of which appears at length in the findings; that some time before March 9, 1950, Plymouth Development Corporation had orally requested plaintiff's assignors to find a buyer for Plymouth Village and that pursuant thereto said brokers had negotiated with William Blackfield and with Goheen Construction Company for the sale of said land to them; that within a few minutes after receiving the above document the brokers delivered to Plymouth Development Corporation a communication reading: "In accordance with our listing agreement on Plymouth Village we hereby notify you that we have negotiated with the following: Wm. Blackfield * * *, Goheen Construction Co. * * *"; that said brokers at once negotiated further with Blackfield and obtained from him a "firm and specific oral offer" for the purchase by him of Plymouth Village; that the terms of said offer were suitable and

acceptable to Plymouth Development Corporation as seller and that said seller "did in fact accept said offer"; that the brokers orally communicated both offer and acceptance to the respective parties and that the seller and the buyer entered into "an oral agreement" for the purchase and sale of Plymouth Village; that thereupon the seller and the buyer designated Louis T. Arbios, an attorney at law, to prepare a written contract embodying the oral agreement; that while he was preparing the agreement the seller repudiated the oral agreement and refused to go further in the matter of the sale; that Blackfield was at all times ready, willing and able to purchase Plymouth Village on the terms and conditions so offered and accepted and was at all times ready, willing and able to enter into a written contract embodying said terms and conditions and offered to do so and to execute a written contract binding upon both the seller and the buyer; that Blackfield would have executed such a contract except for the repudiation and breach by the seller of said oral agreement and its refusal to enter into a written agreement; that the brokers were the procuring cause of obtaining Blackfield as such purchaser so ready, willing and able to act and that the repudiation of the seller was the sole cause of a written contract not having been entered into.

It appears that whatever cause of action the brokers had against Plymouth Development Corporation, the burden thereof passed on to a copartnership later formed which consisted of the individual defendants.

The complaint contained a second cause of action in the form of a common count for services performed by plaintiff's assignors as real estate brokers and the court found that the allegations of the common count were true.

Appellants contend in substance that the foregoing findings of fact are without support in the evidence; that the document of March 9, 1950, which we will call the "brokerage contract" did not comply with the statute of frauds which requires such contracts or some memorandum thereof to be

in writing and signed by the party to be charged, and that the brokers did not produce a purchaser ready, able and willing to buy the subject property.

[1] We will treat of the second contention first. We think little need be said concerning this assignment of error. The requirements for a writing or memorandum to meet the statute of frauds are well set forth in 9 California Jurisprudence 2, section 40, pages 185-186:

"All the terms of the employment of a real estate broker need not be in writing, if the fact of employment is sufficiently certain from the writing.

* * * And the memorandum is not required to be an instrument by the terms of which the agent is empowered so to bind the principal as to support an action for specific performance. It is sufficient if it shows that the broker is authorized by the principal to find a purchaser who is ready, willing, and able to buy or exchange, or one with whom a sale or exchange is actually consummated. * * * However, the memorandum must describe the property with sufficient certainty to identify it. And * * * must be signed by the party to be charged. * * *

"The statute does not require a formal written contract, but merely some note or memorandum thereof. * * * For example, a letter, or the contract between the principal and the person procured by the broker, or escrow instructions may satisfy the requirements of the statute if appropriate language is used."

We also quote the following from *Pray v. Anthony*, 96 Cal.App. 772, 777, 274 P. 1024, 1026:

"As uniformly held by numerous decisions in this state upon the subject, the essential part of a contract to employ a real estate broker, so far as the statute of frauds is concerned, is the matter of the employment * * *."

[2] Applying these rules to the document issued to the brokers by the proposed seller, we hold that it was a sufficient mem-

orandum to satisfy the statute. It contained an express authorization to sell within a time fixed, a promise to pay a commission and a description of the property by name. As to this last requirement, there is no claim that the description was insufficient and it is apparent from the record that the parties all understood exactly what property was referred to by the name "Plymouth Village". This property had been purchased by the proposed seller for subdivision purposes and although a formal subdivision map had not yet been filed for record, it is apparent that the name "Plymouth Village" contained in the broker's contract could, as found by the court, have been readily translated into a metes and bounds description.

The remaining two assignments of error can be treated together as they both are concerned with the sufficiency of the evidence to sustain the findings set out above. These findings were all sufficiently supported by the evidence received. Disregarding, as we must, all conflicts, and, without unduly lengthening this opinion by reciting all of the evidence which supports the trial court's decision, we find the following:

Woodbridge Realty was a copartnership engaged in real estate brokerage, and Albert L. Smith and Bruce Barcus, two of the copartners, were the ones who were active in the transactions herein involved. P. N. Alexander was Secretary, Henry Brandstad was President, and Verni H. Seekatz was Treasurer of Plymouth Development Corporation. P. M. Alexander was mainly in charge of the affairs of the corporation with respect to the purchase, subdivision and sale of Plymouth Village. He informed Smith and Barcus that the corporation was acquiring Plymouth Village which would subdivide into about 200 lots and he wanted Smith and Barcus or their partnership to look for a buyer. This they did. Their attention was brought to Blackfield as an interested party. Blackfield was a contractor and builder of many years' experience who had developed a number of tracts containing from 100 to 400 homes each and his financial ability to buy Plymouth Village was well proven. He himself testified that he could readily

and easily have purchased the property upon the terms which the trial court found were offered by him and accepted by the seller. After a number of telephone conversations concerning his purchase of Plymouth Village, Blackfield came to consider Plymouth Village as suitable property on which to build low-cost homes under F.H.A. regulations. The tract was adjacent to sewers and water and capable of improvement so as to meet F.H.A. requirements. Alexander had told Smith and Barcus that the seller would sell Plymouth Village for \$1,000 a lot with the improvements required to meet F.H.A. rules put in at the seller's expense. It is quite apparent from the whole record that the brokers, the sellers, and Blackfield were all quite familiar with F.H.A. requirements for low-cost homes and that the term "F.H.A. Approved" was one of definite meaning to the parties involved. Smith and Barcus reported to Alexander that they had two prospects and shortly before the brokers' contract was given Blackfield had been sufficiently interested to request the brokers to get written authorization for the sale of the property. Thereupon Smith and Barcus on the morning of March 9, 1950 went to the offices of Plymouth Development Corporation. Alexander and one Barnett, both members of the corporation, were there. At this meeting Smith and Barcus told these men that they had been dealing for the sale of the land, that they had a definite prospect for its purchase and that their partnership wanted protection as to its commission. Alexander answered that they could have such protection and that they should have a written authorization before they went further. The brokerage contract was then prepared, signed and delivered to the brokers. Smith and Barcus then gave the written notification hereinbefore quoted that Blackfield had been negotiated with, as well as Goheen Construction Company. The broker's contract was shown to President Brandstad who expressed approval, telling Alexander to "go ahead". Immediately after receiving the broker's contract Smith and Barcus interviewed Blackfield at Mountain View, where he was engaged in a home development project. They told

Blackfield they had written authorization to sell Plymouth Village and that if Blackfield would make his offer they would convey the offer to the owner. They told Blackfield where the land was, described it to him, showed him a tentative subdivision map which they had received from Alexander, and mentioned the sewer facilities and other matters pertinent to a sale. Blackfield told them he knew the tract and that it was not necessary for him to come to Stockton to look at it. He then gave them an offer to buy. It was oral and of course not binding on him at that time, but it is apparent that both he and the brokers contemplated a written contract to embody the terms of the offer. The offer was to buy Plymouth Village for \$1,000 a lot, fully improved according to F.H.A. specifications, the seller to put in the streets, curbs, gutters, sidewalks, storm drains, if necessary, and sewers, so as to obtain F.H.A. approval, but with Blackfield, the buyer, putting in the necessary water and electricity. The buyer was to pay \$10,000 immediately and to deposit \$90,000 in escrow with the title company, to be drawn upon by the seller as it put in the improvements, the balance of the purchase price of \$1,000 per improved lot was to be paid within a year. Blackfield stipulated that he wanted the seller to convey two lots to him so that he could erect two model homes. The other lots were to be deeded to him for moneys paid and to be paid and all the lots were to be deeded and all the purchase price was to be paid within one year. Blackfield told Smith and Barcus to have the agreement drawn up by an attorney and that when that was done he would sign the agreement and go through with the deal. They asked him if he wanted his own attorney to draft the contract and when he said he did not they suggested Mr. Arbios of Stockton, whom Blackfield approved since he was personally well acquainted with him. Smith and Barcus returned to Stockton, contacted Alexander, told him of their meeting with Blackfield and asked that he call a meeting of the members of the selling corporation. This was done within a day or two. Smith, Barcus and a third partner, Clifford K. Woodbridge, attended

the meeting. There were present all of the directors, officers and stockholders of the seller. Smith and Barcus submitted to them the precise terms of the offer Blackfield had made and these were discussed for some time. It was made known that Blackfield was the proposed purchaser, his business and business experience were related, the brokers informed the members of the seller corporation as to the various home development projects which Blackfield had completed, and they were told that Blackfield was willing to have Mr. Arbios draw up the formal agreement. At the end of the meeting the brokers were told that the matter would be further discussed in private by the members of the corporation and their conclusion would be communicated to the brokers. Several days thereafter Alexander met with Smith, Barcus and Woodbridge and told them the terms and conditions of Blackfield's offer were agreeable, that the corporation would sell, that the corporation had accepted the offer and that the brokers could now go ahead and have the agreement drawn. It was stated that Mr. Arbios was accepted as the attorney to draw the contract. The brokers then telephoned to Blackfield, acquainting him with what Alexander had told them and he replied, "Fine and dandy, go ahead and have Mr. Arbios draw the papers." Smith, Barcus and Alexander thereafter participated in having Arbios prepare the desired contract. They gave him the terms of the offer of purchase made by Blackfield and accepted by the seller. Arbios requested Alexander to get a legal description of the tract. This he did, obtaining a preliminary report from a title company, which he delivered to Arbios. There was some delay in the preparation of the contract, one reason being that a metes and bounds description of the two lots to be immediately conveyed was needed and it took some time to get this. About one week after Arbios had been told to prepare the agreement a meeting was arranged between Alexander, Smith and Barcus to go to Arbios' office. The brokers and Alexander met at the latter's office and started to go to Arbios' office. They stopped for coffee at a coffee shop and while there Alexander told Smith and Bar-

cus that the members of the corporation had changed their minds, that they would not go through with the deal that had been agreed upon and that they had now decided to require Blackfield to do the required improving of the lots at his own expense in addition to the purchase price of \$1,000 per lot. Smith and Barcus protested to Alexander that this additional requirement that Blackfield improve the land at his own expense was contrary to what had been verbally agreed upon and mutually consented to, but Alexander replied that while he personally wanted to go ahead the other members of the corporation did not. Arbios was then called on the telephone and told that the seller had "backed out of the deal" so that the agreement had to be cancelled. Although there was much evidence of efforts made thereafter by the brokers to make a different deal with Blackfield whereby the additional requirements as to improvements at Blackfield's expense would be agreed to by him their efforts were unavailing. Blackfield himself described the proposal as "fantastic". It was further shown that in November, 1950, a contract for the sale of Plymouth Village was entered into between the partnership which succeeded the corporation as owner of the tract, and a corporation whose stock was owned by Blackfield and his wife. The selling partnership embraced in its members all or nearly all of those who had owned the stock of the corporation. Under this contract substantially the same terms and conditions were agreed upon as had been orally agreed upon the previous March, save that a slightly higher price was paid for each lot. Blackfield, as to this deal, testified that he controlled a number of corporations, of all of which he was president and general manager, and the owner of most of the stock; that when he purchased a tract for improvement the title was taken by one or another of these corporations, depending each time mainly upon the tax picture of the various companies. It was further shown that shortly before this sale was made the corporation which owned Plymouth Village was dissolved; a partnership among its members was substituted, and took title to its properties in-

cluding Plymouth Village; and that the partner had been informed by counsel that if these things were done and the sale was made by the partnership they would avoid any liability to their former brokers for commissions.

[3, 4] We think the foregoing evidence amply supports the trial court's challenged findings. In order that a broker may recover a commission it is not always necessary that a binding contract be shown to have been executed between the buyer and seller. Under a brokerage contract such as was here executed it was only necessary that the brokers find a purchaser who was ready, able and willing to purchase and who would offer to purchase upon terms acceptable to the seller. Said the Supreme Court in *Twogood v. Monnette*, 191 Cal. 103, 107, 215 P. 542, 543, as quoted in *Coulter v. Howard*, 203 Cal. 17, 25, 262 P. 751, 754:

"* * * 'It is also established law in this state that a written contract between the seller and the purchaser is not essential to the recovery of the broker's commission if he has produced to the seller a purchaser who is ready, willing and able to purchase upon the terms proposed by the seller and who has agreed to those terms and is willing and offers to enter into a binding written contract. The broker has performed his duty and has earned his commission regardless of whether a written contract is actually entered into or whether the sale is ever consummated by the delivery of the property and the payment of the purchase price.'" See also *Umphray v. Hufschmidt*, 73 Cal.App. 140, 238 P. 749, and *Ford v. Cotton*, 82 Cal.App. 675, 256 P. 301.

[5] Here the seller in its authorization to the brokers contented itself with a very brief statement of the terms upon which it would be willing to sell, saying only that the brokers were authorized to sell "Plymouth Village for \$1,000 per lot, all lots to be approved according to F.H.A. specifications". However under the circumstances this brief statement of terms meant a great deal. The parties were con-

templating the sale of a tract purchased for subdivision purposes and which the seller was then engaged in subdividing. It is quite apparent, as we have said, that all those who negotiated about the matter understood quite well what was meant by F.H.A. approval. The trial court was fully justified in concluding that this brief statement of terms of sale closely approximated Blackfield's offer which the brokers brought back to the seller. That offer contained all the terms expressly stated in the offer to sell and was amplified with particulars as to the mode and method under which the actual purchase would be accomplished and the property taken and paid for. It is apparent from the lack of testimony to the contrary that the offerer and the offeree fully understood just what was intended and what was orally agreed upon and there is nothing to indicate that the seller in "backing out of the deal" did so because of any uncertainty in Blackfield's offer of any material variance from the authorization; or that the formal agreement could not have been and would not have been readily prepared for execution because of any lack of certainty as to terms and conditions. Under such circumstances the rule laid down in *Coulter v. Howard*, supra, applies. We quote from page 26 of 203 Cal., at page 754 of 262 P.:

"* * * 'Whether the sale was prevented by the failure of perfect title or by the mere will of the vendor makes no difference. In either case the compensation had been earned by the agent. *Smith v. Schiele*, 93 Cal. 144 (28 P. 857); *Phelan v. Gardner*, 43 Cal. 306-311; *Justy v. Erro*, 16 Cal.App. 519-522, 117 P. 575; *Neilson v. Lee*, 60 Cal. 555; *Stanton v. Carnahan*, 15 Cal.App. 527-529, 115 P. 339.' *Purcell v. Firth*, 175 Cal. 746, 750, 167 P. 379, 381."

[6-8] When matters had progressed to the stage where the seller was satisfied with the proposal of the buyer and with the buyer himself so far as his character and ability were concerned, where the terms of the purchase had been made sufficiently definite that the draftsman could be given instructions to proceed with the contract document, and where both buyer and seller

had orally agreed upon these terms the seller could not under the sanction of law arbitrarily refuse to go forward and yet say to the brokers that they had not performed all of the obligations necessary to be performed by them in order to earn their compensation. It was wholly the business of the seller whether, not being yet bound by written agreement, it should refuse to go forward with the sale, but the refusal to go forward could not affect the right of the brokers to the compensation they had earned. The trial court was fully justified in finding from the evidence we have related that the sole reason a binding contract of sale between buyer and seller was not executed was the refusal of the seller to proceed. "The law requires of the vendor good faith and the doing of no intentional act to discourage, embarrass, or prevent the completion of the purchase." *Coulter v. Howard*, supra.

Appellants contend that all the brokers did failed to measure up to the production of a purchaser ready, able and willing and offering to buy on terms acceptable to the seller, because the offer of Blackfield was conveyed to the seller by its own brokers rather than direct from Blackfield to the seller by some other medium or personally by Blackfield himself. They cite certain cases which superficially seem to bear out their contention, although they admit that such a contention is against the generally-declared rule of law upon the matter. They quote the following from *Frank Meline Co. v. Kleinberger*, 77 Cal.App. 193, 246 P. 136, 138.

"* * * in the absence of any specific agreement to the contrary, a broker employed to sell real estate has earned his commission when, within the life of his contract * * *, he has produced a person who is ready, able, and willing to purchase the property on terms satisfactory to the seller, and has obtained a binding and valid contract for a sale on terms proposed by the seller, or has brought the seller and buyer together, and thus enabled them to enter into a contract of sale, or has produced such a purchaser who has verbally accepted the seller's terms

and offered to enter into a written contract embodying the said terms and binding upon both parties * * *; but, unless the intending purchaser has entered into such binding contract, or has offered to the vendor, *and not merely to the broker*, to make such an agreement, the broker has not earned his commissions." (Emphasis added.)

[9-12] We have examined the cases cited by appellants in support of this contention as to the way in which the broker may "produce" a purchaser, but we are unable to agree with them that these cases furnish any authority for denying recovery in the case before us. Seller and broker do not deal at arm's length, but engage to deal fairly and reasonably, one with the other. Where, as here, the broker had no authority to sign a binding contract on behalf of the principal, it behooved the principal to act honestly and fairly and to co-operate with the broker in the matter of consummating the proposed bargain by the execution of a binding agreement if that was desired. It is clear from this record that the principal neither expected nor required a cash deal and anticipated, on the contrary, that a formal contract of sale embodying terms agreed upon would be prepared and executed. The brokers did all they could do or were required by the principal to do in progressing towards that consummation. The principal neither asked nor suggested that Blackfield be produced in the sense of being personally brought to the principal. The purpose and the duty of the brokers, and the only thing which under their authorization they could finally accomplish, was to bring the seller and the buyer to "a meeting of the minds". According to the evidence, this essential result they accomplished. This having been done, the seller thereafter, by refusing to go further in the way of formalizing the consensus, could not defeat the brokers' right to be paid for their services. As said in *Owen v. Spangler*, 111 Kan. 484, 207 P. 772, 773:

"Decisions which refer to the necessity of bringing the parties together have reference to bringing their minds

together upon a contract. Physically, the persons may be thousands of miles away from each other. It is not necessary that they ever see one another or communicate otherwise than through the agent."

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.



130 Cal.App.2d 231

Marle STORY, Ann Story, a minor, by her guardian ad litem, Marle Story, Donald Alan Story, a minor, by his guardian ad litem, Marle Story, and Marle Story, as Administratrix of the estate of Donald L. Story, deceased, Plaintiffs and Appellants,

v.

Carl Arthur COX, Jr., Defendant and Respondent.

Civ. 5032.

**District Court of Appeal, Fourth District,
California.**

Jan. 14, 1955.

Action for wrongful death resulting from automobile intersectional collision. The Superior Court, Orange County, Franklin G. West, J., entered judgment for defendant and plaintiffs appealed. The District Court of Appeal, Griffin, J., held that where defendant had collided at unprotected intersection with deceased's automobile which had entered intersection from defendant's right, and where defendant testified that the collision had occurred in twilight, that he had not seen deceased's automobile until both automobiles had entered intersection, and that no warning had been sounded and deceased had not decreased his speed, it was not error for trial court to refuse plaintiffs' instruction based on last clear chance doctrine.

Judgment affirmed.

Automobiles ⚡246(58)

Where defendant had collided at unprotected intersection with deceased's automobile which entered intersection from defendant's right, defendant testified that the collision had occurred in twilight, that he had not seen deceased's automobile until both automobiles had entered intersection, and that no warning had been sounded nor had deceased decreased his speed, it was not error for trial court to refuse plaintiffs' instruction based on last clear chance doctrine, in wrongful death action.

Richmond, Bradley & Barnes, Santa Ana, for appellants.

Head, Jacobs, Corfman & Jacobs, Santa Ana, for respondent.

GRIFFIN, Justice.

A jury verdict resulted in a judgment denying plaintiffs damages in a wrongful death action. The only question involved is whether, under the evidence, the court committed prejudicial error in refusing plaintiffs' instruction based on the doctrine of last clear chance, and one in the language of B.A.J.I. No. 205, bearing on the same doctrine. The record comes to us under a settled statement. There is very little conflict in reference to the facts.

The accident happened on April 18, 1951, about 7:20 in the evening, at the intersection of Lampson and West Streets, in the rural section of Orange County near Garden Grove. West Street runs generally in a north-south direction and is divided into two 9-foot lanes. Lampson runs in an east-west direction and is divided into 8-foot 5-inch lanes with 3 to 5 foot shoulders on each side of both streets. There were orange groves on all four corners of the intersection. One's view in a northerly direction as he approached the intersection traveling westerly on Lampson Street, if possible at all, was limited to a great extent by the trees and a residence on that corner. A police officer described the intersection as a blind intersection as to all four corners, and the

photographs in evidence so indicate. Signs were posted warning of a 15-mile per hour speed limit, but no stop signs were indicated. Defendant's automobile, a 1947 Buick convertible, was traveling west on Lampson Street. The deceased, Donald L. Story, was driving a 1950 Dodge sedan south on West Street. Judging from the gouge marks in the pavement, defendant's car struck the left front side of plaintiffs' car at a point 16 inches west of the center line of West Street and 10 inches north of the center line of Lampson Street. Defendant's car came to rest in an upside-down position at the southwest corner of the intersection and plaintiffs' car, which Mr. Story, the deceased, was driving, remained upright in the same area.

Plaintiffs offered in evidence the deposition of defendant Cox. Therein he testified he was approaching West Street on Lampson Street about 30 miles per hour; that as he approached the intersection he began slowing down; that although it was cloudy he could see a quarter of a mile; that he did not observe the 15-mile per hour caution sign; that he saw no headlights from another car or reflection from them prior to entering the intersection; that as he entered it he was going "very close to 15 miles per hour"; that when his car was in the intersection he saw two headlights to his right; that he put his foot in the air so he could step on the accelerator or the brake, whichever the occasion might require, but by the time he could react to this occasion the impact happened, "it was that quick"; that plaintiffs' car was traveling at 50 miles per hour about 15 feet from the intersection; that he observed Mr. Story's face and Story was looking straight ahead and his car was not slowing down.

Defendant Cox testified that although he had never tried it, he believed he could bring his car to a stop, going 15 miles per hour, in about 20 feet. No skid marks from either car were discernible on the highway.

A police officer testified as an expert witness for plaintiffs that a 1947 Buick automobile in good repair traveling at

15 miles per hour under the conditions there shown could be stopped in a distance of 18.7 feet, including reaction time.

Defendant, testifying in his own behalf, said he was traveling about 30 miles per hour on Lampson, in the twilight of the evening and his headlights were burning; that "it was a time of the evening when lights don't have much effect because it isn't dark enough and it isn't light enough to see good yet"; that as the front of his car was just entering the intersection he, for the first time, observed the automobile that collided with his in the northwest portion of the intersection; that the Story car did not decrease its speed at any time before the impact, and no horn or other warning was heard; that the time between the point where he first saw the Story car and the collision was a "split second".

As authority for the contention that the doctrine of last clear chance was applicable, plaintiffs rely upon such cases as *Girdner v. Union Oil Company*, 216 Cal. 197, 13 P.2d 915; *Sills v. Los Angeles Transit Lines*, 40 Cal.2d 630, 255 P.2d 795; *Peterson v. Burkhalter*, 38 Cal.2d 107, 237 P.2d 977; *Buck v. Hill*, 121 Cal.App.2d 352, 263 P.2d 643; and *Bonebrake v. McCormick*, 35 Cal.2d 16, 215 P.2d 728. They contend that under the evidence and within the time and space limitations available to defendant, he had two alternatives, one, he could have applied his brakes and avoided the accident, or, two, he had the further alternative of swerving to his right or left, and that either alternative would have been reasonable under the circumstances; and that accordingly the doctrine of last clear chance applied.

The cited cases upon which plaintiffs rely are factually distinguishable. This court fully discussed the question of the application of this doctrine under a similar set of circumstances in *Dalley v. Williams*, 73 Cal.App.2d 427, 166 P.2d 595, and we there held that the doctrine presupposes

time for effective action and that it is not applicable where the emergency is so sudden that defendant did not have time to avoid the accident; that in order to invoke the doctrine, there must be evidence that defendant had knowledge of the fact that plaintiff was in a dangerous situation from which he could not extricate himself by the exercise of ordinary care and, at that time, defendant had a clear chance to avoid injuring plaintiff by exercising ordinary care and failed to do so. It was there stated that although negligence and the application of the last clear chance doctrine are ordinarily questions for determination of the jury, a judgment founded on the doctrine cannot be upheld where there is no substantial evidence in the record to support it. To the same effect is *Rodabaugh v. Tekus*, 39 Cal.2d 290, 246 P.2d 663, where it is said that the doctrine of last clear chance should not be applied in a case involving a collision of moving vehicles where the act creating the peril occurs practically simultaneously with the happening of the accident and where neither party can fairly be said to have had a last clear chance thereafter to avoid the consequences; that defendant's chance to avoid the accident must have come later in point of time than any similar chance on the part of the injured person, and that he must have had more than a bare possible chance to avoid an unexpected peril created practically simultaneously with the happening of the accident by the negligence of the injured party.

Under the evidence produced there was no substantial evidence which would have supported a verdict for plaintiffs based on this doctrine. No prejudicial error resulted in refusing the proffered instructions.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

130 Cal.App.2d 210

John V. LANE, Plaintiff and Appellant,

v.

G. A. SWANSON & SONS, a corporation &
Foods Co., a corporation, Defendants
and Respondents.

Civ. 20288.

District Court of Appeal, Second District,
Division 3, California.

Jan. 14, 1955.

Action against processor by buyer of can labeled "boned chicken" for alleged breach of express warranty and for damages resulting from injury when fragment of bone in chicken in can lodged in buyer's throat. The Superior Court, Los Angeles County, Arnold Praeger, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that label of "boned chicken" on can and newspaper advertisements that such canned chicken contained no bones constituted an express warranty that contents of can contained no bones, and such warranty was breached when plaintiff found piece of bone in chicken packed in can.

Judgment reversed.

1. Sales ⇨279

Descriptive names constitute warranty as to general characteristics of article and that it is substantially what name represents it to be, but such descriptive names do not as a rule amount to a representation of perfection.

2. Sales ⇨264, 266

An article sold must answer in kind to description under which it is sold, and there is an implied warranty that article delivered is such an article as the name under which it is sold indicates; but unless an article is designated by some term which is descriptive of the article and calls for a particular quality, no warranty of quality will be implied.

3. Sales ⇨261(6)

Any representation as to special quality made by seller to induce sale in which buyer relies is a warranty, especially where inspection by buyer is not possible and seller

knows quality of goods and buyer does not. West's Ann.Civil Code, § 1732.

4. Sales ⇨261(6)

Language used by seller in making affirmations respecting quality of his goods should be construed liberally, and responsibility of seller should be enlarged to construe every affirmation by him to be a warranty when such construction is at all reasonable.

5. Sales ⇨1(1)

Representation in newspaper advertisements may be considered a part of contract of sale.

6. Sales ⇨440(2)

In action by buyer of can labeled "boned chicken" for alleged breach of express warranty and for damages resulting from injury when fragment of bone in chicken packed in can lodged in buyer's throat, evidence that buyer's understanding at time of purchase was that label implied chicken without bones was admissible to show that buyer relied on affirmation on label in making purchase. West's Ann.Civil Code, § 1732.

7. Sales ⇨261(6), 284(1)

Label of "boned chicken" on can and newspaper advertisements that such canned chicken contained no bones constituted an express warranty that contents of can contained no bones, and such warranty was breached when buyer found piece of bone in chicken packed in can.

Collins & McKenna, Los Angeles, for appellant.

Flint & MacKay, Roscoe C. Andrews, Los Angeles, for respondents.

SHINN, Presiding Justice.

This action is for alleged breach of warranty arising out of the sale of canned chicken. The complaint alleged that plaintiff bought a can of "boned chicken" which was packaged by defendant C. A. Swanson Sons, a corporation, and sold to plaintiff by defendant Foods Co., a corporation; that "Said product was warranted by defendants,

and each of them, to be free from chicken bones or other foreign substances and to be fit for human consumption." It was alleged there was a bone hidden in the contents of the can, that it became lodged in plaintiff's throat, causing severe personal injuries and expense for medical and surgical treatment, for which damages were sought. It was further alleged that plaintiff had given notice of the alleged breach of warranty to each of the defendants. The answers of the defendants denied they warranted the contents of the can to be free from chicken bones but admitted they warranted them to be fit for human consumption. They also pleaded the defense of contributory negligence. Judgment was for the defendants and plaintiff appeals.

The court found there was no evidence of an express warranty by either defendant that the contents of the can were free from chicken bones or other foreign substances. It was found there was a warranty that the contents were fit for human consumption but no breach of that warranty. Plaintiff does not contend there was a breach of implied warranty but insists that the evidence conclusively proved that there was an express warranty that the contents of the can were free from chicken bones. This is the sole question on the appeal.

The can purchased by plaintiff contained six ounces of chicken, salted. Upon the label were the words "Swanson," then in still larger letters "Boned Chicken" and in small letters "Ever Fresh" and beneath that in still smaller letters the word "Brand". The words "Boned Chicken" are in bold type, the word "Brand" in type so small as to be unnoticeable except on close inspection. In addition there was the following evidence: The Los Angeles Times of June 18, 1953, carried a full-page illustrated advertisement by defendant Swanson of its "Boned Chicken," "Boned Turkey," "Boneless Chicken Fricassee," "Chicken Fricassee," and other products. The ad pictures a can of "Swanson Boned Chicken," and beside the can this description of what is in the can: "Swanson Boned Chicken All luscious white and dark meat. *No bones. No waste. Swanson chicken—*

finest in the land. Chosen by poultry experts. Specially bred and fed. Swanson-cooked to juicy perfection. Wonderful for salads and casseroles. Quick! Thrifty, too!" (*Italics added.*) A can of "Swanson Boned Turkey" is pictured in the ad with this description: "Swanson Boned Turkey It's all meat, ready to eat. Solid, juicy turkey—carefully boned—Swanson-cooked to juicy perfection. Extra-delicious. A salad treat!" A can of "Boneless Chicken Fricassee" is displayed in the ad with this description: "Swanson boneless Chicken Fricassee Young and tender pieces of chicken in real butter gravy. A thrifty main-dish meal. *No bones. No waste. No work. Just heat and serve!*" (*Italics added.*) There is no statement in the ad that any of the other products have been boned, or that they are boneless, or that they contain no bones. It will be noted that with respect to "Boned Chicken" and "Boneless Chicken Fricassee" it states that there are "No bones"; but with respect to "Boned Turkey," that it is "carefully boned." Two kinds of fricassee were advertised: "Boneless Chicken Fricassee" with "No bones," and "Chicken Fricassee," with no reference to bones.

Plaintiff testified that prior to the purchase of the can of "Boned Chicken" he had read advertising of defendant Swanson's products similar in form and content to that in the ad of June 18, 1953. Defendants did not introduce any evidence.

It is apparent that the court adopted the theory of the defendants that the term "Boned Chicken" was merely descriptive of the manner in which the product was prepared and packaged and that it did not constitute a warranty that the contents of the can were wholly free from bones. This, they contend, would be the understanding the general public would receive from the description.

Mr. Williston in 1 Williston on Sales, Revised Edition, pages 532, 533, says: "It is true that where the bargain relates to specific goods, which are known to the buyer, words which can properly be understood only as stating in the bargain what are the specific goods on which the par-

ties have agreed, not as stating directly or indirectly some fact about them as an inducement to the purchase, may create no warranty. The reason for this is not because the words are descriptive, but because the buyer does not rely on the description as a basis for his purchase. To justify this conclusion, however, it should be clear that the words of description are reasonably to be understood only as a means of identification, not also a representation of kind or quality. The same words may well serve both purposes."

[1] There are a great many such descriptive terms in common use such as "Fireproof," "Stainless," "Rustproof," "Nonskid," "Punctureproof," "Nonbreakable," "Waterproof," "Shelled," "Boneless," etc. Such a list could be extended to great lengths. Descriptive names constitute a warranty as to the general characteristics of the article and that it is substantially what the name represents it to be. They do not, as a rule, amount to a representation of perfection.

[2] The rule is stated in *Diebold Safe & Lock Co. v. Huston*, 55 Kan. 104, 39 P. 1035, 1037, 28 L.R.A. 53: "There is no doubt, under the authorities, that the article sold must answer in kind to the description under which it is sold, and that there is an implied warranty that the article delivered is such an article as the name under which it is sold indicates. When, however, the question arises whether an article is of a particular quality or degree of excellence, unless it is designated by some term which is descriptive of the article and calls for a particular quality, the general rule is that no warranty of quality will be implied."

Defendants say "The manufacturer's express warranty is merely to the extent that the chicken has been boned and that all bones such as the leg, thigh, wing and other bones which carry identifiable structural names, instead of parts or fragments of such identifiable names, have been removed. * * * While it is true every manufacturer uses every possible precaution to see that no slivers or fragments of

bone of any kind become a part of this product, nevertheless it is humanly impossible to be one hundred percent positive that all such bone fragments have been removed. * * * Furthermore, defendants did not expressly warrant that the product was free from chicken bones in any event. Merely because the word 'boned' appears on the label does not imply that the product is entirely free from bone fragments which are normal to the product." etc.

[3] "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. * * *" Civ.Code, § 1732; *Stott v. Johnston*, 36 Cal.2d 864, 869-870, 229 P.2d 348, 28 A.L.R.2d 580. Any representation as to special quality made by a seller to induce a sale on which a buyer relies is a warranty, especially where inspection by the buyer is not possible and the seller knows the quality of the goods and the buyer does not. 77 C.J.S., Sales, § 324 c, page 1175. See *Flint v. Lyon*, 4 Cal. 17, 21, in which the use of the word "Haxall" in the sale-note for flour amounted to a warranty that the flour was of that brand; *Webster v. Klassen*, 109 Cal.App.2d 583, 590, 241 P.2d 302, 303, in which the term "Arthur Johnson, double O's rating, Washington seed" was held to be an express warranty that the seed potatoes were of that grade; *Brandenstein v. Jackling*, 99 Cal.App. 438, 446, 278 P. 880, 883, in which the term "No. 1 rice" was held to be an express warranty of quality; *Porter v. Gestri*, 77 Cal.App. 578, 582, 247 P. 247, in which the term "'dried black grapes'" was held to be an express warranty that the grapes were of the black variety; *Pacific Feed Co. v. Kennel*, 63 Cal.App. 108, 112, 218 P. 274, in which the description of beet pulp as "number one" and as "first class" was held to be an express warranty of quality; *Newhall Land & Farming Co. v. Hogue-Kellogg Co.*, 56 Cal.App. 90, 95, 204 P. 562, 563, in which the description "'Wilson's improved bush lima bean'" was

held to be an express warranty as to a variety of seed; *Firth v. Richter*, 49 Cal. App. 545, 548, 196 P. 277, 279, in which the term "Valencia orange trees" was held to be an express warranty that the trees were of that description and that they would bear "Valencia" oranges; *Barrios v. Pacific States Trading Co.*, 41 Cal. App. 637, 639, 183 P. 236, 237, in which the term "'export cured boneless codfish'" was held to be an express warranty of quality; 22 Cal. Jur. 994, § 69.

[4] The tendency of the modern cases is to construe liberally in favor of the buyer language used by the seller in making affirmations respecting the quality of his goods and to enlarge the responsibility of the seller to construe every affirmation by him to be a warranty when such construction is at all reasonable. *Luitweiler Pumping Engine Co. v. Ukiah Water & Improvement Co.*, 16 Cal. App. 198, 206, 116 P. 707, 712.

[5] The representation in the newspaper advertisements may be considered a part of the contract of sale. *Dugan v. Phillips*, 77 Cal. App. 268, 275, 246 P. 566; *Annotations* 28 A.L.R. 991, 992; 158 A.L.R. 1413.

Defendants' argument is centered upon the use of the word "boned" on the label of the can. Little is said of the use of the statement "no bones" in the advertising. The question is whether the statement that "boned chicken" contained "no bones" would reasonably be understood by the buying public to mean that the principal bones had been removed but there might be fragments of bone remaining or that all bones, large and small, and all pieces of bone had been removed. From a strictly anatomical standpoint it may be said that if a leg bone of a chicken has been removed with the exception of small fragments the leg bone has been removed; but the fragments of bone that remained would be "bone" to anyone who might attempt to swallow them. "No bones," no doubt, means to the manufacturer that great care has been used to remove all bones and all pieces of bone, but we think it would mean to a buyer that no bones whatever would be found in the

product. Unless it can be said that a small piece of bone is no bone at all when it sticks in one's throat it cannot be said that a product which contains one or more bone fragments contains no bones. And with respect to the theories of the defendants it may be asked how many bone fragments would be permissible without contradicting the representation that there were no bones. Defendants argue that it is impossible to extract the bones of a defunct chicken without leaving in the remains small slivers or pieces of bone and that if they are held to liability under such facts as were in evidence here it will be impossible for them to continue the processing and sale of boned or boneless poultry and that they and many processors of similar products would be forced out of that business. We do not believe this dark outlook is justified, but even if Swanson and other manufacturers they mention may find it necessary or wise to change their methods of doing business this would be no reason for abrogating the principles of law under which they must operate.

[6] Plaintiff testified that his understanding at the time he purchased the "Boned Chicken" was "just what the reading on the label implied, chicken without bones." On motion of defendants this testimony was stricken, although there was no objection to the question as to what his understanding was. In our opinion, the ruling was erroneous. The evidence was admissible for the purpose of showing that plaintiff, the buyer, relied on the affirmation on the label that the can contained chicken from which the bones had been removed. *Civ. Code*, § 1732; *Cf. Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409, 412, 15 P.2d 1118, 88 A.L.R. 521; *Beckett v. F. W. Woolworth Co.*, 376 Ill. 470, 34 N.E.2d 427.

[7] Our conclusion is that the label on the can, coupled with the representation in the newspaper ads that the contents contained no bones, constituted an express warranty and that the same was breached. If there could be a doubt as to the meaning of "boned chicken," it was removed by the statement that it contained no bones.

The brief of the defendants does not point out any ground of distinction between the responsibility of Swanson & Sons and Food Co. with respect to the express warranty. We have not considered that question.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ.,
concur.



130 Cal.App.2d 239

In the Matter of Perfecto MARTINEZ, an
Alleged Sexual Psychopath.

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Perfecto MARTINEZ, Defendant and
Appellant.

Cr. 977.

District Court of Appeal, Fourth District,
California.

Jan. 14, 1955.

Proceeding in the matter of an alleged sexual psychopath. From an order of the Superior Court of San Bernardino County recommitting the defendant as an alleged sexual psychopath for an indefinite period to the State Medical Facility at Terminal Island, Jesse W. Curtis, Jr., J., the defendant appeals. The District Court of Appeal, Griffin, J., held that where defendant who had been committed as a sexual psychopath, filed a motion for his return to court for certain psychopathic proceedings and the court granted the motion and it was ordered that the psychopath be returned for a hearing upon the order, but he was not present at the hearing nor were witnesses sworn or examined and he had no counsel, order recommitting the alleged psychopath was invalid.

Judgment of recommitment reversed with directions.

1. Mental Health \S 449

In proceeding against an alleged sexual psychopath an order of recommitment for an indeterminate period for custodial care and treatment having been made after judgment in a special proceeding of a civil nature and being collateral to the criminal case, was appealable. Welfare and Institutions Code, §§ 5500 et seq., 5517(a-c), 5519; West's Ann.Code Civ.Proc. § 936.

2. Mental Health \S 446, 449

Under statute providing that committing court "may" require Superintendent of State Hospital to forward his opinion concerning alleged psychopath's future care or treatment, and that committing court "may" order return of psychopath for a hearing, quoted word is not a mandatory direction to court, regardless of sufficiency of the showing, but is merely discretionary, and unless there is an abuse of that discretion ruling of the committing court may not be disturbed on appeal. Welfare and Institutions Code, § 5519.

See publication Words and Phrases, for other judicial constructions and definitions of "May".

3. Mental Health \S 446

Where defendant who had been committed as a sexual psychopath filed a motion for his return to court for certain psychopathic proceedings, and the court granted the motion and it was ordered that the psychopath be returned for a hearing upon the order, but defendant was not present at the hearing nor were witnesses sworn or examined and he had no counsel, order of the court recommitting the alleged psychopath was invalid. Welfare and Institutions Code, §§ 5504, 5511, 5517(a-c), 5519.

Perfecto Martinez, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

On February 10, 1948, petitioner was charged and convicted of the crime of

vagrancy, to wit, being an idle, lewd and dissolute person. He was ordered confined in the county jail for six months. His alleged propensities were to appear in public in female wearing apparel and to manifest a sexual perverted mental aberration.

On March 12, 1948, there was filed a warrant of apprehension under section 5501 of the Welfare and Institutions Code, alleging him to be a sexual psychopath and that he was a menace to the health and safety of others. A hearing was duly had on the issue presented on March 25, at which time petitioner appeared in person and by his attorney. Evidence was produced by all parties concerned. The hearing resulted in an order confining petitioner in a state hospital until he recovered. Operation of the sentence imposed was suspended.

On April 2, 1952, by order, defendant was returned to the Superior Court of San Bernardino County under the provisions of section 5517, subdivision (c) of the Welfare and Institutions Code, for further proceedings in respect to the claim that he had recovered. Defendant was represented by an attorney. Clinical reports and medical opinions of the hospital staff were received in evidence. The opinion stated that petitioner had not recovered and was still a menace to the health and safety of others and recommended that petitioner be returned. An examination of the facts set forth in the recommendation fully justified this opinion. A judgment and order of recommitment resulted on May 16, 1952.

On January 9, 1953, the court requested of the Medical Director of the State Hospital to again report on petitioner's sexual psychopathic tendencies and on January 26, 1953, an adverse report was returned indicating that petitioner was still a menace to the health and safety of others. It set forth certain homosexual acts indicating that the report had foundation. The recommendation was made that petitioner be recommitted and that he be placed at Terminal Island Medical Facility. Defendant was present at the hearing. On February 27, 1953, the court made such an order. On April 10, 1953, a similar,

but more lengthy hearing was held on a subsequent application, and a recommitment order followed. On April 13, 1954, petitioner, in propria persona, filed a very elaborate "Motion for Court Order" and in it asked the Superior Court to "make and sign an order" directing his return to that court "for those certain psychopathy proceedings provided for in Chapter 24, sections 5501, 5501.5, 5503, 5503.5, 5504, 5505, 5508, 5510, 5517, 5518, and 5519, of the State Welfare and Institutions Code." Accompanying this written motion was a note that in the event the motion was denied he enclosed therewith a notice of appeal and application for clerk's and reporter's transcripts. A subsequent request was made of the County Clerk to notify him if the court granted him a hearing, and the effect of the decision rendered.

From the clerk's transcript it appears that on June 9, 1954, the court signed an order reciting that a motion had been made by petitioner pursuant to section 5519 of the Welfare and Institutions Code, and that such motion is granted, and that the superintendent of the Medical Facility was ordered to forward his opinion as to whether petitioner had recovered from the sexual psychopathy, and to recommend accordingly, and that after the report was received petitioner "shall be returned to this court, upon order, for hearing as to whether the said Perfecto Martinez is still a sexual psychopath within the meaning of Chapter IV, Division 6, Part I, of the Welfare and Institutions Code."

On July 15, 1954, the progress report was filed by the medical staff, and clearly indicated the petitioner had not recovered and was still a menace to the health and safety of others. It does not affirmatively appear that defendant was present at any hearing had on such motion, that he was represented by counsel, or that any witnesses were sworn and examined. On July 15, 1954, the court signed an "Order of Recommitment", reciting that upon request of petitioner the court directed the superintendent of the Medical Facility to forward his opinion and recommendations under subdivisions (a), (b) or (c) of Section 5517 of the Welfare and Institutions

Code, as to future care and supervision of petitioner; that such report and recommendation was received by the court and accordingly petitioner was recommitted for an indeterminate period, for custodial care and treatment.

[1] Apparently, it is from this later order that petitioner appeals. Such an order, having been made after judgment in a special proceeding of a civil nature, has been held to be collateral to a criminal case and appealable. *Gross v. Superior Court*, 42 Cal.2d 816, 270 P.2d 1025; *Sec. 936 Code Civ.Proc.*; *People v. McCracken*, 39 Cal.2d 336, 246 P.2d 913.

It is petitioner's contention on this appeal (1) that the court erred in denying him a fair and open hearing after granting his motion for such a hearing and ordering the return of petitioner to such court for such hearing; (2) that the court erred in rendering judgment and order without having the petitioner personally present; (3) that the court erred in rendering the judgment without the introduction of evidence in support thereof; (4) that the proceedings had were not authorized by law; and (5) that the provisions of the Welfare and Institutions Code, as applied to such proceedings, are jurisdictional and mandatory, citing *People v. Thompson*, 102 Cal.App.2d 183, 227 P.2d 272; and *People v. Neal*, 108 Cal.App.2d 491, 239 P.2d 38.

Petitioner relies principally upon section 5518 of the Welfare and Institutions Code, which provides that if the opinion of the Superintendent of the hospital and Director of Mental Hygiene, prescribed in section 5517, is under subdivision (c) of that section, "the committing court shall forthwith order the return of the person to said committing court and shall thereafter cause the person to be returned to the court in which the criminal charge was tried to await further action with reference to such criminal charge."

[2] It should be noted that the procedure therein set forth in reference to recommitment proceedings was enacted by Statutes 1949, chapter 1325, section 8, page 2313. Section 5519 was added by Statutes

1st Ex.Sess.1952, ch. 24, sec. 12, which prescribed a different procedure in reference to commitments. We must assume that the procedure therein indicated is the one applicable to petitioner on the date in question. It provides that after a person has been committed for an indeterminate period to the department for placement in a state hospital as a sexual psychopath, the committing court *may*, upon its own motion, or on motion by or on behalf of the person committed, require the Superintendent of the State Hospital to forward to the committing court his opinion under subdivisions (a), (b), or (c) of section 5517, including therein a report, diagnosis and recommendation concerning the person's future care, supervision, or treatment. It then provides that after receipt of the report, the committing court *may* order the return of the person to the court for a hearing as to whether the person is still a sexual psychopath within the meaning of this chapter. Had the committing court, in the instant proceeding, after receiving the report and recommendation, denied the motion, a different question would here be presented. The word "may", as it is used in that section, should not be construed as a mandatory direction to the court regardless of the sufficiency of the showing. It is merely discretionary. Unless there is an abuse of that discretion the ruling of the court in that regard may not be disturbed on appeal. *People v. Haley*, 46 Cal.App.2d 618, 623, 116 P.2d 498; *People v. McCracken*, 39 Cal.2d 336, 353, 246 P.2d 913; *People v. Barnett*, 27 Cal.2d 649, 656, 166 P.2d 4.

[3] It appears from the order here entered that the motion of the appellant, as made, for a hearing under the sections here involved, was unqualifiedly granted and that it was ordered that he be returned for such hearing "upon order". Apparently defendant was not present and no witnesses were sworn or examined, and petitioner had no counsel representing him at such hearing, if there was one. Therefore, the order of the court *recommitting* him has no evidentiary support other than the diagnosis and recommendation of the hospital staff.

Section 5519, *supra*, provides that when such a hearing has been ordered that it shall be conducted substantially in accordance with sections 5504 and 5511, inclusive, which sections provide for the calling and examination of witnesses in court, the presence of the defendant at such hearing, and if he has no attorney the judge may appoint an attorney to represent him or the court may order the county public defender to represent him at the hearing if he determines that the person is not financially able to employ counsel.

The judgment of recommitment is reversed and the trial court is directed to proceed with the hearing in conformity with section 5519 of the Welfare and Institutions Code.

BARNARD, P. J., and MUSSELL, J.,
concur.



130 Cal.App.2d 227

In the Matter of the ESTATE of Clyde
EFIRD, Deceased.

Gertrude M. EFIRD, Appellant,

v.

C. H. ANTRIM CO. et al., Respondents.
Civ. 4942.

District Court of Appeal, Fourth District,
California.

Jan. 14, 1955.

Rehearing Denied Jan. 27, 1955.

Hearing Denied March 9, 1955.

Proceeding in a matter of the estate of the deceased. The Superior Court of Fresno County, Arthur C. Sheppard, J., entered an order granting relief prayed for in petition of real estate brokers to have order of confirmation of sale of realty reopened to permit brokers to apply for and secure an order fixing and allowing commissions, and fixing commissions and directing executor to pay commissions to brokers, and widow of deceased appealed. The District Court of Appeal, Mussell, J., held that the Su-

perior Court, sitting in probate, had jurisdiction to set aside order confirming sale of realty, for sole purpose of allowing, fixing, and directing that commissions be paid to the brokers, though no application for payment of the commissions had been made at time of confirmation of sale.

Order affirmed.

1. Executors and Administrators ⇨379

Real estate brokers who procured purchaser for realty and personalty belonging to estate of deceased were "parties" to proceedings for confirmation of the sale within meaning of section of the Code of Civil Procedure providing that court may relieve a "party" from judgment or order taken through mistake, inadvertence, surprise, or excusable neglect. West's Ann.Code Civ. Proc. § 473.

See publication Words and Phrases, for other judicial constructions and definitions of "Party".

2. Courts ⇨472(4)

The Superior Court, sitting in probate, had exclusive jurisdiction to set aside order confirming sale of realty belonging to estate of deceased, for sole purpose of allowing, fixing, and directing that commission be paid to the real estate brokers, though no application for payment of the commission had been made at time of confirmation of sale. West's Ann.Code Civ.Proc. § 473.

3. Courts ⇨472(4)

A demand of a real estate agent employed to sell realty belonging to an estate, is a claim which comes under the head of expense in the care, management, and settlement of the estate, and of such claims the court, sitting in probate, has complete and exclusive jurisdiction.

4. Judgment ⇨345

Section of the Code of Civil Procedure providing that court may relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, is applicable to probate proceedings. West's Ann.Code Civ.Proc. § 473.

5. Judgment ⇨363

Section of the Code of Civil Procedure providing that court may relieve a party

from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, is a remedial statute designed to make judicial proceedings equitable and fair and to relieve a party from excusable neglect to take procedural steps at precise time designated. West's Ann.Code Civ.Proc. § 473.

6. Executors and Administrators ☞97

Real estate brokers' listing agreement to procure purchaser for realty belonging to estate of deceased was not void because it provided that brokers should look solely to assets of trust estate for satisfaction of their rights and failed to limit the source of payment of compensation to the proceeds of the sale. Probate Code, § 760.

7. Stipulations ☞14(11)

Where parties entered into written stipulation waiving service and signing of separate findings of fact and conclusions of law, trial court did not err in not making findings of fact and conclusions of law on the issues.

Lester N. Gonser, Fresno, for appellant.

Charles Ray Barrett and Davis, Guerard & Barrett, Fresno, for respondents.

MUSSELL, Justice.

Respondents, licensed real estate brokers, under authority of a written listing, procured a purchaser for real and personal property in Fresno county belonging to the estate of Clyde Efird, deceased. The executor, Security First National Bank of Los Angeles, filed in the Superior Court an original and amended return, account of sale and petition for confirmation. No application was made by the executor in its return and petition for the allowance of any commissions to respondent brokers for their services. At the hearing on the petition for confirmation of sale, held on March 1, 1954, Calvin Rodeck Antrim, one of the respondents, was present in court and heard an objection being made by the attorney for the surviving wife of the decedent to the allowance of any realtors' commissions on the ground that the executor had failed to include a request for such allowance in its

petition. Mr. Antrim had relied upon the executor to include a request for the said allowance in its petition and was surprised at the objection. He was not represented by counsel and before he could secure information as to the procedure for protecting his rights, the court confirmed the sale without allowing brokers' commissions. Respondents then, on April 28, 1954, filed a verified petition in the probate proceedings alleging that the sale was confirmed without allowing petitioners the commissions to which they were entitled and that through their surprise, mistake, inadvertence and excusable neglect they failed to apply for their commissions or object to the confirmation without the allowance thereof. Petitioners' prayer was (1) That they be relieved of their default in failing to object to the entry of the order confirming the sale; (2) That the order of confirmation of the sale be reopened solely for the purpose of permitting petitioners themselves to apply for and secure an order fixing and allowing appropriate realtors' commissions; and (3) That the court then fix commissions and direct the executor to pay them to petitioners. This petition came on regularly for hearing on May 10, 1954, and after a full hearing thereon, including objections to the petition filed by the surviving widow of the deceased, the court entered its order granting the relief prayed for in the petition. The widow, Gertrude M. Efird, appeals from the last mentioned order.

[1] Appellant first argues that respondents are not parties to the proceedings herein so as to entitle them to petition the court for relief under section 473 of the Code of Civil Procedure, or otherwise, particularly after the entry of the order confirming the sale in the probate proceedings. However, this contention was considered and rejected in *Re Estate of Ince*, 98 Cal.App. 763, 277 P. 886. In that case the appeal was from an order vacating a previous order allowing a broker's commission for sale of estate property and fixing anew the amount of commission to respondent. There, as here, the motion to vacate was made under section 473 of the Code of Civil Procedure and was based upon the ground that the first order was made and taken against respondent

through mistake, inadvertence, surprise and excusable neglect and the court held:

"As to appellants' first contention, that respondent is not a party within the meaning of section 473 of the Code of Civil Procedure, the case of *Eastwood v. Stewart*, 64 Cal.App. 614, 222 P. 369, is decisive, holding that a real estate agent employed under the authorization given under section 1559 of the Code of Civil Procedure, is a person interested in the estate.

"The superior court has general jurisdiction to vacate its own order and make another increasing the amount to be paid, upon a motion made by respondent under section 473 of the Code of Civil Procedure, on the ground that the first order was taken against him through his inadvertence, surprise, and excusable neglect. *Levy v. Superior Court*, 139 Cal. 590, 73 P. 417. The fact that the later order was made at a time subsequent to the time of confirmation of the sale could not, on any admissible theory, affect the validity of said order."

[2, 3] Appellant next contends that the trial court had no jurisdiction to set aside an order confirming a sale of real property, for the sole purpose of allowing, fixing and directing paid a real estate broker's commission, where no application or order therefor had been made at the time of confirmation. This contention is likewise without merit. The fact that the order from which this appeal is taken was made after previous confirmation of the sale does not affect its validity. In *re Estate of Ince*, supra. The probate court has exclusive jurisdiction to adjust brokers' claims and as was said in *Re Estate of Hughes*, 3 Cal. App.2d 551, 553, 40 P.2d 295, 296:

"A demand of a real estate agent, employed to sell real property belonging to an estate, is a claim which comes under the head of expense in the care, management and settlement of the estate, and of such claims the court, sit-

ting in probate, has complete and exclusive jurisdiction."

[4, 5] Section 473 of the Code of Civil Procedure is applicable to probate proceedings, In *re Estate of Moreland*, 49 Cal.App. 2d 484, 487, 121 P.2d 867, and is a remedial statute designed to make judicial proceedings equitable and fair and to relieve a party from excusable neglect to take the procedural steps at the precise time designated. *Denke v. Bowes*, 77 Cal.App.2d 642, 645, 176 P.2d 81.

[6] Appellant argues that the brokers' listing agreement herein is void because it provides that the broker shall look "solely to the assets of the trust estate for satisfaction of his right hereunder" and fails to limit the source of payment of compensation to the proceeds of a sale. This argument is not meritorious. In *Re Estate of Mitchell*, 20 Cal.2d 48, 50, 123 P.2d 503, it is held that the provisions of section 760 of the Probate Code that the contract "shall provide for the payment to such agent out of the proceeds of a sale to any purchaser secured by him of a commission" need not be set forth in the contract of employment, and that this section is by law made a part of any such contract. In *Re Estate of Rule*, 25 Cal.2d 1, 16, 152 P.2d 1003, 155 A.L.R. 1319, it is held that the provisions of the Probate Code are to be liberally construed with a view to effect its objects and to promote justice.

[7] Finally, it is argued that the trial court erred in not making findings of fact and conclusions of law on the issues. However, the record shows that the parties entered into a written stipulation waiving service and signing of separate findings of fact and conclusions of law. This stipulation was dated May 17, 1954, signed by appellant's attorney of record and filed in the probate court proceedings on May 19, 1954.

The order appealed from is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur

130 Cal.App.2d 216

In the Matter of the ESTATE of
Harold W. DUNNE, Deceased.

Addie May WEST, Petitioner and Appellant,
v.

Dorathy L. HARTER, Contestant and
Respondent.

Civ. 20348.

District Court of Appeal, Second District,
Division 3, California.

Jan. 14, 1955.

Rehearing Denied Feb. 1, 1955.

Hearing Denied March 9, 1955.

Will contest case. The Superior Court, Los Angeles County, Thurmond Clarke, J., denied probate to proposed will and admitted to probate a will offered by contestant, and petitioner appealed. The District Court of Appeal, Shinn, P. J., held that evidence did not support findings of lack of testamentary capacity and undue influence in respect to proposed will.

Judgment reversed with directions.

1. Wills Ⓒ50

The test in determining whether testator was mentally competent at time of executing will is whether he had sufficient mental capacity (1) to understand the nature of his act, (2) to understand and recollect the nature and situation of his property, and (3) to remember and understand his relations to those persons having claims upon his bounty, and whose interests would be affected by the will.

2. Wills Ⓒ52(1, 5)

A testator is presumed to be sane, and the burden is on a contestant to show incapacity by either mental incompetence generally or a delusion which directly influenced the testamentary act.

3. Wills Ⓒ31

Not every degree of mental unsoundness or mental weakness will suffice to destroy testamentary capacity.

4. Wills Ⓒ21

The question of testamentary capacity is related to the mental condition at the time of execution of will.

5. Wills Ⓒ55(1)

In will contest case, evidence on issue of decedent's general mental condition was insufficient to sustain finding that he had not had testamentary capacity.

6. Wills Ⓒ38(2)

To vitiate a will, a delusion must directly influence the testamentary act, and the will must result from hallucination or delusion.

7. Wills Ⓒ55(3)

In will contest case, evidence whether a delusion had directly influenced the testamentary act did not support finding of testamentary incapacity.

8. Wills Ⓒ155(1), 163(2)

To set aside a will on ground of undue influence, evidence must show that pressure was brought to bear directly on the testamentary act, and the burden of proof, in absence of a confidential relationship, is on the contestant.

9. Wills Ⓒ166(7)

A mere showing of opportunity to exert undue influence is not sufficient to support a finding that it was exerted.

10. Wills Ⓒ166(12)

A suspicion of undue influence is not sufficient to overthrow a will.

11. Wills Ⓒ155(4)

Conduct inspiring affection and gratitude does not constitute undue influence.

12. Wills Ⓒ166(1)

Evidence in will contest case did not support finding that will had been product of beneficiary's undue influence.

Woodrow W. Baird, Los Angeles, for appellant.

Harold E. White, Van Nuys, for respondent.

SHINN, Presiding Justice.

This is an appeal from a judgment denying probate of a will of December 8, 1952, offered by the petitioner and appellant, Addie May West, and admitting to probate a holographic will offered by the contestant

and respondent, Dorathy L. Harter, which bears the date of March 5, 1952.

The testator, Harold W. Dunne, was about 53 years old at the time of his death on March 6, 1953. Shortly after the death of his wife in February of 1952, decedent entered the Long Beach Veterans Hospital for treatment of a serious illness. Just before going into surgery decedent on March 5, 1952, duly executed a holographic will naming Chris Nelson, his deceased wife's stepfather, Dorathy Harter, sole contestant, Donald Walsh and Earl Walsh as equal beneficiaries of his estate. Dorathy Harter, Donald Walsh and Earl Walsh are stepchildren of Dunne by a previous marriage of his deceased wife. Dorathy Harter was named as executrix without bond. Later in March, after being released from the hospital, Dunne returned to his own home, where he was cared for by Chris Nelson, his stepfather-in-law, with whom he lived. Sometime in April, Addie May West, with a friend, came to visit Mr. Dunne. There was evidence that Mrs. West and her deceased husband, Tom West, had been acquaintances of the Dunne family for several years. At the time of this visit decedent learned of the death of Mrs. West's husband in 1951. Mr. Dunne returned Mrs. West's visit and they had dinner together on several occasions after this, until about five weeks after Mrs. West's first visit when decedent moved into Mrs. West's residence where he remained most of the time until the illness preceding his final entry into the hospital. Decedent returned to his own home for a short time in September while Mrs. West was in New York because he could not get along with her mother, who remained in Mrs. West's home. Dunne entered into an agreement as to how much he should pay as rent although he paid none. Mrs. West also loaned decedent small amounts of money, and sometimes paid expenses when they went out together during this time. Dunne proposed marriage to Mrs. West in June 1952, but she refused him. Later in 1952 they planned to be married in June 1953, until Mrs. West in February 1953 learned that Dunne was a victim of cancer. On November 24, 1952, Dunne re-entered the hos-

pital because of a respiratory infection which was superimposed on lung cancer. The evidence indicated that at this time decedent was not on the critical list, and was not in as imminently serious condition as was suspected prior to his entry. He left the hospital again on December 2, 1952, and returned to Mrs. West's residence, where he later executed the second will, duly signed and witnessed. He returned to the hospital January 20, 1953, was released in February, and returned late in February to the hospital, where he died on March 6, 1953.

The trial court, sitting without a jury, found that the will of December 8th was made when the decedent was of unsound mind, without capacity to make a will because of physical and mental weakness, and also that it was induced by undue influence and fraud on the part of the proponent, Mrs. West.

The new will, executed December 8, 1952, just six days after decedent's release from the hospital, provided for \$50 bequests for the four beneficiaries under the former holographic will, and made Mrs. West the beneficiary of the residue of the estate, amounting to about \$15,000.

The appellant makes two contentions, namely, there was insufficient evidence to support the finding that the deceased was of unsound mind at the time of the execution of the second will and there was insufficient evidence to support the finding that the second will was executed through undue influence and fraud.

[1, 2] As to the first contention, the test in determining whether the testator was mentally competent at the time of executing the will is whether he had sufficient mental capacity to be able (1) to understand the nature of his act; (2) to understand and recollect the nature and situation of his property; and (3) to remember and understand his relations to the persons having claims upon his bounty, and whose interests would be affected by the will. The testator is presumed to be sane, and the burden is on the contestant who must show incapacity by either (1) mental incompetence generally or (2) a delusion which di-

rectly influenced the testamentary act. In *Re Estate of Smith*, 200 Cal. 152, 252 P. 325.

[3,4] Of course, not every degree of mental unsoundness or mental weakness will suffice to destroy testamentary capacity. The question of capacity is related to the mental condition at the time of the execution of the will. In discussing the question of general incompetence of the deceased, we shall first state the evidence which was most favorable to the contestant.

The record shows that decedent had delusions and at times was not entirely rational. Dorathy Harter testified that just before Thanksgiving of 1952, when she went to visit deceased at the West residence, he asked her why she had come to pick up a pick and a shovel, and stated that it was 2:30 in the morning, although it was actually late in the afternoon or early evening. Earl Walsh and Mary Walsh were present at this time and testified they observed this incident. Mrs. Harter testified further that at about the same time, before he entered the hospital, deceased stated he was in great pain and that he was being given some kind of dope to relieve the pain; that he was irrational in his conversation in that he would start a conversation, quit it and then start on a new subject two or three minutes later. Mrs. Harter testified that shortly after the first of December she visited deceased at the West home, after he had returned from the hospital, and that he stated he wanted her to stay with her mother "until after the baby was born." Mrs. Harter's mother was deceased at that time. Again, prior to Thanksgiving, according to Mrs. Harter, Mrs. West told her it " * * * wasn't necessary for me to come down there and see Harold [decedent] * * * that he was asleep and wouldn't know me." Chris Nelson testified that on November 24, 1952, he observed Dunne in a "delirious condition" at Mrs. West's home, that he was "talking out of his mind * * * his mind was wandering * * * he wasn't talking conversation with the people visiting. I couldn't say who he was talking with." Earl Walsh testified that when he visited decedent at

Mrs. West's home shortly before Thanksgiving in 1952, decedent was "wandering" in his conversation and saw images on the wall of his dead wife and of soldiers marching, "more or less * * * dreaming with his eyes open." Mary Walsh testified that after the execution of the second will in January or February 1953, she and her husband visited decedent in the hospital and he wanted to know if Mr. Walsh had put that "black gas" in the car again; and that he mentioned the black gas two or three times during the visit. Donald Walsh testified that when he visited decedent at Mrs. West's home before Thanksgiving 1952, that " * * * he was very thick-tongued. He was glassy-eyed. You couldn't understand his conversation. * * * When he talked, he didn't make sense." Donald Walsh also testified that Dunne thought he was building the new home that he, Donald, was building at the time. Muriel Pinkerton, secretary to Mr. Baird, the attorney who drew the will of December 8th, was present with Mr. Baird and took notes at the time of execution of the will, at which time Dunne stated that three witnesses had signed the prior holographic will executed in March 1952, when, in fact, they had not, and Mr. Dunne's signature was the only signature, although the four beneficiaries were present. Decedent stated he had only one stepsister when, in fact, the will in question lists the names of three stepsisters who were given \$10 each. Mr. Baird asked decedent if he was able to get around, to which Dunne replied " * * * he was able to walk around, but he wasn't well enough to do things for himself."

The evidence we have related had reference to the approximate time when decedent re-entered the hospital November 24, 1952, to one occasion shortly after he had left the hospital and to a visit made by Mr. and Mrs. Walsh in January or February, 1953. Aside from the claimed delusions there was testimony that on one occasion decedent was irrational in his conversation (testimony of Mrs. Harter); that on another occasion he was "talking out of his mind * * * his mind was wandering" (testimony of Mr. Nelson); upon another occasion his mind was "wandering" (testi-

mony of Earl Walsh and testimony of Donald Walsh); that on the latter occasion decedent was "very thick-tongued * * * glassy-eyed * * * when he talked he didn't make sense." The court evidently believed the testimony of these witnesses and would have been justified in believing that when decedent was unable to carry on a rational and understandable conversation, he did not at those times possess testamentary capacity. However, it could not be inferred from the fact that the conversation of the decedent was irrational on the few occasions described by these witnesses that he was irrational at all times and especially at the time of the execution of the will. There was abundant evidence that the state of mind of the decedent was generally consistent with the possession of testamentary capacity. This evidence related to many occasions other than those immediately preceding Thanksgiving 1952 and decedent's return to the hospital.

Lawrence L. Boyd, a subscribing witness to the December 8, 1952 will, testified he had known the deceased for about ten years, that he appeared to be of disposing mind and memory at the time of execution, that it appeared he was executing his own judgment, and that he examined the will and discussed some of its contents at that time. Miss Pinkerton, secretary of Baird, testified that deceased appeared to be of sound, disposing mind at the time of the execution of the will, was able to walk around, and did not appear to be under the influence of opiates. She recorded a statement of the deceased after he executed the will, in which he stated two sheets of blank paper had been substituted for his holographic will without his consent, and that his reason for making Mrs. West the principal beneficiary was because she had been taking care of him. The testimony of the physicians that attended deceased was to the effect that he was of sound mental condition and not subject to adverse aftereffects from the opiates he was taking. Dr. Claude Wagner, M. D., examined deceased on November 24, 1952, and again on December 30, 1952, and testified that on both occasions he was in full possession of his mental faculties. Dr. Wag-

ner, who had previously cared for decedent, said he was in "excellent" mental condition November 24th when he was admitted to the hospital. Dr. Boyle, who attended the deceased in the hospital from November 24, 1952, to December 2, 1952, and after January 20, 1953, until his death, testified the deceased had full possession of all his mental faculties on all occasions observed from November 24th to his death; that he observed no mental confusion and that he was mentally alert and not "dopey" after taking the codeine to relieve the pain. He testified that deceased was ambulatory when he left the hospital on December 2nd and that he, Dr. Boyle, anticipated that it would be possible for Dunne to work at some job part time if he took enough protein to regain a little greater strength. Mary Walsh, wife of Earl Walsh, who was present with her husband and Dorathy Harter when the alleged "pick and shovel" delusion and the "black gas" delusion occurred, testified that deceased on that occasion recognized Dorathy Harter, Earl Walsh and herself. She did not recall any conversation about a pick and shovel. Marion Beall, a registered nurse, who attended decedent while in the hospital, testified that he stated while in the hospital after his return on January 20, that he had seen to it that Mrs. West was well taken care of for her kindness in caring for him; and that he had changed his will. Chris Nelson, who had lived with decedent before he went to live at Mrs. West's residence, testified to but one occasion, above referred to, when he observed that decedent had any mental confusion. Nelson testified that otherwise decedent was rational when he visited deceased every day from December 2nd to December 8th at the West home.

[5] There is a wealth of authority to the effect that evidence of deviations from normal mental processes and capacity such as those in evidence here are legally insufficient to prove want of testamentary capacity. Full discussions of this subject will be found in *In re Estate of Perkins*, 195 Cal. 699, 235 P. 45; *In re Estate of Selb*, 84 Cal.App.2d 46, 190 P.2d 277, and *In re Estate of Ridgway*, 92 Cal.App.2d 325, 206 P.2d 892.

[6] As to the effect of delusions upon the execution of a will, the rule is that the mental condition at the time of the execution of the will is significant. The delusion must directly influence the testamentary act; the will must result from hallucination or delusion. *In re Estate of Perkins*, 195 Cal. 699, 235 P. 45, *supra*; *In re Estate of Clark*, 100 Cal.App. 357, 280 P. 204.

[7] There was no evidence of a delusion or hallucination which influenced the execution of the will of December 8th. Although the testimony indicated that decedent had delusions prior to November 24, 1952, and one early in December 1952, there was no evidence of any delusion on the day of execution which was the cause of or influenced the execution of the will; the testator was seriously ill and was receiving medication to ease his pain. Any misstatements of fact by deceased as to past events were merely indications of faulty memory and not of delusions.

[8] As to the second contention of the appellant, the rule is well settled that to set aside a will on the ground of undue influence, evidence must be produced to show that pressure was brought to bear directly on the testamentary act, and the burden of proof in the absence of a confidential relationship is on the contestant to prove the undue influence. *In re Estate of Clark*, 170 Cal. 418, 424, 149 P. 828; *In re Estate of Carithers*, 156 Cal. 422, 428, 105 P. 127; *In re Estate of Gleason*, 164 Cal. 756, 765, 130 P. 872; *In re Estate of Lavinburg*, 161 Cal. 536, 543, 119 P. 915; *In re Estate of Llewellyn*, 83 Cal.App.2d 534, 561, 189 P.2d 822, 191 P.2d 419. There was no allegation of a confidential relationship between Dunne and Mrs. West nor were any facts alleged that would relieve the contestant of the burden of proof of undue influence.

Dorathy Harter testified that Mrs. West told her it would not be necessary for her to come down and see "Harold" (Mr. Dunne). Mrs. Harter further testified that just prior to Thanksgiving 1952, when she went to visit her stepfather at the West home, Mrs. West tried to shut the

door and "I pushed it open and said I was going in to see Mr. Dunne." This was the only evidence that Mrs. West made attempts to keep the relatives away from deceased.

Testimony of a bank representative was to the effect that decedent's savings and checking accounts originally opened in the name of Harold W. Dunne were converted to joint tenancy in the name of Addie May West and deceased. Mrs. West also became the beneficiary of deceased's insurance policy.

Earl Walsh, who testified he had visited Dunne practically every day after his return from the hospital on December 2nd, said Dunne appeared to be under Mrs. West's influence in his thinking. "One time he told me that she wanted him to sign some papers—I don't know nothing of what they were—and he said he didn't want to sign them." In response to questions as to what kind of papers Walsh testified, "He didn't say. * * * He didn't sign them." He also testified that Mrs. West told him, "* * * that if I stuck by her and Chris, I would be taken care of." Mary Walsh also testified she overheard this conversation; that Mrs. West wanted "* * * Chris, Mr. Nelson and my husband to stick together until this trial was over, that she would see that he would be taken care of * * *" Apparently this occurred during or shortly before the trial. Muriel Pinkerton, in answer to a question as to whether Mrs. West was present at the time of execution of the will, stated "I heard someone else in the house, but I did not see her."

For the proponent, Eleanor Pearce, a friend of appellant, testified she visited Dunne at the West home on December 7th, one day before the execution of the second will and that while Mrs. West was out deceased told her that Dorathy Harter had been to see him and "* * * had been hounding him for some linens that her mother had, and also borrowed money, and then she stole the will. * * * It makes me so * * * mad. I am going tomorrow and make a new will." Robert Cooper testified that a few days before the

date of execution of the will of December 8th deceased had told him he was going to change his will. Mrs. West testified she did not know of the new will making her principal beneficiary until December 10th or 11th and that decedent had never previously discussed making a new will with her. Lawrence F. Boyd, subscribing witness to the December 8th will, testified that about a week after the will was executed deceased called him by phone from the Veterans of Foreign Wars Post and asked him to come down, that they had a conversation and Dunne said "I want to be sure of one thing, if you can be sure in your lifetime, that you see that this will that I made is carried out to the fullest extent of your ability." Marion Beall, registered nurse, testified that while Dunne was in the hospital after his return on January 20, 1953, he told her he had changed his will and that he was going to take care of Mrs. West for her kindness and care for him. There was also testimony that Dunne wanted to have Mrs. Harter excluded from his ward and that on one occasion loud talking was heard between deceased and Mrs. Harter. Unknown to Dunne, his holographic will of March 1952, which was placed in a safety deposit box, had been replaced with two blank sheets of paper. He mentioned this to Eleanor Pearce and in the statement taken by Miss Pinkerton on December 8, 1952.

[9-11] Certainly Mrs. West had an opportunity to exert undue influence upon deceased. It is well settled, however, that a mere showing of opportunity to exert undue influence is not sufficient to support a finding that it was exerted. In *re Estate of Fleming*, 199 Cal. 750, 251 P. 637; In *re Estate of Bryson*, 191 Cal. 521, 217 P. 525. A suspicion of undue influence is not sufficient to overthrow a will. In *re Estate of Kilborn*, 162 Cal. 4, 13, 120 P. 762. Nor does conduct inspiring affection and gratitude constitute undue influence. In *re Estate of Doty*, 89 Cal. App.2d 747, 201 P.2d 823.

Miss Pinkerton testified that the will was prepared before she and Mr. Baird went to see decedent. Mr. Baird had

previously acted as Mr. Dunne's attorney. Mrs. West had done housecleaning in Mr. Baird's home. For some unexplained reason Mr. Baird was not called as a witness. It is usually of considerable importance in a will contest to ascertain whether the testator or some beneficiary caused the will to be prepared and gave information as to the provisions to be incorporated therein. But we do not see that the failure to prove that fact could operate in favor of either party as against the other. It is sufficient that Mrs. West was not shown to have been active in the preparation of the will. She never discussed it prior to its execution; she was not present when it was executed and it was some time thereafter that she learned of its existence.

[12] The court found that decedent was under the influence of opiates when he signed the will. There was no evidence to that effect. There was no evidence of the existence of a trustee relationship between Mrs. West and decedent and no evidence that Mrs. West used undue influence to bring about execution of the will. The court found that the will was induced by the fraudulent representations of Mrs. West. There was no evidence of any false or fraudulent representation. It may be conceded that the generosity of decedent, to Mrs. West was out of proportion to what she deserved, but that was for him to decide. He had a right to place his own valuation upon her kindness and her services. She gave him a home and care during his fatal illness and since he was competent to declare what her ministrations were worth to him, and acted voluntarily, it does not reflect upon the validity of the will that he may have been overgenerous.

The judgment is reversed and the court is directed to make new findings and conclusions consistent with the views herein expressed and to admit to probate the will of December 8, 1952, and to vacate the order admitting to probate the will of March 5, 1952.

WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

130 Cal.App.2d 250

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Ralph J. DONALDSON, Defendant and
Appellant.
Cr. 3043.

District Court of Appeal, First District,
Division 2, California.

Jan. 17, 1955.

Prosecution for bookmaking. The Superior Court, County of San Francisco, Eustace Cullinan, Jr., J., entered judgment of conviction. Accused appealed. The District Court of Appeal, Kaufman, J., held that where arresting officer observed accused seated in automobile where people stopped and talked to him, then accused went behind tavern to a box where daily racing form and other papers were found, and when officer arrested accused, accused dropped match book covers which contained writings identified as records of horse race bets, and asked officer to give him a break, evidence was sufficient to support conviction.

Judgment affirmed.

1. Criminal Law \S 369(1, 2)

Proof of another offense distinct from that for which a defendant is on trial is admissible if relevant, but such evidence may not be admitted if its sole function is to demonstrate a general criminal propensity on the part of defendant, even though it may show an earlier violation of the same or similar statute.

2. Criminal Law \S 374

The question of relevancy of evidence of a previous conviction of an accused to the issues in prosecution is to be determined by the trial court.

3. Criminal Law \S 371(1), 372(3)

In prosecution for bookmaking, evidence that at time of a previous conviction accused was operating in a manner similar to his alleged operation at time of present arrest, demonstrated a pattern or method of operation used by accused, was relevant to show that possession of bookmaking paraphernalia on the person of accused was

most probably not an innocent possession, and tended to prove the element of intent. Pen.Code \S 337a, subd. 6.

4. Criminal Law \S 369(2)

In prosecution for bookmaking, evidence that accused had been observed a few weeks prior to his arrest talking to several men, and then placing a call in a phone booth with a newspaper and a piece of paper in his hand, was relevant to prove the nature of accused's operations. Pen.Code \S 337a, subd. 6.

5. Criminal Law \S 374

The question of remoteness between evidence of an accused's prior arrest to the issues in prosecution is primarily to be determined by the trial court.

6. Criminal Law \S 369(2)

Remoteness between evidence of accused's prior arrest, and the issues in prosecution affects only the weight, and not the admissibility of the evidence.

7. Criminal Law \S 372(1), 673(5)

Evidence of other criminal acts may be admitted to show a general system or plan used by a defendant and from which the inference can be drawn that he committed the offense charged and that he also had a particular state of mind, but when admitted such evidence must be restricted to other acts with a sufficiently high degree of common features to justify an inference that defendant committed offense for which he is on trial.

8. Criminal Law \S 814(5)

In prosecution for bookmaking, against accused who at time of arrest had upon his person records of bets which he attempted to destroy, and who asked officer to "give him a break," where trial court instructed jury that in every crime there must exist a union of acts and intent, and that every person who lays, makes, offers or accepts any bets is guilty of a crime, trial court did not err in refusing to instruct that mere possession of bookmaking paraphernalia is insufficient to sustain a conviction. Pen.Code, \S 337a, subd. 6.

9. Criminal Law \S 829(15)

In prosecution for bookmaking, where jury was instructed that they were not

permitted to find defendant guilty on circumstantial evidence alone, unless the proved circumstances not only were consistent with hypothesis that defendant was guilty of the crime, but also were irreconcilable with any other rational conclusion, court did not err in not instructing that each fact necessary to complete the chain of circumstantial evidence against the defendant must be proved beyond a reasonable doubt. Pen.Code, § 337a, subd. 6.

10. Criminal Law Ⓒ814(17)

If evidence in prosecution is not entirely or chiefly circumstantial, it is not error for trial court to fail to instruct on this type of evidence.

11. Gaming Ⓒ98(3)

Evidence was sufficient to support conviction for bookmaking. Pen.Code, § 337a, subd. 6.

Gregory S. Stout, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., of the State of Cal., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment of conviction after jury verdict, of a violation of subdivision 6 of Section 337a of the Penal Code. Motion for new trial was denied. Probation having been likewise denied, defendant was sentenced to 9 months in the county jail.

Defendant and appellant Donaldson was arrested in San Francisco on July 30, 1953 on Cedar Street which runs from east to west between Post and Geary, parallel to those streets, and connects Larkin with Polk Street. Inspector Overstreet of the Bureau of Special Services, San Francisco Police Department, who made the arrest, had appellant under observation in this area for some time before he approached him. He observed appellant get into a Buick sedan parked at the corner of Cedar and Larkin Streets on the north side of Cedar. He saw him looking at a news-

paper later found to have been the San Francisco Examiner of the same date as appellant's arrest. Two men approached the car at different times and talked with appellant. Although Officer Overstreet was in a car with Officer Siegfried parked on the south side of Cedar Street about midway in the block facing Larkin, he was aided in his observation by a pair of binoculars.

After the man had left the car, appellant got out and entered a small enclosed area behind a tavern which is known as the Jay Room. A couple of moments later he returned to the street and walked to the corner of Cedar and Larkin. He paused a moment, then went across Larkin Street and entered a small doughnut shop. After a short time he returned and again entered the small area behind the tavern. Shortly thereafter he returned to the car, then went into the Jay Room, and after about five minutes went back into the area behind the tavern for the third time.

When appellant left this area and returned to Larkin Street, Inspector Overstreet went the other way around to Post Street. By going through an apartment house, he gained access to the tradesman's entrance on Cedar Street which adjoined the small area behind the tavern. A board fence approximately six and one-half feet in height separated the tradesman's entrance from the area behind the tavern, but the Inspector was able to observe appellant through a crack in the fence when he arrived on the scene about 8 or 10 minutes later. Appellant removed some papers from his pocket, walked over to a wooden cabinet built around the gas and electric meters and which formed a kind of open shelf on the wall of the building in which the Jay Room tavern is located. Appellant looked at some papers, walked toward the fence and turned his back to it. Officer Overstreet then stepped upon a box, looked over appellant's shoulder at the papers which he was reading, and could see the particular piece of paper appellant was then looking at. Overstreet then walked out of the tradesman's entrance into the area to confront appellant. This took him about 10 seconds.

When appellant saw the officer, with whom he had had earlier contacts in the previous 8 or 9 years, he crumpled the papers with both hands, dropped them to the street, and walked toward Overstreet. The officer picked up the crumpled papers and examined them, having told appellant to remain where he was. These papers, eleven in all, two of which were cardboard match-book covers, were introduced in evidence at the trial as Peoples' Exhibit 1, and were identified by Officer Overstreet who had been qualified as an expert on book-making activities in San Francisco, as a record of bets on horse races. One of the papers, a matchbook cover from Walton's Bar had three bets recorded on the inside of it.

Appellant remained silent when Overstreet questioned him in regard to book-making activities. He asked the officer for a break this time and told Overstreet that he would never be bothered by him again.

Two pencils and a blank pad of paper were found in appellant's pockets. The San Francisco Examiner for July 30, 1953, page 4a from the sports section was found on the seat of the car in which appellant had been seated. Four pieces of paper found in the areaway where appellant was arrested were also identified as records of bets by Overstreet, and The Daily Racing Form for July 28, 1953, characterized by Overstreet as "bookie" paraphernalia was found by the officer on top of the cabinet surrounding the gas and electric meters. By comparing the material found in the records of bets with the Examiner Sports Section one record of bets was determined to be for July 30, 1953, and three for July 29, 1953. Another group could not be identified as to date. It was the officer's opinion that appellant's method of operation was to take bets, phone them to a third person who would record them, and that appellant would then destroy the records he had made of the individual bets.

On cross-examination Inspector Overstreet testified that he had not seen appellant write, nor had he asked him if the handwriting on the papers was his, nor

was any scratch sheet or Turf Digest found upon appellant's person nor in any of the places where he was observed that day. Overstreet was questioned in regard to prior occasions when he had arrested and searched appellant, and over objection, attributed his reason for doing so to the fact that appellant was a known book-maker, that he considered him a suspect when he saw him walking around that area talking to various persons, and had not known him to be engaged in any legitimate employment.

Officer Siegfried, who accompanied Overstreet on the day of appellant's arrest, testified that on July 19, 1953, he had observed appellant in the Jay Room talking to several men, that he then went to a telephone booth to place a call, and had in his hand a Daily Bulletin and a piece of paper. He heard the appellant talking on the phone, but as he was 15 feet away, he could not distinguish what was said. Similar testimony was given as to appellant's conduct on July 15.

Sergeant Marino of the San Francisco Police was allowed to testify as to records of bets found on appellant's person when he was arrested on August 16, 1950, among which records were some recorded on match books from Walton's Bar, as were some of those in the present case. The official minutes of the Superior Court were then read into evidence showing that appellant had pleaded guilty to violation of Subdivision 2, Sec. 337a, Penal Code, book-making.

[1] Appellant contends that the trial court committed prejudicial error in permitting the introduction of evidence of acts by appellant at times and places other than that for which he was on trial. Appellant concedes that proof of another offense distinct from that for which a defendant is on trial is admissible if relevant. *People v. Peete*, 28 Cal.2d 306, 169 P.2d 924. However, such evidence may not be admitted if its sole function is to demonstrate a general criminal propensity on the part of defendant even though it may show an earlier violation of the same or a similar statute by said defendant. *People v. Cook*, 148

Cal. 334, 340, 83 P. 43; *People v. Glass*, 158 Cal. 650, 658, 112 P. 281.

[2-4] The question of relevancy is of course primarily a question to be determined by the trial court. That the trial court correctly determined that the evidence of appellant's arrest in 1950 was relevant to the issues in the present case cannot be doubted when it is noted that in the 1950 incident, appellant operated in the same area and in much the same manner as he was alleged to have done herein. On the earlier occasion he was observed coming out of Walton's Bar near Larkin and Geary. He had on his person several matchbook covers advertising that bar and on which bets were recorded. In the instant case appellant also was discovered in possession of matchbook covers from the same bar with bets similarly recorded thereon, and was again making his contacts in the same locale. Therefore such evidence clearly demonstrates a pattern or method of operation used by appellant, and explains the nature of his activities on July 30, 1953. The evidence also is relevant to show that the possession of the bookmaking paraphernalia on the person of appellant, most probably was not an innocent possession, and therefore tends to prove the element of intent. *People v. Alexander*, 123 Cal.App.2d 918, 267 P.2d 883; *People v. Burns*, 109 Cal. App.2d 524, 241 P.2d 308, 242 P.2d 9; *People v. Coppla*, 100 Cal.App.2d 766, 224 P.2d 828. The evidence of appellant's actions a few weeks prior to his arrest was also relevant to prove the nature of appellant's operations. *People v. Woods*, 35 Cal.2d 504, 511, 218 P.2d 981; *People v. Grayson*, 83 Cal.App.2d 516, 520, 189 P.2d 285; *People v. Hart*, 46 Cal.App.2d 230, 115 P.2d 546.

[5,6] The question of remoteness is also primarily to be determined by the trial court. In *People v. Peete*, 28 Cal.2d 306, 169 P.2d 924, evidence of a murder committed by defendant and for which she had been convicted was admitted to show design or scheme although it had been committed more than twenty years prior to the crime for which she was then being tried. And in *People v. Burns*, supra, evidence of a similar offense committed several years

earlier was held to have been properly admitted. Furthermore, remoteness affects only the weight, and not the admissibility of the evidence. *People v. Zatzke*, 33 Cal. 2d 480, 202 P.2d 1009.

[7] In *People v. Burns*, 109 Cal.App.2d 524, 241 P.2d 308, 242 P.2d 9, and *People v. Cassandras*, 83 Cal.App.2d 272, 279, 188 P. 2d 546, the rule as to admission in evidence of other criminal acts is discussed at length. It is well settled in this state that such evidence may be admitted to show a general system or plan used by a defendant and from which the inference can be drawn that he committed the offense charged, and that he also had a particular state of mind. The cases note that when admitted such evidence must be restricted to other acts with a sufficiently high degree of common features to justify an inference that the defendant committed the offense for which he is then on trial.

Appellant discusses *People v. Grayson*, 83 Cal.App.2d 516, 189 P.2d 285, at some length and argues that it stands for the limited proposition that the commission of other crimes by defendant may be shown as part of the *res gestae* of defendant's arrest. The fact that in the cited case the evidence of other crimes were of crimes contemporaneous with the one for which defendant was being charged, does not in any way cast doubt upon the rule stated in *People v. Peete*, supra, and followed in *People v. Cassandras*, supra, and *People v. Burns*, supra.

[8] It is claimed that prejudicial error was committed by the trial court in refusing to instruct at appellant's request that possession of paraphernalia used by bookies is insufficient to sustain a conviction. Appellant contends that no evidence other than inferences deducible from possession of bookmaking paraphernalia indicates that appellant had laid, made, offered or accepted a horse racing wager, and cites *People v. Coppla*, 100 Cal.App.2d 766, 224 P.2d 828. In the *Coppla* case, the defendant handed sealed envelopes to another person. In the sealed envelopes were found betting markers and owe sheets, but the court stated that there was no evidence that defend-

ant knew what was contained in the envelopes, and the prosecution had put in evidence defendant's statement that he did not know the contents of the sealed envelopes. It was held that the prosecution was bound by that evidence in the absence of contrary proof. The instant case is quite different. Appellant herein had records of bets upon his person which were not sealed, and which he attempted to destroy. He made no protestations of lack of knowledge of the contents of the papers. He asked the officer, who was well known to him, to give him a break.

The jury were instructed that "In every crime or public offense there must exist a union or joint operation of act and intent. To constitute such criminal intent, it is merely necessary that a person intend to do an act which, if committed, will constitute a crime." They were also instructed that "Every person who lays, makes offers or accepts any bet or wager * * * is guilty of a crime." The jury was therefore adequately instructed on the necessity of finding intent to commit a criminal act.

[9,10] Appellant maintains that since the evidence against him was in large part circumstantial, the failure of the trial court on its own motion to instruct in a manner similar to CALJIC 28, that each fact necessary to complete the chain of circumstantial evidence against defendant must be proven beyond a reasonable doubt, was prejudicial error. The jury was instructed, however, that "You are not permitted on circumstantial evidence alone to find the Defendant guilty of the crime charged against him, unless the proved circumstances not only are consistent with the hypothesis that the Defendant is guilty of the crime, but are irreconcilable with any other rational conclusion." In *People v. Candiotto*, Cal.App., 272 P.2d 63, cited by appellant, no instruction, such as that quoted above was given on circumstantial evidence. And even though it was held erroneous not to so instruct in that case, it was held not to constitute prejudicial

error under the facts therein. *People v. Hatchett*, 63 Cal.App.2d 144, 146 P.2d 469, a manslaughter case, was reversed for several errors committed at the trial, one of them being failure to give an instruction on circumstantial evidence similar to the one which was given in this case. And see *People v. Bender*, 27 Cal.2d 164, 163 P.2d 8. And of course, if the evidence is not entirely or chiefly circumstantial, it is not error to fail to instruct on this type of evidence. *People v. Ybarra*, 127 Cal.App.2d 74, 273 P.2d 284. We feel that the instruction given in this case sufficiently informed the jury of the manner in which they were to consider the circumstantial evidence in the case.

[11] Finally, it is urged that the evidence is insufficient to justify appellant's conviction of violation of subdivision 6 of Section 337a, Penal Code, and that the evidence of the fact that he laid, made, offered or accepted a bet on horse races was merely conjecture. The evidence reviewed earlier herein points convincingly to the fact that appellant was in the business of accepting bets, and it is unnecessary to again review it in detail. Suffice it to say that records of bets were found on his person, he had a kind of improvised "office" at the rear of the tavern containing betting paraphernalia, the newspaper in the car at which he had contacted the two men, was opened at the racing page, he remained silent in the face of accusatory statements and asked the officer to give him a break, stating that he wouldn't be bothered with him again. The jury was clearly justified in concluding that appellant was guilty of a violation of Section 337a, subd. 6, of the Penal Code.

In view of the foregoing, the judgment finds ample support in the record before us and there being no prejudicial error it must be affirmed.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

John OOSTEN, Plaintiff and Respondent,
v.

HAY HAULERS, DAIRY EMPLOYEES
AND HELPERS UNION, LOCAL UNION
NO. 737, A. F. OF L.; Plant and Clerical
Dairy Employees Union, Local Union No.
93, A. F. of L.; Knudsen Creamery Com-
pany of California, a corporation, Thomas
C. Case, Jack Menage, Al Moen and Mark
Whiting, John Doe 1 to 10, Inclusive of
All Intervening Members as Though Each
John Doe Were Severally and Separately
Designated, Defendants,*

Knudsen Creamery Co. of California,
Appellant.

Civ. No. 20153.

District Court of Appeal, Second District,
Division 1, California.

Jan. 17, 1955.

Rehearing Denied Feb. 14, 1955.

Hearing Granted March 16, 1955.

Action by milk supplier against creamery and certain labor unions and officials thereof, for injunctive relief, damages and for breach of contract. The Superior Court, Los Angeles County, Frederick F. Houser, J., denied relief as against labor unions but entered judgment against defendant creamery, which appealed. The District Court of Appeal, White, P. J., held that where parties wrote into contract a dispensation from performance if labor troubles which either "directly or indirectly" involved either party rendered performance impossible, refusal by creamery employees to unload supplier's milk because of union instructions and fact that if creamery had fired such employees for insubordination, strike of its plant would in all probability have resulted, operated to excuse creamery from performance on ground of impossibility.

Judgment reversed.

1. Contracts ☞328(1)

Objective impossibility as well as impracticability due to excessive and unreasonable difficulty or expense are recognized as defenses to action for breach of contract.

2. Contracts ☞275

Where party by his own contract creates duty or charge upon himself, he is

* Opinion vacated 291 P.2d 17.

bound to possible performance of it because he promised it.

3. Sales ☞177

Where creamery and milk supplier, who were parties to contract for purchase of milk, wrote into contract a dispensation from performance if labor troubles which either "directly or indirectly" involved either party rendered performance impossible, refusal by creamery employees to unload supplier's milk because of union instructions and fact that, if creamery had fired such employees for insubordination, strike of its plant would in all probability have resulted, operated to excuse creamery from performance of its contract with milk supplier on ground of impossibility.

Vaughan, Brandlin & Wehrle, by J. R. Vaughan and Warren J. Lane, Los Angeles, for appellant.

Russell E. Parsons and John Van Aalst, Los Angeles, for respondent.

WHITE, Presiding Justice.

Appellant Knudsen Creamery Co. is engaged in the business of manufacturing and distributing milk and milk products with its principal place of business in the city of Los Angeles. Approximately 500,000 pounds of fresh milk are received and processed daily at the Los Angeles plant. Prior to August 6, 1951, respondent John Oosten, a dairy farmer, was one of the principal suppliers of milk to appellant Creamery Co. at its Los Angeles plant, and had been such a supplier for approximately ten years.

Defendant Hay Haulers, Dairy Employees and Helpers Union, Local Union No. 737 of the International Brotherhood of Teamsters, Chauffeurs & Warehousemen, affiliated with the A. F. of L. (hereinafter called Local 737), is a labor union having as one of its objects the organization of milkers in Los Angeles County in the vicinity of respondent's dairy farm. Defendant Tom Case is the Secretary-Treasurer of Local 737.

The defendant Plant and Clerical Dairy Employees Union, Local No. 93 of the International Brotherhood of Teamsters,

Chauffeurs & Warehousemen, affiliated with the A. F. of L. (hereinafter called Local 93), is a labor union comprising, with other affiliated locals, all of the employees of appellant and of all the other major creameries in Southern California. Defendant Mark Whiting is the Secretary of Local 93.

The Christian Labor Association, Local No. 17, is a labor union of dairy employees in the same territory as that in which Local 737 exists.

The business relations between respondent and appellant Creamery Co. were evidenced and governed through the years by written contracts, the current one being introduced into evidence at the trial of this litigation.

On July 13, 1951, representatives of Local Union 737 called upon respondent and informed him that some of his employees wanted to join the A. F. of L. and gave him a copy of a proposed labor agreement to read over. The following Monday, the representatives of Local 737 again visited respondent and he told them he had not had time to get legal advice. Two days later, on Wednesday, respondent told these representatives of Local 737 that he did not desire to sign a contract with them. Respondent testified that he next saw defendant Case on August 3, 1951, at which time Case again sought to have him sign a contract with his union and informed him that if he did not sign there would be a picket line the following week.

A few days after the first visit from the representatives of Local 737 respondent had a conversation with Ben Meninga, Business Agent of Local 17 of the Christian Labor Association and on July 27, 1951, respondent signed a contract with the latter union.

On August 6, 1951, Local Union 737 put a picket line in front of respondent's dairy farm. At 6:00 a. m. on that day, an hour before the picketing started, Jess Goins, Business Agent of Local 93 appeared at the Knudsen Creamery Co. plant at 1974 Santee Street. Pete A. Breum was the employee of Knudsen Creamery Co. on duty at the dock to receive milk tankers. Goins spoke to Breum; he told him that a load of respondent's milk was coming in that morning; he

described the milk tanker of respondent and told Breum that the latter's milk was unfair and that Breum didn't have to handle it. Breum reported this information to all the other employees that he was working with but said nothing to any of the management of Knudsen Creamery Co. Respondent's truck arrived about 9:00 a. m. Breum informed the driver that he couldn't handle respondent John Oosten's milk because it was unfair, but would unload Ralph Oosten's milk which was in a trailer attached to the same truck. Mr. Goins was joined by Mr. Vanderhar, Business Agent for Local 737, and both were present at the scene when respondent's truckload of milk arrived.

Prior to this occasion respondent had been dealing with appellant for ten years and during that time appellant had never refused to take respondent's milk. Respondent testified that he knew that all of the employees of appellant were members of A. F. of L. Unions and that Al Lorge and Eugene Krug were the designated milk receivers.

After the employees of appellant refused to handle respondent's milk he delivered the milk to the Excelsior Creamery, a non-union creamery at Santa Ana, in Orange County, and continued to sell his milk to Excelsior from then on. He did not try to sell his milk to any other creamery because he did not know of any other non-union creamery and he knew that no union man would take the milk. Respondent brought milk to appellant's plant on five occasions subsequent to August 6, 1951, i. e., on August 16, August 29, September 1, September 8, and October 3.

Respondent had not accompanied his truck on August 6, 1951, but on August 16 he arrived at appellant's plant before his truck arrived and went to the office of Mr. Urquhart, appellant's Production Manager. His truck arrived about 12:30 p. m. There were then present on the receiving dock respondent, appellant's Production Manager, Plant Superintendent, Director of Industrial Relations, the Assistant Plant Superintendent, and Eugene

Krug, the designated milk receiver. In the presence of all these persons, Mr. Nygaard, the Assistant Plant Superintendent, ordered Krug twice to receive the milk. Respondent testified that Nygaard said "We have a contract with John Oosten to receive the milk and I order you to receive this milk." The employee refused, saying that it was against the Union By-Laws to handle unfair milk.

On August 29, and September 1, 1951, the employee Al Lorge refused to handle the milk. When asked who told him that the milk was "hot" he said he wasn't talking and finally walked away. On one or two occasions, Mr. Meninga, the Business Agent of Local 17, and Mr. Boer, of an organization known as United Dairymen, and a Mr. Miller were also present. On September 8, 1951, Miller told Lorge about a preliminary injunction and that he would be in contempt of court if he didn't take the milk, but Lorge nevertheless refused to handle the milk.

On October 3, 1951, Jesse M. Corneilson, a private detective employed by respondent's attorneys, served copies of a second preliminary injunction on several employees of appellant, including Al Lorge. When respondent's truck of milk arrived, Greenburg, appellant's Director of Industrial Relations, called those present into one group. In reply to questions of Greenburg, Lorge stated that he had received a copy of a court order, had read it and that he understood it. Greenburg then said: "We are under a court order to receive this milk * * *. We want you to unload it." Lorge said he would not and Greenburg said: "We order you to unload it." Lorge replied: "I refuse to do it * * *. It is unfair."

Lorge then left to call Local 93. When he returned, Corneilson asked him if he would receive the milk, and he said: "Absolutely not." Corneilson informed Lorge that he would be in contempt of court, but Lorge was steadfast in his refusal to receive the milk.

Immediately upon learning of the incident at the receiving dock on August 6, 1951, appellant's management commenced

an inquiry. Breum was interrogated. About August 10, 1951, Mr. Greenburg conferred with defendant Mark Whiting, Secretary of Local 93, to which appellant's production employees belonged. Whiting said that the injunction prohibiting further picketing by Local 737 did not change the status of the milk so far as Local 93 was concerned or in so far as appellant's employees were concerned. He said that the milk was still "hot." About September 1, 1951, Greenburg conferred with Baird and Goins, who were officials of Local 93. Baird said that the employees did not have to receive the milk because it was "unfair" and they did not have to handle an "unfair" product. He said that under the contract with the Union an exempt employee could not dump the milk and that appellant could not fire an employee for refusing to dump the milk. In connection with a similar case a year before the Oosten matter, Whiting had informed appellant that if the company disciplined or discharged an employee for refusing to handle "hot" milk, the plant would be shut down.

Following repeated attempts to deliver milk to appellant Creamery Co. and the refusal of the latter to accept it, respondent Oosten instituted an action against defendant Unions, certain of their officers and appellant Knudsen Creamery Co., for injunctive relief, damages and for breach of contract. Following trial before the court, judgment was rendered denying respondent relief as against the defendant Unions but judgment was ordered against appellant Creamery Co. in the sum of \$20,314.19, representing the difference between what respondent would have received from appellant Creamery had the latter, pursuant to the terms of its contract, purchased and received from respondent Oosten all of the milk produced by the latter's herd, and what respondent actually received for the milk from Excelsior Creamery Co., to whom the product was sold after appellant Creamery Co. refused to take delivery thereof. From such judgment, Knudsen Creamery Co. prosecutes this appeal.

As a first ground for reversal of the judgment, appellant earnestly insists that

labor troubles above narrated rendered it impossible for appellant to handle or dispose of respondent's milk on and after August 6, 1951.

The milk purchase agreement between appellant and respondent, in effect on the last named date contained the following provision:

"12. In case of strike, lockout, or other labor trouble (whether the parties hereto are directly or indirectly involved) * * * which shall render it impossible for Seller to deliver, or Buyer to handle or dispose of such milk, no liability for non-compliance with this agreement caused thereby during the time of continuance thereof shall exist or arise with respect to either party hereto."

We are not here concerned with a situation wherein the parties to a contract did not foresee the possibility of labor troubles preventing performance of their agreement. On the contrary, they recognized such a contingency and shielded themselves against it by the aforesaid condition and qualification contained in paragraph 12 of their contract.

The question, therefore, resolves itself as to whether, under the facts and circumstances here present, it was "impossible" for appellant Creamery Co. to handle and dispose of respondent's milk.

[1] In section 454 of the Restatement of Contracts, "impossibility" is defined as not only strict impossibility but as impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved. In modern cases, not only objective impossibility in the true sense is recognized as a defense, but also impracticability due to excessive and unreasonable difficulty or expense. *Autry v. Republic Productions, Inc.*, 30 Cal.2d 144, 148, 149, 180 P.2d 888; *Christin v. Superior Court*, 9 Cal.2d 526, 533, 71 P.2d 205, 112 A.L.R. 1153; *Transbay Const. Co. v. City and County of San Francisco*, D.C., 35 F.Supp. 433, 435.

[2] As a general rule it is true as contended by respondent that when a party by his own contract creates a duty or a

charge upon himself, he is bound to a possible performance of it because he promised it. But this general rule is grounded on the premise that the promisor did not shield himself by proper conditions or qualifications. In the instant case both parties to the contract were mindful of the difficulties that might ensue should either become involved in labor troubles. And so they wrote into their contract a dispensation from performance if labor troubles which either "directly or indirectly" involved either party rendered performance impossible. And, in shielding themselves against the consequences of labor troubles, the parties herein did not limit their dispensation from performance to an all out strike, lockout or a complete shut-down of their respective activities due to labor troubles, but specifically provided as follows: "* * * or other labor trouble (whether the parties hereto are directly or indirectly involved) * * *."

Under the definitions of impossibility as above set forth let us examine the factual situation confronting appellant Creamery Co. to determine whether it was impracticable because of extreme or unreasonable difficulty, expense, injury or loss, for it to handle or dispose of respondent's milk. Appellant had a labor contract with Local Union No. 93 and that Union instructed its members employed by appellant not to handle respondent's milk because it had been labeled "unfair" or "hot" by Local Union No. 737, and the members of Local No. 93 who were ordered by appellant to handle respondent's milk refused to do so and the remaining 210 union employees of appellant testified they would not have handled respondent's milk even if they were to be discharged for such refusal. What would have happened had appellant discharged such union employees was made perfectly clear at the trial. Appellant would have been faced with a strike of its own employees, its plant would have been shut down and it would have been effectively prevented from receiving or disposing of any milk whatsoever. To us it seems manifest that appellant was confronted with insurmountable difficulties.

And furthermore, respondent's loss was proximately occasioned, not through any act of appellant, but by reason of his own controversy with Local Union No. 737. As pointed out by appellant, "Knudsen's unwillingness to precipitate a general work stoppage had good reason. A staggering loss would have been sustained, not only by Knudsen but also by all other producers shipping milk to Knudsen, if Knudsen's Teamster-represented employees had refused to perform their jobs, thereby leaving this perishable commodity to spoil in Knudsen's plant. Factually, we know that it takes eight hours to get fluid milk from the tanker to the bottle in Knudsen's operation. * * * All milk coming into the plant is commingled. * * * Knudsen's Los Angeles plant handles about 500,000 pounds of milk a day. This milk comes in through the medium of fifteen to twenty tankers having an average capacity of 23,000 to 24,000 gallons of milk per tanker. Respondent argues that Knudsen should have brought on a strike and infers thereupon its obligation would be excused. * * * The trial court makes the same point when it says that Knudsen should have 'tested' for a strike. * * * Neither respondent, nor the trier of fact were confronted with making the decision of whether to take the step which would place in jeopardy 500,000 pounds of milk. The producers of this milk would have lost if it were to perish because of John Oosten's labor trouble, because in the face of strike or work stoppage paragraph 12 of the contract would certainly exonerate Knudsen from liability. It is one thing to conjecture without responsibility; it is a different thing to conjecture with knowledge of terrible losses to innocent bystanders which will result from a wrong decision."

[3] Viewed in the light of the rules heretofore announced, adopted as they were to make for justice between the parties to a contract, we are persuaded that under the provisions of the foregoing paragraph 12 of the contract now before us, appellant was excused from performance of its contract with respondent, and that under the circumstances here present,

it would be unjust to require, as the judgment herein does, that appellant Creamery Co. underwrite the whole expense of respondent's controversy with the Unions, and with which controversy appellant Creamery Co. had no connection.

The foregoing conclusion at which we have arrived makes it unnecessary to consider or determine other issues presented on this appeal.

The judgment is reversed.

DORN and DRAPEAU, JJ., concur.



130 Cal.App.2d 258

In the Matter of the ESTATE of J. F. T. O'CONNOR, Deceased.

Minnie L. TREPANIER and L. E. O'Connor,
Appellants,

v.

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION,
Executor-Respondent.

University of North Dakota, St. Mary's Catholic Church, a North Dakota Corporation, St. Michael's Catholic Church, a North Dakota Corporation, Academy of St. James, Respondents.

Civ. 20546.

District Court of Appeal, Second District,
Division 1, California.

Jan. 17, 1955.

Hearing Denied March 16, 1955.

Proceeding in the matter of the estate of deceased testator. The Superior Court of Los Angeles County, Roy L. Herndon, J., entered an order adverse to sister and brother of testator, and they appealed. The District Court of Appeal, White, P. J., held that where testator, who was a lawyer and judge, by nineteenth paragraph of holographic will directed that residue of his estate should be kept intact for five years after his death, and that income during sixth year and each year thereafter should be

paid to his sister and brothers, and that on death of survivor the remainder of his estate should be divided equally among educational institutions on certain conditions, and that, if such institutions were not entitled to such a share, residue of estate should be distributed to hospital, testator would be deemed to have intended that first five years' income should be distributed to sister and brothers during sixth year and that it should not be added to and become part of the residue to be distributed to institutions.

Order reversed and cause remanded with directions.

1. Executors and Administrators

⌋314(11, 12)

Wills ⌋440

Where no evidence was given or offered in proceeding for determination of heirship, and only question involved was interpretation of will, construction of will was a question of law, to be ascertained, if possible, by testator's intent as expressed by language in will, and it was therefore duty of District Court of Appeal on appeal to interpret will independently and without presumption as to correctness or error of decree determining heirship.

2. Wills ⌋457

Testator, who was a lawyer and judge, must be presumed to have known and intended the usual meanings of words used by him in holographic will.

3. Wills ⌋458

Words occurring more than once in a will are presumed to be used in same sense.

4. Wills ⌋684(7)

Where testator, who was a lawyer and judge, by nineteenth paragraph of holographic will directed that "residue" of estate should be kept intact for five years after his death, and that income during sixth year and each year thereafter should be paid to his sister and brothers, and that, on death of survivor, "remainder" of estate should be divided equally among educational institutions on certain conditions, and that, if such institutions were not entitled to such a share, "residue" of estate should be distributed to a hospital, words

"residue" and "remainder" meant portion of corpus of estate, which should remain after payment of funeral expenses, debts, and specific legacies in prior paragraphs of will, and did not mean entire corpus.

See publication Words and Phrases, for other judicial constructions and definitions of "Remainder" and "Residue".

5. Wills ⌋684(7)

Where testator, who was a lawyer and judge, by nineteenth paragraph of his holographic will directed that residue of his estate should be kept "intact" for five years after his death, and that income during sixth year and each year thereafter should be paid to his sister and brothers, and that, on death of survivor, "remainder" of estate should be divided equally among educational institutions on certain conditions, and that, if such institutions were not entitled to such a share, "residue" of estate should be distributed to hospital, testator's intention was that first five years' income should be distributed to sister and brothers during sixth year and that it should not be added to and become part of residue to be distributed to institutions.

See publication Words and Phrases, for other judicial constructions and definitions of "Intact".

6. Wills ⌋452

If meaning of will is in doubt, that interpretation by which property goes to those of the blood of testator is preferred over construction under which it would go to strangers.

Sander L. Johnson, Los Angeles, Ronald N. Davies, Grand Forks, N. D., for appellant.

Herbert G. Nilles, Fargo, N. D., Harold D. Shaft, Shaft, Benson & Shaft, Grand Forks, N. D., for respondents.

WHITE, Presiding Justice.

This is an appeal from the decree determining heirship, which provides that "income accumulated during the period of five years after the date of the decedent's death be added to the corpus" and distributed to respondents, a University and several

Religious Corporations, after the death of the last of appellants, the sister and brother of testator, who are to be paid "the income from the augmented corpus".

The matter was heard by the Superior Court upon the petition for Determination of Heirship filed by Bank of America National Trust and Savings Association, as Executor of the Last Will and Testament of said Decedent, and the answer thereto filed by appellants as persons interested in said estate. No evidence was given or offered, and the only question involved is the interpretation of the testamentary writings of decedent.

Testator had never married. He was an experienced and successful business man, lawyer and federal judge, and a former Comptroller of the Currency of the United States. He died September 28, 1949, leaving a will dated October 17, 1937, and two codicils dated May 10, 1946, all of which were entirely written, dated and signed in his own handwriting.

By decedent's holographic will and codicils, after directing payment of his funeral expenses, debts and obligations, and making specific bequests, including \$5,000 each to respondents and appellants, he provided in Paragraph Nineteenth as follows:

"Nineteenth I direct that the residue of my estate shall be kept intact for a period of five years after my death the income during the sixth year and each year thereafter shall be paid to my sister, Minnie L. Trepanier, my brothers Thomas J. O'Connor, L. E. O'Connor, Charles A. O'Connor and my cousin Annie Enright share and share alike, during the lifetime of each. At death of any one his or her interest shall pass to the survivors named in this paragraph. Upon the decease of the last remaining beneficiary named in this paragraph, the remainder of my estate both real and personal shall be divided equally share and share alike among the University of North Dakota, St. James, St. Michaels and St. Mary's Schools provided that each institution shall raise a sum of money equal to the share under this paragraph provided which total sum shall be held by each institution in trust the income to be used for scholarship awards. The failure of one or

more of the institutions named to comply with this provision within one year after such institution is entitled to the benefits named then such share shall pass to the institutions complying with these terms. If no institution is found entitled to the benefits of this section the residue of my estate shall be distributed to St. Michael's Hospital at Grand Forks, No Dak."

The names of Thomas J. O'Connor and Annie Enright were stricken from said Paragraph Nineteenth by the provisions of one of the codicils. Charles A. O'Connor, one of the beneficiaries of the income mentioned in Paragraph Nineteenth, died on October 11, 1952.

Briefs on appeal have been filed by Minnie L. Trepanier and L. E. O'Connor, testator's sister and brother, hereafter referred to as "Appellants", by Respondent University of North Dakota, hereafter referred to as "Respondent University", and by Respondents St. Mary's Catholic Church, St. Michael's Catholic Church, and Academy of St. James, hereafter referred to as "Respondent Religious Institutions".

Appellants suggest that punctuation be added to make the first sentence of said Paragraph Nineteenth read thus:

"I direct that the residue of my estate be kept intact for a period of five years after my death. The income, during the sixth year and each year thereafter, shall be paid to * * * my sister Minnie L. Trepanier * * * and brother(s) * * * L. E. O'Connor * * * share and share alike during the lifetime of each." (The period, capital, and two commas underlined have been added.)

Respondents concede that if said portion of Paragraph Nineteenth were so punctuated, the phrase "during the sixth year and each year thereafter" would be an adverbial phrase designating the times for payments of the income to be made to appellants. However, respondents insist that the plain-words of said Paragraph Nineteenth "without the addition of punctuation, show a clear and consistent plan of testamentary disposition and show beyond question that it was the intention of the testator that the income for the first five years after his death should

be accumulated and added to the principal. * * *” and distributed to respondents after the death of the last of appellants; and Respondents argue that “the addition of this punctuation does violence to the expressed intention of the testator.”

In the first eighteen paragraphs of said will, some sentences have been commenced with small letters and some have not been closed by periods, although there is no doubt that such sentences are complete and are not a part of preceding or succeeding sentences or phrases. While Respondent University urges that “There is no legal authority * * * which would support a repunctuation of the will in question * * *”, and the copy of said Paragraph Nineteenth appended to its Brief discloses no punctuation in the portion which gives rise to this controversy, in the remainder of the so-called copy of said Paragraph Nineteenth we find one period and seven commas which do not appear in the photostatic copy of the holographic will in the Clerk’s Transcript.

[1] Under the circumstances of this proceeding, the construction of the will is a question of law, and its purpose is to ascertain, if possible, the testator’s intent as expressed by his own language used in his will. Estate of Ottovoggio, 64 Cal.App.2d 388, 391, 148 P.2d 878. It is therefore the duty of this court to interpret the will independently and without presumption as to the correctness or error of the Decree Determining Heirship, from which this appeal was taken. Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825; Estate of Norris, 78 Cal.App.2d 152, 159, 177 P.2d 299; Estate of Sahlender, 89 Cal.App.2d 329, 347, 201 P.2d 69.

[2] As a lawyer and judge, testator must be presumed to have known and intended the usual meanings of the words used by him. Estate of Welsh, 89 Cal. App.2d 43, 50, 200 P.2d 139; Estate of Rutan, 119 Cal.App.2d 592, 598, 260 P.2d 111.

First, we will consider what was intended by testator when he used the word “residue”. Appellants contend that by “residue” testator refers to the balance of the corpus

of the estate (as of the date of death) remaining after payment therefrom of the funeral expenses, debts, expenses of administration, and specific bequests in accordance with paragraphs First to Eighteenth of the Will. Respondents urge that testator intended all such debts, expenses of administration and specific bequests to be paid out of the first five years’ income, and the remainder, if any, of said five years’ income to become a part of the residue to be distributed to respondents, and the income for the sixth and subsequent years only to be distributed to appellants.

[3] Words occurring more than once in a will are presumed to be used in the same sense. In the will now being construed the word “residue” appears only twice, and about midway between the two uses of the word “residue”, testator has used the word “remainder” to designate the same portion of his estate, all in said Paragraph Nineteenth, as follows: “I direct that the *residue* of my estate be kept intact for a period of five years after my death * * * Upon the death of the last remaining beneficiary named in this paragraph (appellants), the *remainder* of my estate * * * shall be divided equally between” respondents, upon certain conditions, or “the *residue* * * * shall be distributed” to the Hospital. (Emphasis added.)

Webster’s International Unabridged Dictionary defines “remainder” as “the portion of a thing remaining, or left, after the separation and removal of a part; residue; remnant”. “Residue” is there defined as “the part of a testator’s estate * * * remaining after the satisfaction of all debts and previous devises and bequests”.

[4] We are persuaded that testator, by the words “residue” and “remainder” in said Paragraph Nineteenth, meant the portion of the corpus of his estate which should remain after payment of funeral expenses and “all debts and obligations” in accordance with Paragraph First, and payment of all specific legacies expressed in Paragraphs Second to Eighteenth, inclusive. Testator directed that “the residue * * * shall be kept intact for a period of five years after my death * * *”.

Had he meant "the entire corpus" he would have said so. He was not a layman who did not know the difference between the terms.

[5] The next difference in construction to be considered is the meaning of the words "shall be kept intact for five years * * *". Respondents contend that these words, when considered with the whole of Paragraph Nineteenth are tantamount to a direction that five years' income shall be added to and become a part of the "residue" to be distributed to respondents. Such construction completely ignores the meaning of the words "shall be kept intact". Again, we look to the dictionary. "Intact", literally and in every day usage, means "not touched" or "untouched". "Touched", the adjective, describes that which "has been subjected to touching, especially to handling, meddling, improving * * *". A residue which is "kept intact" cannot be subtracted from, nor can it be added to. We conclude that it was testator's intention, when he directed that the "residue * * * shall be kept intact for five years * * *", that it remain the same as it was after effect had been given to Paragraphs First to Eighteenth of his will.

Testator's words, "I direct that the residue of my estate shall be kept intact for a period of five years after my death" form a complete sentence. His next following expression, "The income, during the sixth year and each year thereafter, shall be paid to my sister, Minnie L. Trepanier, my brother * * * L. E. O'Connor * * *, share and share alike, during the lifetime of each," is likewise a complete sentence. We are impressed that testator so intended them.

From the fact that testator provided that some of the specific bequests in Paragraphs First to Eighteenth should be paid in six months, one year, two years, or five years, Respondent University argues that "Testator showed a consistent regard for the time element in his bequests" and had set the times for payment in order that such bequests could be paid from income

without disturbing the corpus of the estate. However, it appears to us that testator's providing such varying times for payment makes it even more logical that he intended the phrase "during the sixth year and each year thereafter" to express the times for payment of the income from the residue to his relatives, the appellants.

Appellants' argument that testator intended the first five years' income to be distributed to them during the sixth year, and each year's income to be so distributed annually thereafter, is more convincing than is the position of respondents that the first five years' income was intended to be added to and become a part of the "residue" to be distributed to respondents.

We have considered Paragraph Nineteenth alone and in conjunction with and as a part of the entire will and the two codicils, and we find no expressed or implied provision for adding the first five years' income to the residue and distributing it to the Respondents. On the contrary, it seems clear that testator intended "the income", not a part only, to be distributed to his brother and sister, the appellants.

[6] If, however, the testamentary writings of decedent had left this question in doubt, and it could not be determined from the will, then "the interpretation by which the property goes to those of the blood of the testator is preferred" over the construction under which it would go to strangers. Estate of Boyd, 24 Cal.App.2d 287, 289-290, 74 P.2d 1049; Estate of Hartson, 218 Cal. 536, 540, 24 P.2d 171.

Because of the conclusions hereinabove expressed, it becomes unnecessary for us to consider the other questions discussed in the briefs.

The order is reversed and the cause remanded with directions to the court below to enter its decree determining heirship in accordance with the views expressed herein.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

Doris ROBELET, Plaintiff and Respondent,
v.

Victor M. ROBELET, Defendant and Appellant.

Civ. No. 16133.

District Court of Appeal, First District,
Division 2, California.

Jan. 17, 1955.

Rehearing Denied Feb. 16, 1955.

Hearing Denied March 16, 1955.

Dispute over custody of children of divorced parents. The Superior Court, County of San Mateo, A. R. Cotton, J., entered an order from which children's father appealed. The District Court of Appeal, Kaufman, J., held that where children of divorced parents were of tender years, and other things were equal, mother was entitled to their custody.

Order affirmed.

See also, 121 Cal.App.2d 598, 263 P.2d 486.

1. Divorce ⇨303(3)

In proceeding for custody of children of divorced parents, evidence of change in circumstances since entry of order awarding custody to father was sufficient to warrant grant of custody to mother.

2. Infants ⇨19

Requirement that there be a change of circumstances before there can be a change in child custody order is not an iron-clad rule.

3. Infants ⇨19

Welfare and best interests of children is the all important consideration in custody cases.

4. Infants ⇨19

Where children were under 14 years of age, trial court did not abuse discretion in deciding matter of custody without consulting children's opinion, even though different judge who had earlier passed on matter had expressed opinion that children should be given opportunity to express preference.

5. Parent and Child ⇨2(4)

Fitness of a parent to have custody of a child is determined as it exists at time of

hearing, and not as it may have been at some time in past.

6. Divorce ⇨312.6(9)

Refusal to allow father, in dispute over custody of children of divorced parents, to question mother as to her interest in children at an earlier date was, even if error, not reversible.

7. Infants ⇨19

Trial court in custody proceeding was authorized to consider record of prior hearing.

8. Divorce ⇨298(6)

Where children of divorced parents were of tender years, and other things were equal, mother was entitled to their custody. West's Ann.Civil Code, § 138.

Paul M. Hupf, San Francisco, for appellant.

Franklyn M. O'Brien, San Francisco, for respondent.

KAUFMAN, Justice.

This is an appeal from an order of the Superior Court of San Mateo County, made on September 8, 1952, awarding custody and control of the minor children of the parties to this proceeding to their mother, Doris Alvarado, formerly Doris Robelet, the respondent herein.

Victor and Doris Robelet were married on September 21, 1940. Their children Doreen and Victor were born on December 25, 1941, and June 23, 1943. On March 22, 1949, an interlocutory decree of divorce was entered in favor of Doris upon grounds of extreme cruelty, and care, custody and control of the minor children were awarded to her. The final decree of divorce, which incorporated by reference the provisions of the interlocutory decree, was entered on March 22, 1950.

Respondent, Doris Robelet, was at the time of granting the interlocutory decree, seriously ill both physically and mentally and upon the advice of her physician and her attorney, allowed the paternal grandmother of the children to have their physical custody. The grandparents' home had al-

ways been near to the home of the children's parents, and there was a very pleasant relationship between the grandmother and the children. Appellant also lived in the grandparents' home with the children.

The treatment of the mother's illness took a long period of time, but she is now apparently completely recovered both in her physical and mental health.

In April, 1952, respondent married William Alvarado and their home is in Covina, California.

In June, 1952, appellant, Victor Robelet, remarried, and resides in San Mateo County with his present wife and her young daughter whom he has legally adopted.

Appellant applied in June 1952 to the Superior Court of San Mateo County to change the order for custody and control of the children from the mother to him. The matter was heard by Judge Gregory P. Maushart who was at that time sitting in the Superior Court of San Mateo County. On October 3, 1952, he ordered that the interlocutory and final decrees of divorce be modified so as to give the care, custody and control of the children to the father, Victor Robelet, with visitation rights to the mother, and ordered that they should be allowed to visit and remain with her during Easter vacation and from June 1953 till September 1953. In an opinion filed prior to the order, the judge stated that the case was most unusual in that both parties are sincere in their efforts to determine what is for the best interest of the children, and that both parents are fit persons to have their care, custody and control. He stated that he made the order for the purpose of giving the children an opportunity to live with their mother during the summer, and be able to express an intelligent opinion concerning their future place of habitation, and that a further hearing be held in August 1953 prior to the opening of school so that it might be determined whether a further change in the custody order would be for the best interest of the children. The opinion concluded as follows: "It is distinctly to be understood that the order made herein by the Court is without prejudice to

either party to further apply for modification of this order."

The final decree of divorce was modified in accordance with said opinion. The children continued to live in San Mateo County with appellant and his present wife, but visited respondent during Easter vacation. In June, 1953, they went to respondent's home in Covina to spend the summer vacation.

In August, 1953, respondent applied to the Superior Court of San Mateo County for an order changing the custody of the children to her. On September 8, 1953, the matter was heard before Judge A. R. Cotton, who ordered the final decree of divorce and the modification order of October 2, 1952, to be further modified so as to give the care, custody and control of the minor children to the mother, with rights of visitation to the father. The order also reduced the amount of child support in the divorce decree of \$100 per month to \$75.00 per month, since the trial judge considered the appellant's financial obligations at present too onerous to make payment of the full \$100 per month feasible.

It is contended that the trial court in making the modification order awarding custody of the children to the mother, improperly disregarded the previous judgment which awarded custody of the children to the father. Appellant cites *Washburn v. Washburn*, 49 Cal.App.2d 581, 122 P.2d 96 and *Davis v. Davis*, 41 Cal.2d 563, 261 P.2d 729 to the effect that while the court has a broad discretion in such matters, it is the general rule that to warrant the modification of a custody order, there must be substantial evidence of change in circumstances after the entry of the original decree. Appellant argues that the trial court in the August hearing in effect disregarded the prior hearing before Judge Maushart which culminated in the order of October 2, 1952, and instead of limiting the evidence to the period between October 2, 1952 and August 1953, went into the entire matter.

However, it is true, that the modification order made in October, 1952, was made for the purpose of giving the mother's home a trial, but still protecting the father by giv-

ing legal custody to him. The trial judge in making such an order suggested that a further hearing be held in August 1953 to determine whether a further change in the order should be for the best interests of the children.

The best interests of the children could scarcely be determined by the trial judge at the August 1953 hearing without some evidence on the background of the case. Appellant admits that he does not consider the impropriety on the part of the court in considering the entire matter, in itself sufficient to justify a reversal, but maintains that that fact together with the lack of any substantial evidence of any change in circumstances and other facts which he enumerates, sufficient ground for a reversal. Appellant then proceeds to review facts in the history of the case prior to the 1952 hearing which he contends the trial judge disregarded.

A review of the record of the hearing of September 8, 1953, reveals that although the trial court stated that he was going to take the whole matter up, the evidence was confined almost entirely to conditions in the Robelet and Alvarado homes since the remarriages of appellant and respondent in 1952 and the reactions of the children in both those homes since that time, as related to the court by the parties. If the trial court also consulted the record of the hearing before Judge Maushart for background on the case, then it must be presumed that he was cognizant of the facts to which appellant refers, but that he did not regard them as determinative of the matter when considered together with present circumstances.

[1,2] We cannot agree with appellant that no change of circumstances sufficient to warrant the order made herein was proved to the court. Appellant had after his remarriage adopted the little daughter of his second wife, and at the time of the hearing, the Robeleets were expecting a child. The financial situation in appellant's home was such that the trial judge deemed it advisable to cut the child support order from \$100 to \$75 per month. There were no other children in respondent's home.

The testimony showed that the children had made an excellent adjustment in respondent's home and that their health and manners had improved to some extent. Therefore, if it were in all cases necessary to show a change of circumstances to support a modification of a custody order, we feel that a substantial change in circumstances was shown. However, it has been said that the change of circumstances rule "is not an iron-clad rule to which there can be no exceptions." *Cowen v. Cowen*, 100 Cal.App.2d 366, 370, 223 P.2d 666, 669; *Foster v. Foster*, 8 Cal.2d 719, 728, 68 P.2d 719.

[3] The welfare and best interests of the children is the all important consideration in custody cases. *Foster v. Foster*, 8 Cal.2d 719, 68 P.2d 719; *Johnson v. Johnson*, 72 Cal.App.2d 721, 165 P.2d 552; *Newman v. Newman*, 109 Cal.App.2d 359, at page 360, 240 P.2d 682.

[4] It is true that Judge Cotton did not follow out the desire expressed in Judge Maushart's opinion that the children should be given an opportunity to express an intelligent opinion as to their preference. Judge Cotton was not bound by this opinion, however, for the children were under 14 years of age, and the trial judge did not abuse his discretion in deciding the matter without the opinion of the children.

[5-7] Appellant contends finally that error was committed by the trial court in sustaining objection to questions by appellant's counsel which were asked for the purpose of showing a lack of interest on the part of the mother in her children prior to the 1952 hearing. If there had in fact been a lack of interest on the part of the mother in earlier years, still that would not be controlling, if during the immediate past her interest and concern was that of a normal mother. The fitness of a parent to have the custody of a child is determined as it exists at the time of the hearing, and not as it may have been some time in the past. *Prouty v. Prouty*, 16 Cal.2d 190, 194, 105 P.2d 295; *Sorrels v. Sorrels*, 105 Cal.App. 2d 465, 234 P.2d 103. The question was, therefore, not material and relevant, but even if it had been, this error alone would

not warrant a reversal. The trial judge, if he reviewed the prior proceedings in this case, would have noted the testimony in the record given by appellant and his mother on the matter of respondent's interest in her children, and would have weighed against this respondent's testimony of her visits, as well as the fact that her mental and physical illness made it necessary for her to stay away from her children for a long period. The trial court was authorized to consider the record of the prior hearings. *Cowen v. Cowen*, 100 Cal.App.2d 366, 370, 223 P.2d 666, and cases there cited.

[8] The trial judge here also noted that the children were of tender years, that other things being equal, the mother was entitled to their custody. Civil Code, § 138; *Washburn v. Washburn*, 49 Cal.App.2d 581, 588, 122 P.2d 96; *Sorrels v. Sorrels*, 105 Cal.App.2d 465, 468, 234 P.2d 103. His decision is therefore supported by the record and the authorities, and no abuse of discretion appears.

Order affirmed.

NOURSE, P. J., and DOOLING, J.,
concur.



130 Cal.App.2d 176

Mervin A. LEWIS, Plaintiff and Appellant,
v.

COUNTY OF CONTRA COSTA, a political
subdivision of the State of California;
Earl Smith, an individual doing business
under the fictitious name of Earl Smith
Development Organization, Defendants
and Respondents.

Civ. 16175.

District Court of Appeal, First District,
Division 1, California.

Jan. 11, 1955.

Action by mail carrier against landowner and county for personal injuries resulting from fall when mail carrier jumped over

mud covered gutter and slipped on mud covered sidewalk. The Superior Court, County of Contra Costa, Homer W. Patterson, J., entered judgment of no liability on part of defendants, and mail carrier appealed. The District Court of Appeal, Fred B. Wood, J., held that mail carrier who in crossing highway in middle of block jumped over mud filled gutter onto mud covered sidewalk which he knew would be slippery when he could have avoided muddy area by retracing his steps 100 feet or so, assumed risk or was contributorily negligent in so jumping, and, therefore, was not entitled to recover for injuries sustained when he slipped and fell on mud covered walk.

Judgment affirmed.

1. Highways ⇨197(1)

Mail carrier who in crossing public highway in middle of block jumped over mud filled gutter onto mud covered sidewalk which he knew would be slippery when he could have avoided muddy area by retracing his steps 100 feet or so, assumed risk or was contributorily negligent in so jumping, and, therefore, was not entitled to recover for injuries sustained when he slipped and fell on mud covered walk.

2. Damages ⇨59

Damages recoverable by an injured party cannot be reduced in the amount of payments for his loss from a source wholly independent of the wrongdoer.

3. Appeal and Error ⇨1052(5) Damages ⇨182

In mail carrier's action for personal injuries resulting from fall when he jumped over mud covered gutter and slipped on mud covered sidewalk, admission of evidence that at time of accident mail carrier had sufficient sick leave to cover period of disability was error in respect to question of damages, but it was not prejudicial error in view of fact that jury found no liability and did not award damages.

4. Appeal and Error ⇨1050(1)

In mail carrier's action for personal injuries suffered in fall, evidence that mail carrier had enough sick leave coming to cover period of disability did not tend to

impeach his description of accident and surrounding circumstances, and its admission was not prejudicial error, notwithstanding his contention that jury might have inferred therefrom that he was trying to recover twice for same injury.

5. Appeal and Error ⇨1064(1)

Highways ⇨214

In mail carrier's action for personal injuries resulting from fall when he jumped over mud covered gutter at edge of highway and slipped on mud covered sidewalk, assumption of risk instructions, which were extended to include persons who, in exercise of ordinary care, would know that danger existed, were erroneous, but giving those instructions was not prejudicial error where evidence indicated mail carrier had actual knowledge of the hazard.

6. Negligence ⇨66(1)

Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge.

7. Counties ⇨141

Highways ⇨214

A County is not responsible for injuries caused by conditions maintained by others on property neither owned by nor under control of County, and in mail carrier's personal injury action against landowner and County for injuries sustained when he jumped from public highway over mud covered gutter and slipped on mud covered sidewalk, his requested instruction that if landowner, by permitting the mud to remain on sidewalk, was maintaining a public nuisance, county could have had such nuisance abated, was erroneous. Government Code, § 53050-53056.

1. Plaintiff said his mail was so "cased" as to call for zigzagging. Yet, a post office official under whose supervision plaintiff worked testified it is the policy of the post office to route a carrier down one side of a street and back up the other, not to require zigzagging; that it is the practice to predetermine and "case" the route to assure delivery in the quickest possible time but that a carrier may alter

Russell F. King, Richmond, for appellant.

Carlson, Collins, Gordon & Bold and John Ormasa, Richmond, for respondent Contra Costa County.

Hagar, Crosby, Rosson & Vendt, Oakland, Lewis E. Lercara, Oakland, of counsel, for respondent Earl Smith.

FRED B. WOOD, Justice.

Plaintiff was injured when, in crossing a public highway, he jumped over a mud filled gutter onto a mud covered sidewalk, slipped and fell.

He joined Earl Smith and the County of Contra Costa as defendants: Smith because, allegedly, excavations on his nearby land loosened the soil which was carried down to and onto the sidewalk and highway by the surface run-off whenever it rained; the county, because it allegedly suffered the alleged nuisance on Smith's land to continue unabated and failed to remedy a dangerous and defective condition in the highway.

Verdict was for the defendants and plaintiff has appealed. He claims insufficiency of the evidence, error in the admission of evidence, and error in the giving and refusing of instructions.

[1] (1) *The evidence amply supports the verdict*, viewed either as a case of assumption of risk or of contributory negligence.

Plaintiff, a mail carrier of many years' experience, was delivering mail afoot. He had been "zigzagging" back and forth across the highway in making deliveries.¹ He had been proceeding in this fashion along Canyon Road for some distance without difficulty until, at his next crossing (not at a street intersection; it was in the middle of a block), he encountered an area where wet mud filled the gutter and covered the

his path to meet changed conditions; when confronted by a situation he has discretion to decide what to do. Plaintiff concurred, stating that if asked the same questions he would give the same answers. Even if his employer accorded plaintiff no such discretion, that would not change the nature and scope of the defendants' duties toward the plaintiff.

sidewalk along the front of 3 or 4 fifty-foot lots. Instead of going around this area he jumped across the gutter onto the sidewalk, skidded and fell. He admitted that he knew he was jumping on mud and knew the mud would be slippery.

[2,3] (2) *Was it prejudicially erroneous to admit evidence that at the time of the accident plaintiff had accumulated sufficient sick leave to cover the period of his disablement?*

It was error to admit this evidence over plaintiff's objection. The general principle is that damages recoverable by an injured party can not be reduced in the amount of payments for his loss from a source wholly independent of the wrongdoer. Thus, in *Gersick v. Shilling*, 97 Cal.App.2d 641, 649-650, 218 P.2d 583, it was held error to elicit from plaintiff the information that her hospital bills had been paid by the Blue Cross and that she had drawn \$460 from the United States Employment Service for disability. In *Anheuser-Busch, Inc., v. Starley*, 28 Cal.2d 347, 170 P.2d 448, 166 A.L.R. 198, plaintiff sued a person whose car allegedly collided with the truck of a common carrier and injured property of the plaintiff which was being transported by the carrier. The fact that the carrier had compensated plaintiff for its loss was no defense to the action. The court stated the rule and added "[t]he rule has been applied where the independent source is pension systems or charity." 28 Cal.2d at page 349, 170 P.2d at page 450. That rule seems especially applicable here. Plaintiff used up his accumulated sick leave. In a very real sense of the term it is as if he had drawn upon his savings account in an amount equal to his salary during the period of his disablement.

But this error was not prejudicial. The verdict clearly indicates that the jury found there was no liability and did not reach the point of fixing the amount of damages sustained.

[4] Plaintiff contends that this evidence operated as an "unfair attack" upon his "credibility" as a witness "because the jury

might infer he was attempting to recover twice for the same injury." We fail to see the logic of such an argument. The evidence had no tendency to impeach his own description of the accident and the surrounding circumstances.

[5,6] (3) *Was the giving of certain erroneous instructions on the assumption of risk prejudicial?* The instructions on assumption of risk were not limited to the situation in which a person having actual knowledge of a dangerous condition voluntarily exposes himself to that danger but extended to a person who "in the exercise of ordinary care would know" that the danger exists.² The quoted portion has been disapproved in *Hayes v. Richfield Oil Corp.*, 38 Cal.2d 375, 384-385, 240 P.2d 580, 585, and in *Prescott v. Ralph's Grocery Co.*, 42 Cal.2d 158, 161-162, 265 P.2d 904, holding that there must be actual knowledge or its equivalent.

This error, however, was not prejudicial. The facts demonstrate that plaintiff actually knew or must have known of the hazard. He testified that he knew of the presence of mud in the gutter and on the sidewalk and that the mud was slippery. Yet, instead of going beyond the point of hazard or of retracing his steps a mere 100 feet or so to the point where he had last crossed the street without difficulty, he took a chance and jumped, with the untoward results already narrated. In explanation, he says he did not at the time know how thick the mud on the sidewalk was (there is evidence it was an inch thick), suggesting that in the absence of such knowledge he was not fully aware of the hazard. We do not see the logic of that argument. He was thoroughly aware that the mud covered the sidewalk and that it was slippery. That would seem sufficient to put any adult person upon actual notice of the hazard. "Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge * * *." *Hayes v. Richfield Oil Corp.*, supra, 38 Cal.2d 375, 385, 240 P.2d 580, 585, and *Prescott v.*

2. These instructions included B.A.J.I. Nos. 207 and 207-B, third revised edition.

They were given at the request of defendant Smith.

Ralph's Grocery Co., supra, 42 Cal.2d 158, 162, 265 P.2d 904. As to the type of risks "which any one of adult age must be taken to appreciate," see Prosser on Torts (1941), 386-387, § 51 and authorities there cited.

It is improbable that the jury would have rendered a different verdict had the erroneous portion of the instructions been omitted. The jury did ask a rereading of the instructions concerning assumption of risk and contributory negligence, which were thereupon again read to them at length. That of itself does not suggest to us that the jury may have applied the assumption of risk doctrine upon the theory that defendant was unaware of the hazard but would have been aware of it had he exercised due care. If they did apply the assumption of risk doctrine, we think they must have applied it upon the theory of actual knowledge. In view of these circumstances we conclude that the error under discussion was not prejudicial.

(4) *Was it prejudicial error to refuse certain instructions requested by the plaintiff concerning the duties of the county?*

[7] One of these instructions read as follows: "* * * If you find that defendant Earl Smith had created or was maintaining a public nuisance, you are further instructed that defendant County of Contra Costa could, by proper application to the District Attorney's office, have such nuisance abated." Even if we assume that the defendant Smith was maintaining a nuisance, it does not follow that the county owed plaintiff a duty to abate that nuisance or respond in damages to the plaintiff for injuries caused by the condition which constituted the nuisance. Plaintiff cites no authority for any such doctrine. The logic of plaintiff's argument would comprehend a liability upon the part of the county or of the state whenever any person suffers personal injury or property damage at the hands of any person maintaining a nuisance if the county or the state fails to abate the nuisance after reasonable notice of its existence. There is no such doctrine. The measure of county liability is defined by statute, the Public Liability Law, Gov.Code, §§ 53050-53056, which imposes a liability under

certain conditions in respect to injuries resulting from dangerous or defective property of the county. The county is not thereby made responsible for injuries caused by conditions maintained by others upon property neither owned by nor under the control of the county.

Of the following instruction requested by the plaintiff the court gave the first sentence but deleted the remainder of it: "The County of Contra Costa not only has the duty to repair a dangerous or defective condition of its streets and highways *after* it occurs, but to reasonably anticipate that a pre-existing condition of which it has notice, will become dangerous when affected by natural elements.

"That is to say, that if you find from all the evidence that defendant County of Contra Costa had actual or constructive notice of a pre-existing condition [which] when affected by the natural elements, made Canyon Road dangerous for ordinary use, they would be required to exercise ordinary care to correct or alleviate such pre-existing condition so as to keep their streets and highways reasonably safe at all times." The county claims that the deleted portion of this instruction would have informed the jury that the county was under a duty to correct a condition on land not belonging to the county and over which the county had no control. We think that is a reasonable interpretation. The "pre-existing condition" mentioned reasonably had reference to the condition of excavated and loosened soil on defendant Smith's land and the "natural elements" reasonably referred to the surface run-off during the rainy season which carried some of that eroded soil down to the county road and deposited it in the form of mud in the gutter and upon the sidewalk. That such was plaintiff's intent when he used those terms in the rejected portion of the instruction, appears quite clearly from his brief. In effect, therefore, the deleted portion of this instruction would have erroneously advised the jury that the county was legally responsible to the plaintiff for the conditions allegedly maintained by the defendant Smith upon his land. *Shea v. City of San Bernardino*, 7 Cal.2d 688, 692-693,

62 P.2d 365, is inapplicable. It involved the duties of a city toward the public in relation to conditions at a grade crossing; conditions in a city street, not conditions on private lands under private control.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.



130 Cal.App.2d 235

In the Matter of the ESTATE of Elizabeth
L. LA BRIE, also known as Mrs. Louis
R. LaBrie, Deceased.

William ATWOOD, Proponent and Appellant,
v.

Velma A. LA VOY, Contestant and
Respondent.
Civ. 5102.

District Court of Appeal, Fourth District,
California.
Jan. 14, 1955.

Petition for revocation of a probate of a will. From an order of the Superior Court of San Diego County, C. M. Monroe, J., determining heirship and construing a will, the proponent appeals. The District Court of Appeal, Barnard, P. J., held that where will after naming the only child of testatrix disposed of entire estate by leaving it to another, with a further provision for a contingent beneficiary, an intentional omission to provide for the child of the testatrix was clearly shown, and the child was not entitled to take as if the testatrix had died intestate.

Order reversed with instruction.

I. Descent and Distribution §47(2)

In order for a successful claim to be made under the Probate Code section respecting pretermitted children, there must be an omission to provide for the child in the will which must fail to show that the omission was intentional. Probate Code, § 90.

2. Descent and Distribution §47(2)

Under statute respecting pretermitted children, words of the will must show that testator had omitted persons in mind, and although having them in mind, has intentionally omitted to provide for them, and in order to disinherit children, the intent that they shall not so share in the testator's estate must appear on the face of the will strongly and convincingly. Probate Code, § 90.

3. Descent and Distribution §47(2)

Where will after naming the only child of testatrix disposed of entire estate by leaving it to another, with a further provision for a contingent beneficiary, an intentional omission to provide for the child of the testatrix was clearly shown and child was not entitled to take as if the testatrix had died intestate. Probate Code, § 90.

Brooks Crabtree, Charles E. Burch, Jr.,
San Diego, for appellant.

Ruel Liggett, Roy M. Cleator, E. C.
Davis, Olney R. Thorn, San Diego, for
respondent.

BARNARD, Presiding Justice.

This is an appeal from an order determining heirship and construing a will. The testatrix died on September 23, 1952, leaving a will dated May 19, 1949, at which time she was 60 years of age. The first paragraph of the will reads:

"I declare that I am married, the name of my husband being Louis R. LaBrie, and that we have no children of our marriage; but that I have one child of a previous marriage, whose name is now Velma Blanche LaVoy."

The second paragraph requests her executor to pay any debts owed by her. The third paragraph reads:

"I give, devise and bequeath any and all property of any kind whatever, real, personal or mixed, and wheresoever the same might be situated, of which I may die seized or possessed or to which I may be entitled at the time of my death, to my husband, Louis R. LaBrie, to have and to hold the same as his sole and separate property."

The fourth paragraph leaves her entire estate to her nephew William Atwood, in the event of the previous death of her husband. The fifth paragraph reads:

"To any other person whom I may have either intentionally or unintentionally omitted from mentioning in this my Last Will and Testament, I leave the sum of One Dollar (\$1.00), upon such person proving just claim thereto."

The will was admitted to probate, the testatrix' husband having predeceased her, and the Bank of America was appointed executor. The daughter Velma LaVoy, under the name of Velma A. LaVoy, filed a contest of the will after probate alleging that her mother was not of sound mind when the will was executed, that the execution of the will was obtained by undue influence, and that she was entitled to the property under section 90 of the Probate Code in that she was a child of the deceased and it does not appear from the will that the testatrix intentionally omitted providing for her. The executor filed a petition for construction of the will and a determination of heirship in connection therewith, alleging that the question with respect to the application of section 90 of the Probate Code should be determined by the court.

At a jury trial upon the contest the court ruled as a matter of law that there was no evidence legally sufficient to warrant the submission of the issue as to mental capacity to the jury, and submitted the issue of undue influence as the only issue to be determined by the jury. The jury specially found that the will had not been executed as the result of any undue influence. The court entered a judgment upon the verdict, and decreed that the petition for a revocation of the probate of the will be denied. The court then made an order determining heirship and construing the will, decreeing that Velma A. LaVoy is a pretermitted child of the deceased and her only heir at law, and that by reason of section 90 of the Probate Code Velma A. LaVoy succeeds to the same share of the estate as if the testatrix had died intestate. It was further ordered that the executor distribute the

entire estate, less administration expenses, to the said pretermitted heir, Velma A. LaVoy. William Atwood, as sole beneficiary under the will, has appealed from that order.

The sole question presented is whether or not the respondent Velma A. LaVoy was disinherited by this will; whether the omission to provide for her was intentional within the meaning of section 90 of the Probate Code. That section, so far as material here, reads:

"When a testator omits to provide in his will for any of his children,
* * * unless it appears from the will that such omission was intentional, such child * * * succeeds to the same share in the estate of the testator as if he had died intestate."

[1, 2] Most of the problems in construing this section have arisen in cases where the omitted person was not specifically mentioned in the will, and where the solution has depended entirely upon construing the other language used in the will. It is well settled that in order for a successful claim to be made under section 90 "there must be an omission to provide for the child in the will, and the will must fail to show that the omission was intentional." *In re Estate of Lindsay*, 176 Cal. 238, 168 P. 113. Under the statute it must appear from the will itself that the omission was intentional. The words of the will must show that the testator had the omitted persons in mind and, although having them in mind, has intentionally omitted to provide for them. *In re Estate of Trickett*, 197 Cal. 20, 239 P. 406; *In re Estate of Talmage*, 114 Cal.App.2d 18, 249 P.2d 345. It was said in *Re Estate of Hassell*, 168 Cal. 287, 142 P. 838, 839 that in order to disinherit children "the intent that they shall not so share must appear upon the face of the will strongly and convincingly." *In re Stevens' Estate*, 83 Cal. 322, 23 P. 379, 381, the court said:

"We think that the correct rule is that the words of the will must show, as above pointed out, that the testator had the person omitted in his mind, and, having her so in his mind, had omitted to make any mention of her."

It would seem that an intention to disinherit would naturally and usually appear where the omitted person is actually named and described as a child, and then is omitted as a beneficiary by a provision leaving the entire estate to another. An intentional omission is further indicated here by another provision leaving the entire estate to the nephew, in the event of the previous death of the husband. In *Re Estate of Fanning*, 8 Cal.2d 229, 64 P.2d 951, in a will stating that "having in mind my children" and then naming four sons, the testator left his entire estate to a named daughter. It was there held that the expression "having in mind my children," as there used, disclosed an intentional omission of the four sons so that they would not take as pretermitted heirs. A similar situation here appears, and we see no distinction in principle between the facts of that case and those here involved.

[3] This will itself discloses, beyond question, that the testatrix had this daughter in mind, and that she omitted to provide for her. All that the statute requires is that it shall also appear from the will that "such omission was intentional". In this will, immediately after naming this child, the testatrix disposed of her entire estate by leaving it to another, with a further provision for a contingent beneficiary, as to the entire estate, in the event of the previous death of the first. An intentional omission to provide for this child could not more clearly be made to appear, except by actually stating in the will that nothing was left to the child thus named. The respondent argues that there must be some such "apt language to demonstrate an attempt to disinherit." To require such an express statement would be to add something to the statute which the legislature did not see fit to require. Under the established rules we think it clearly and convincingly appears from the will itself that the testatrix not only had this daughter in mind but, having her in mind, intentionally omitted any provision for her.

While the respondent does not come within the class referred to in the fifth paragraph, since she was mentioned in the will,

that paragraph rather strongly indicates that the testatrix intended to make no provision for anyone except her named beneficiaries, and that she was not omitting to provide for this daughter by mere inadvertence.

Under the statute and the established rules, it must be held that the trial court's construction of this will is not sustained by the language therein used. The order appealed from is reversed, with instructions to order distribution of this estate in accordance with the views herein expressed.

GRIFFIN and MUSSELL, JJ., concur.



130 Cal.App.2d 7

**Robert E. BARBER et al., Petitioners
and Appellants,**

v.

**CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al.,
Respondents.**

**Harold CROUSE et al., Petitioners
and Appellants,**

v.

**CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al.,
Respondents.**

Civ. 16035, 16036.

**District Court of Appeal, First District,
Division 1, California.**

Dec. 30, 1954.

Hearing Denied Feb. 24, 1955.

Mandate actions for review of determinations by Unemployment Insurance Appeals Board denying unemployment benefits. Superior Court, City and County of San Francisco, W. T. Sweigert, J., denied the petitions and petitioners appealed. The proceedings were consolidated for purpose of appeal. The District Court of Appeal, Peters, P. J., held that where, under terms of the union contract with the employers' association, maritime workers were as-

signed in rotation at union hiring hall to various employers and had a contract right to such work in rotation and no right to seek work independently, a registered worker who was without work during strike period had "left his work" because of a trade dispute even if he had been temporarily unassigned when strike commenced.

Affirmed.

1. Mandamus ¶172

In mandate actions involving right to unemployment benefits, instituted by certain maritime workers who had been temporarily without assignment when strike commenced, allegations in petitions that actions were brought on behalf of all workers who had been denied benefits under similar circumstances did not make actions "class actions" so as to determine rights of any persons not named as actual parties. Code Civ. Proc. § 382.

See publication Words and Phrases, for other judicial constructions and definitions of "Class Action".

2. Parties ¶11

Minimum requirements of "class action" under statutory language are (1) well-defined community of interest in questions of law and fact between those bringing suit and those claimed to be represented, and (2) suing and non-suing groups must constitute a definite ascertainable class, and if rights of each member of class are dependent upon facts applicable to him, there is not requisite ascertainable class required for a representative suit. Code Civ. Proc. § 382.

3. Social Security and Public Welfare ¶430

Where terms of union contract with employers' association were in effect under Taft-Hartley injunction and under such terms maritime workers were assigned in rotation in hiring hall to various employers and had contract right to such work in rotation and no right to seek work independently, registered worker who was without work during strike period had "left his work" because of a trade dispute even if he had been temporarily unassigned when strike commenced, and such worker was ineligible for unemployment benefits for

such period. Gen. Laws, Act 8780d, § 56(a); Labor Management Relations Act, 1947, 29 U.S.C.A. § 141 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Left His Work".

4. Social Security and Public Welfare ¶510

Work which maritime workers had left because of trade dispute was not "new work" as to them, though, because of union hiring-hall procedure, new employers might be involved, and statute providing that unemployment benefits should not be denied one for refusing new work if position is vacant because of strike was not applicable. Gen. Laws, Act 8780d, §§ 13(b) (1), 56(a); 26 U.S.C.A. §§ 1602, 1603.

See publication Words and Phrases, for other judicial constructions and definitions of "New Work".

5. Social Security and Public Welfare ¶510

An employee cannot be denied unemployment benefits because he refuses to become strike breaker, but that rule does not apply to work in claimant's last employment, which is not "new work". Gen. Laws, Act 8780d, §§ 13(b) (1), 56(a); 26 U.S.C.A. §§ 1602, 1603.

6. Social Security and Public Welfare ¶576, 651

In action for review of determinations by Unemployment Insurance Appeals Board denying unemployment benefits, documents relating to hearing by Secretary of Labor to determine whether California law was in conformity with federal law on subject of unemployment benefits was relevant on issue of interpreting California law, but improper exclusion of such documents was harmless error. Gen. Laws, Act 8780d, §§ 13(b) (1), 56(a); 26 U.S.C.A. §§ 1602, 1603.

Gladstein, Andersen & Leonard, Lloyd E. McMurray, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw, Vincent P. Lafferty, Deputy Attys. Gen., for respondent California Employment Stabilization Commission.

Richard Ernst, San Francisco, for respondent Pacific Maritime Ass'n.

PETERS, Presiding Justice.

In these two cases, each involving a group of claimants, the Unemployment Insurance Appeals Board denied unemployment benefits to the respective petitioners. Both groups sought a review of these determinations by writs of mandate in the Superior Court pursuant to the provisions of section 1094.5 of the Code of Civil Procedure. These petitions were denied. Petitioners appeal. The two proceedings have been consolidated for the purpose of appeal.

In the Barber action all appellants are members of the National Union of Marine Cooks and Stewards, while in the Crouse action all appellants are merchant seamen belonging to the Marine Firemen, Oilers, Watertenders and Wipers Union. In addition, each group of claimants avers that they are not only suing on their own behalf, but also on behalf of all others similarly situated. The theory of the claims is that prior to September 2, 1948, each of the claimants had left his employment and was unemployed, awaiting assignment to another job from his hiring hall. On that date the unions of which appellants are members engaged in a trade dispute with, and refused to work on any ships operated by, the Pacific American Shipowners' Association, since superseded by the Pacific Maritime Association. This association represents the owners and operators of at least 90 per cent of all ships operating out of San Francisco harbor. The strike continued from September 2nd until December 3, 1948. Appellants claim that they are entitled to unemployment benefits for that period. At oral argument appellants claimed that some of the petitioners had been denied benefits that had accrued before September 2nd, but in the memorandum filed after argument they have failed to substantiate this charge by reference to the record. The opinions of the Appeals Board and the decision of the Superior Court make it perfectly clear that only the period of the strike was considered and passed upon.

In filing their claims for unemployment benefits covering the period of the work stoppage, the appellants averred that they all had been unemployed prior to the dispute for reasons unconnected with that dispute. This allegation is true in the sense that all the appellants had completed prior assignments and were registered for employment at their respective hiring halls. None of the appellants was working for a particular employer, or drawing wages from a particular employer, on September 2, 1948. The Department of Employment held that all of the appellants were unemployed on September 2, 1948, had not left their employment because of a trade dispute, and were entitled to unemployment benefits. On application to the Board, the referee in the Barber case came to the same conclusion, but the referee in the Crouse case ruled that the appellants in that case had left their employment because of the trade dispute within the meaning of section 56(a) of the Unemployment Insurance Act. (3 Deering's Gen.Laws, Act No. 8780d. This statute, somewhat modified, is now codified in the Unemployment Insurance Code.) On separate appeals to the Unemployment Insurance Appeals Board that Board, in separate opinions, reversed the referee in the Barber case and affirmed the referee in the Crouse case, thus denying to the appellants in both cases the right to unemployment benefits. Upon review of these decisions by writ of mandate to the Superior Court that court re-examined the record of the administrative hearings, rejected certain additional exhibits offered by appellants, and found the facts substantially as found by the Appeals Board. It concluded from these facts that all appellants had left their work because of the trade dispute, and were, therefore, not entitled to unemployment benefits.

It should be mentioned that as to appellants Crouse, Mercado and Souza, the Appeals Board denied them benefits on the ground that their rights thereto had been determined adversely to them in a prior case. These appellants alleged in their petitions in the Crouse case that all of the petitioners in the prior case had been denied

benefits solely on the ground that their appeal to the Board had not been timely filed, and averred that such ruling constituted an abuse of discretion. There is nothing in the present record to support this averment. The Superior Court did not make a finding as to this allegation, but simply denied the writ as to them on the same grounds as was done in reference to all other appellants. They will not be separately considered in this opinion.

The right to benefits, or conversely, the lack of any right to benefits, must turn upon the proper interpretation of the provisions of the Unemployment Insurance Act as it read in 1948. 3 Deering's Gen. Laws, Act No. 8780d. The basic section involved is section 56(a). It then read:

"An individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him under any of the following conditions:

"(a) If he left his work because of a trade dispute and for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed."

Both the Appeals Board and the Superior Court held that, under this section, the appellants had left their work as a result of the trade dispute, remained unemployed because of that dispute, and during the period of the strike would not have accepted employment with any of the employers comprising the employer's association. The appellants contend that prior to the trade dispute they were unemployed, that they did not leave their work because of the trade dispute, and that they were not unemployed because of the trade dispute within the meaning of section 56(a).

In order to understand the proper application of this section to these cases reference must be made to the rather unique hiring procedures applicable to members of the two unions here involved.

The appellants, as union members, worked under collective contracts entered into between the unions and the employer's association, the latter representing nearly all steamship companies operated out of

San Francisco. These agreements included provisions for preferential hiring, that is, the employers agreed to give preference in employment to members of the unions. All such employees were to be hired through the union hiring halls. Each union maintained a hiring hall for its respective members and the employers had no voice in their operation. Employers placed orders for workers with the union by telephone and indicated the number of men wanted, the required ratings or qualifications, and time and place to report. In order to be eligible for work a member had to be registered with the union. Upon registration a printed card called a "shipping card" was issued to the member, giving the exact time of registration and a number to each registrant. Regular attendance at union meetings was a requisite to maintaining active registration. The dispatcher each hour of each working day announced to those present in the hall the jobs that were open, and the qualifications of the vacant positions. A member could, if he so desired, present his shipping card by way of application for the announced opening. If the dispatcher found him qualified to fill the position and if his registration was the oldest active one in point of time, he would be issued an assignment card designating the vessel to which he was to report. Under the collective bargaining agreements it was permissible for a seaman to continue in employment for one employer for an indefinite period if it were mutually agreeable, but in most cases employment with a single company did not extend beyond one or two voyages. A registrant was privileged to refuse three offers of work. If he refused a fourth offer, his current registration was forfeited and he would be required to re-register. All registrants were required to re-register every 45 days. Non-union persons were permitted to register at the hiring hall, and if no union man was available for an open position, the non-union man would be assigned by the dispatcher to the proper ship.

By these agreements, it is apparent that the employees had bargained away their right to negotiate for employment with any particular employer, and the employer had,

for all practical purposes, bargained away his right to negotiate in reference to employment with particular employees. Under this hiring hall system, except in minor particulars not here relevant, each registered member of the union had a contract right to his proportion of the work available.

The collective bargaining agreements between the unions and the employers' association expired on June 15, 1948. Negotiations to amend the agreements had begun prior to this date and continued until September 1, 1948. Between June 15th and September 1st, although the contracts had expired, the employers continued to place orders with the hiring halls and the unions continued to dispatch their members in fulfillment of such orders. In other words, the provisions of the collective bargaining agreements were observed although the contracts had expired. This was done by reason of an injunction issued by the United States District Court under the provisions of the Taft-Hartley Act, 29 U.S.C.A. § 141 et seq. At the conclusion of the statutory 80-day cooling-off period, the final offers of both sides were rejected, and the unions established picket lines at the various piers where vessels of the employers were docked. The cooks and stewards union voted not to work without a contract, and the marine firemen, while not calling a strike under the procedures outlined in its constitution, nevertheless referred to the situation as a "strike." The union officials expressed the view that "we can't work without a contract."

Members of the employers' association did not place any orders for union men during the period September 2 to December 2, 1948. When any of their vessels docked at ports in the United States, the union members refused to continue their work. Ultimately, a new collective bargaining agree-

ment was reached by the disputants on December 2, 1948, and the work stoppage ended. These cases involve the right to unemployment benefits during the period September 2 to December 2, 1948.

Before discussing the legal rights of the parties some generalizations can be made about appellants. They have not seen fit in their briefs to point out by transcript references what appears therein as to the actions of each appellant prior to and during the strike, singling out only a very few of the appellants for this purpose. We have, however, read the administrative transcripts. From them it appears that each of the appellants is a union member. Each appellant, for a variety of reasons, was "on the beach" prior to the commencement of the strike. Each appellant had registered for employment with his hiring hall,¹ and thus maintained his status in the pool of available seamen. The record also shows that practically every appellant actively participated in the strike. All were issued picket cards. Some were assigned to picket duty at the piers for 6 hours every other day. Some helped around the union hall, or were excused by a union clearance committee. Some worked in the pickets' soup kitchen.

Is this a class suit?

[1, 2] The first point to be determined is whether this is a class suit. In their respective petitions appellants alleged that the actions were brought not only on behalf of the named claimants, but also on behalf of many "hundreds" of unnamed merchant seamen in California who have been denied unemployment insurance benefits under substantially similar circumstances as were the named appellants. Respondents, who are the officials of the Employment Stabilization Commission, the Director of Employment and the Unemployment Insurance Board,² unsuccessfully attempted by a pre-

1. The one exception is Ernest Buffman, named as an appellant in the Crouse appeal. He had apparently withdrawn from the maritime industry in June of 1948. His case was specifically withdrawn from consideration when the Crouse proceeding came before the Appeals Board. He was apparently erroneously included in

the mandate proceeding and in the notice of appeal.

2. The Pacific American Shipowners' Association, now the Pacific Maritime Association, has filed separate briefs in support of the trial court's determinations.

trial motion to have these class suit allegations stricken from the petitions. After trial of the mandate proceeding, however, the Superior Court specifically found that the allegations that this was a class action were untrue. On these appeals the contesting parties argue pro and con the merits of this ruling. Most of these arguments confuse the questions of who are proper, necessary or indispensable parties with the question of whether or not this is a class suit. (For a discussion of necessary and indispensable parties see 2 Witkin, California Procedure, p. 1049, § 72; for a discussion of class suits see 2 Witkin, California Procedure, p. 1079, § 99.) This confusion arises, apparently, because section 382 of the Code of Civil Procedure combines the subject of who must be joined in an action with the subject of class suits. The first part of the section deals with joinder. The last phrase of the section provides for class suits in the following language: "and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

It is certain that the minimum requirements of a class suit under this language are (1) there must exist a well-defined community of interest in questions of law and fact between those bringing the suit and those claimed to be represented, and (2) the suing and non-suing groups must constitute a definite ascertainable class. If the rights of each member of the class are dependent upon facts applicable only to him, there is not the requisite ascertainable class required for a representative suit. This was clearly illustrated in *Weaver v. Pasadena Tournament of Roses*, 32 Cal.2d 833, 198 P.2d 514. See also *Parker v. Bowron*, 40 Cal.2d 344, 254 P.2d 6.

32 Cal.2d at page 838, 198 P.2d at page 517, of the *Weaver* case the court stated:

"But plaintiffs misconstrue the nature of this litigation. The causes of action of the several plaintiffs and the other unnamed aggrieved individuals are separate and distinct. The question, as to each individual

plaintiff, is whether *he* 'as a person over the age of twenty-one years' presented himself and demanded admittance to the game, whether *he* tendered the price of the ticket, and whether, as to *him*, the refusal of admission was wrongful under section 53 of the Civil Code * * *. Moreover, other independent factors of consideration arise in connection with the respective individual claims * * *. Thus, a decision favorable or adverse to these plaintiffs—or any one of them—could not determine the rights of any of the unnamed parties whom plaintiffs purport to represent."

The following quotations, 32 Cal.2d at pages 839 and 842, 198 P.2d at pages 518, 520, are also applicable:

"In the present case there is no ascertainable class, such as the stockholders, bondholders, or creditors of an organization. Rather, there is only a large number of individuals, each of whom may or may not have, or care to assert, a claim against the operators of the 1947 Rose Bowl Game for the alleged wrongful refusal of admission thereto. * * *

"* * * Rather, these unknown parties are ascertainable only insofar as each may come forward and individually present proof of all the facts necessary to authorize a recovery in accordance with the merits of his particular case, and judgment in one would by no means be a judgment in any other. Plaintiffs here do not claim to represent an association or protective committee, nor do they present any reasonable basis for ascertaining the members of the alleged class for whom they seek to act in this litigation."

In the instant case, by the very nature of the facts, each of the named claimants must stand or fall upon facts applicable only to himself. Obviously, the status of each claimant as to his employment or unemployment prior to the trade dispute and his actions during the trade dispute depend upon the facts applicable to that claimant. Conceivably, there could be an almost indefinite number of factual situations applicable to the "many hundreds" of those claimed to be similarly situated

that appellants seek to make parties to this action without their knowledge, consent or participation. Quite clearly a judgment that Crouse or Barber is entitled or not entitled to benefits could not or should not operate as *res judicata* as to those not parties. Thus, it is quite clear that the trial court properly determined that this was not a class suit.

Under section 56(a) are appellants barred from unemployment benefits?

[3] The Appeals Board and the Superior Court answered this question in the affirmative, and we think correctly so. Appellants' argument is relatively simple. All appellants were "on the beach" on September 2, 1948, when the work stoppage began, in the sense that they were not working for any particular employer. Therefore, say appellants, none of them "left his work" because of a trade dispute. They were "unemployed" when the work stoppage started for reasons unrelated to the trade dispute. Therefore, say appellants, section 56(a) has no application. Appellants contend that the Superior Court must have held that membership in the respective unions alone was sufficient to disqualify them, because that, so it is argued, constitutes appellants' only connection with the trade dispute.

The problem is not so simple. While it must be conceded, and respondents do concede, that union membership alone is not sufficient to disqualify a claimant, this case involves more than mere union membership. Here, under the collective bargaining agreements the employers agreed to hire through the hiring halls under a procedure that gave each union member a contract right to his proportional share of work. As already pointed out, under the collective bargaining agreements, the employees bargained away their right to seek work from or to negotiate with individual employers, and the employers bargained away their right to negotiate with individual employees. Under this system, each registered member, although technically out of work, had a contract right to his proportional share of all work available. Under such circumstances, it

is settled by prior decisions, that all registered members have such a group attachment to all available work that when a strike is called, and a work stoppage results, it must be held that each such registered member "left his work" because of the trade dispute, and is therefore disqualified from receiving benefits under section 56(a).

The three leading cases on this subject, all decided on the same day, are *Matson Terminals, Inc. v. California Emp. Comm.*, 24 Cal.2d 695, 151 P.2d 202; *American Hawaiian S. S. Co. v. California Emp. Comm.*, 24 Cal.2d 716, 151 P.2d 213; and *Grace & Co. v. California Emp. Comm.*, 24 Cal.2d 720, 151 P.2d 215.

The Matson case is the key case. It involved longshoremen who refused to work because they refused to cross a picket line set up by the Ship Clerks Union. In *Bodinson Mfg. Co. v. California Employment Comm.*, 17 Cal.2d 321, 109 P.2d 935, the Supreme Court had held that an employed union member who refused to work because another union had set up a picket line had "left his work" because of a trade dispute and was not entitled to benefits under section 56(a). Thus, the only question was whether, under the facts in the Matson case, the longshoremen who refused to cross the picket line had "left" their work because of a trade dispute. These longshoremen operated under a hiring hall procedure set up by agreement between the employers and the longshoremen's union that was substantially similar to the one here involved. The only substantial difference between the Matson agreement and those here involved was that in the Matson case the hiring hall was jointly operated by the employers and the union, while in the instant case the collective bargaining agreements provide for union operation. But the basic purpose of this hiring hall procedure was the same in both cases. In the Matson case the court stated that by such hiring procedure the union "seeks to make work opportunities available to all longshoremen equally by dispatching them in rotation to jobs." 24 Cal.2d at page 698, 151 P.2d at page 204.

That same purpose is equally apparent in the instant cases.

The longshoremen, in the Matson case like the appellants in the instant cases, worked intermittently for various employers. When the strike was called by the Ship Clerks' Union on November 10, 1939, some of the longshoremen were working for particular employers, others, like the claimants in the instant case, were registered at the hiring hall and not working, while others were working for employers not involved in the strike. This last group worked until their particular assignments were finished, when they, like the others, refused to work. All were denied benefits.

The administrative board had allowed all claimants unemployment benefits for the period of the strike. In reversing the Commission as to all claimants, and with particular reference to those who were registered with the hiring hall but not working when the strike was declared, the Supreme Court had the following to say about section 56(a), 24 Cal.2d at page 704, 151 P.2d at page 207: "The section provides that a claimant is ineligible for benefits while 'he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed' and thus contemplates that the 'work' that claimant left was in an 'establishment in which he was employed.' The commission contends that the word 'employed' envisages the 'legal relationship of employer and employee' between the claimant and a particular employer at the precise moment that the trade dispute arises, and that a longshoreman in the interim between work assignments is not 'employed' for the reason that he is under no contract of hire, but simply has a right to be dispatched to a new assignment in his proper rotational order and, therefore, does not stand in the legal relationship of employer and employee with any particular employer. Under the commission's interpretation of section 56(a) the waterfront docks do not constitute an 'establishment' since they were separately owned and controlled by the various com-

panies and were operated as separate enterprises.

"Had the Legislature intended, however, that disqualification under section 56(a) should turn on whether the claimant had ended a legal relationship of employer and employee at the precise moment the trade dispute arose, it would hardly have failed to speak in terms of that relationship or to provide some standard by which its existence at that time could be determined. It is unlikely that the Legislature would leave it to the commission, a body of laymen, to deduce such an intention from the words 'left his work' by way of a presumed definition of the word 'employed.' Since there is no generally accepted test for determining at a particular moment whether a person is 'employed' it cannot be presumed that the Legislature intended such a test when it used that word in section 56(a). The test for such a determination may vary according to the nature of the rights and liabilities involved."

After discussing the several meanings of the word "employed," the court stated, 24 Cal.2d at page 706, 151 P.2d at page 208: "A registered longshoreman, however, has more than an expectancy; his right to work is more secure than that of the ordinary employee, for he has a legally enforceable right whereby the group is entitled to first call on the work and each longshoreman is entitled to his share. Although he does not work regularly for the same employer at the same place of business, a procedure forbidden by the contract between the longshoremen's union and the employers' association, and the intervals between work assignments may at times be longer than those for a factory worker, because of the intermittent nature of longshore work, he works under an employment arrangement that assures him his proportionate share of the work on the San Francisco waterfront. He is not permitted to look for work with the individual members of the employers' association but is dispatched to the various docks where his services are required, in his turn in the manner described. Under the arrangement provided by the contract the longshore work of the port is

his work. If there is work to be done the employers cannot refuse it to him. The interval between work assignments is a normal incident of his employment. The longshore work that each claimant regularly performed for the various members of the employers' association, and to which he had an exclusive right was 'his work' within the meaning of section 56(a). That work cannot be taken from him except by joint action of his union and the employers' association acting through the Joint Labor Relations Committee. It was this work that claimants left when they refused to perform it during the ship clerks' strike.

"The commission's interpretation of 'establishment' as each place of business of each employer, however apt it may be generally, does not fit the facts in the present case. The longshoremen's work and its local are governed by contract. One of the objects of the contract was the abolition of the system that normally prevailed when some longshoremen worked regularly for one employer while others had only occasional work. Under the contract all registered longshoremen are assigned through the hiring hall to all the work of all the employers. As applied to these facts the term 'establishment' as used in section 56(a) means the place of employment, namely, the various docks covered by the contract, where the longshoremen customarily work. This was the area covered by the ship clerks' strike. The disqualification of the claimants therefore continued for the period covered by that strike."

In concluding this portion of the discussion the court stated, 24 Cal.2d at page 707, 151 P.2d at page 209: "The act establishes a policy of neutrality in trade disputes by provisions that the payment or withholding of benefits should not be used to aid either party to a trade dispute. Thus the provision disqualifying a worker who leaves his work because of a trade dispute § 56(a) is balanced by the provision that other unemployed workers shall not be required to fill the vacated jobs or lose their right to unemployment insurance benefits. [§ 13(b) (1).] The payment of benefits to a claimant who leaves his work because of a trade dispute would conflict with this policy just

as would the withholding of payments because a claimant refused to become a strike-breaker.

"As all the claimants in this case left their work because of a trade dispute, they are disqualified under section 56(a) from receiving benefits for unemployment during the period of the dispute."

The American-Hawaiian S. S. Co. v. California Emp. Comm. case, 24 Cal.2d 716, 151 P.2d 213, so far as the instant cases are involved, adds little to the discussion. There were involved various members of the Ship Clerks' Union who claimed unemployment benefits for the period of the same strike that was involved in the Matson case. Their employment procedure was substantially similar to that applicable to longshoremen. Their collective bargaining agreement had expired prior to the strike, but, pursuant to agreement of the parties, the provisions of that contract were continued in effect after expiration and up to the time of the work stoppage. In the instant cases, the collective bargaining agreements expired in June of 1948, but they were continued in effect by a Taft-Hartley injunction. All concede that until September 2, 1948, when the work stoppage started, the parties abided by the terms of the collective bargaining agreement. So far as the employees' right to unemployment benefits is concerned, it would seem immaterial whether the hiring hall arrangement was provided for by express contract, by arrangements to continue it in effect as in the American-Hawaiian case, or by implied contract or by virtue of a Taft-Hartley injunction, as in the present cases. The real question is, what was the relationship between the parties at the time of the work stoppage?

The checkers involved in the American-Hawaiian case were of four classes. (1) Monthly checkers, working for one employer on a monthly salary; (2) preferred checkers, working generally for one company, unless the employer had no work for 2 days, in which event this group became casual daily checkers; (3) casual daily checkers, who worked for various employers on a rotation basis substantially similar to that here involved; and (4) permit

checkers, who were non-union checkers who were assigned jobs when the casual daily checker list was exhausted. Citing the Matson case, the court held as to all four groups of checkers, 24 Cal.2d at page 719, 151 P.2d at page 215: "Since the claimants went on a strike against petitioners and refused to work for them during the strike, they left their work because of a trade dispute within the meaning of section 56(a) of the California Unemployment Insurance Act, supra, and are precluded by that section from receiving benefit payments for unemployment during the period of the strike."

The third case, the Grace Co. case, need not be discussed at length. There the Ship Clerks' Union struck against the American-Hawaiian Steamship Company and established picket lines. Various groups of longshoremen, other than those involved in the Matson case, were affected. Some longshoremen, when they reported to the docks, were told by the employers that there was no work unless they were willing to work without checkers, while others quit work when they reached the stage checkers were needed. As to these two groups, the court, relying on the Matson and American-Hawaiian cases, held that the longshoremen had left their employ because of the trade dispute within the meaning of section 56(a) and were barred from benefits.

Other longshoremen were simply told by their employers to return to the hiring hall before or after they had started work. As to this group it was held that section 56(a) was not applicable unless they were told to return to the hiring hall because they refused to work without checkers, and this portion of the case was returned to the Commission to make a finding on the issue.

These cases are decisive of the present controversy, adopting as to the maritime industry using hiring halls of the type here involved, a concept of group attachment to available work. Under the hiring hall procedure involved in the instant case, and under the terms of the collective bargaining agreements, the employees, as well as the employers, had bargained away their

respective rights to individually negotiate with each other. Under such an arrangement, each registered member of the union had a claim to available work based on the rotation of assignments through registration numbers.

The fact that closed shop agreements have now been prohibited under the Taft-Hartley Act does not affect the actual facts. If, under a hiring hall procedure such as is here involved, each registered employee in fact has a group attachment to all available work, then the fact the registered union member was not actually working on the date the strike was called is a false issue. He nevertheless "left his work" because of the trade dispute within the meaning of section 56(a). The test, according to the Matson case, is whether the petitioners, because of their group attachment to their work, had a reasonable expectancy of receiving the struck work, though "based only on a probability." If so, it is the work of the striker.

[4] The trial court found not only that all appellants became unemployed because of the trade dispute, but also that they would not have accepted employment with respondent employers because of the trade dispute. Apparently the court made this finding in order to indicate that section 13(b) (1) of the Unemployment Insurance Act was not applicable. That section provides:

"Notwithstanding any other provisions of this act, no work or employment shall be deemed suitable and benefits shall not be denied to any otherwise eligible and qualified individual for refusing new work under any of the following conditions:

"(1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute."

Appellants urge that since they were unemployed on September 2nd, the work, if any, thereafter was "new work," and that they cannot be disqualified because they refused to accept "new work" made available because of the labor dispute.

The difficulty with this argument is that the major premise upon which it is predi-

cated is contrary to the facts. If the appellants had not left their work because of the trade dispute, a sound argument could be made that they could not be deprived of benefits because they refused "new work" made vacant because of the strike. But section 13(b) (1) has no application to situations in which section 56(a) is applicable. If the men left their work because of a trade dispute within the meaning of section 56(a), they are ineligible for benefits during the period of the strike, because the jobs thus made vacant are their jobs and not as to them "new work." Thus, had an association employer during the strike period offered work, through the hiring hall procedure, to any one appellant, it would not have been "new work" as to that appellant, but work already belonging to him by right and virtue of his membership in the labor pool from which the employer must draw his employees. In such a case the offered work is the regular work each registered member already claims, although its assignment rotates through the registered group who are awaiting vacancies and assignment.

[5] The provisions of section 13(b) (1) are common to the unemployment insurance laws of every state. Such provision must be included in the state law in order that the employers may receive certain tax credits and the states some financial aid. The obvious intent of the provision is that applicants shall not be denied benefits because they refuse to perform "new work" made vacant by the strike. Under sections 56(a) and 13(b) (1) an employee cannot be denied benefits because he refuses to become a strike breaker, but that rule does not apply to work in the claimant's last employment. That is not "new work." The work made vacant by a strike is "new work" only to strangers to the strike. It is not "new work" to the strikers themselves when they fall within the classification made by section 56(a).

Appellants devote a considerable portion of their briefs to the contention that if sections 56(a) and 13(b) (1) be interpreted as set forth in this opinion, it will place the California law out of conformity

with the federal Unemployment Tax Act, 26 U.S.C. § 1602-1603. Under that act a tax is levied against employers, but employers are allowed a 90 per cent credit to the extent of contributions made to a state act provided the state law is certified by the Secretary of Labor as being in conformity with the federal act. In addition, the Social Security law provides that some federal funds will be supplied to state unemployment administrators in the event the state law has been approved by the Secretary of Labor. The federal act, 26 U.S.C. § 1603, provides as does section 13(b) (1) that compensation shall not be denied if the position offered to the applicant is "new work" made vacant because of a trade dispute.

[6] Much comment appears in the briefs about a hearing held by the Secretary of Labor in Washington, D. C., in December, 1949, to determine whether the California law was in conformity with federal law, and this court permitted the record to be augmented to include various documents relating to that hearing. This evidence is relevant on the issue of interpreting the California law. But certainly there is no lack of conformity in determining that one who has left his employment because of a trade dispute is not entitled to benefits. Nor is there any lack of conformity in the holding that under the collective bargaining agreements and the hiring hall procedures all registered members have such a group attachment to all available work as to make such work their work. That has been the California law certainly since 1944 when the Matson case was decided. The Secretary of Labor has certified the California law as being in conformity with the Federal law each year since 1944. The only possibility of lack of conformity would exist under certain interpretations of section 13(b) (1). But for reasons already stated, we never reach that section in the present cases because all appellants are disqualified under section 56(a).

The trial court struck from the record the exhibits which were subsequently made part of the record on appeal by the aug-

mentation process. As already pointed out, those documents might have some relevancy in interpreting the California statute. But interpretation is a matter of law, not of fact. The improper exclusion of these documents could not possibly have harmed appellants, because, had they been admitted and considered, they would not even suggest that the interpretation of section 56(a) contained in this opinion and based on the Matson case is erroneous.

The other points raised do not require discussion.

The judgments appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; CARTER, J., dissenting.

Petition of Mabel **BLACK** and **T. Y. Wulff**,
In a representative capacity for, by and
on behalf of Bio-Lab Union of Local 225,
United Office and Professional Workers of
America, its officers and members, for an
order confirming an award in arbitration,
Petitioners and Respondents,

v.

CUTTER LABORATORIES (a corporation),
Respondent, Adverse Party and

Appellant.

S. F. 18522.

Supreme Court of California.

In Bank.

Jan. 18, 1955.

Rehearing Denied Feb. 16, 1955.

Proceeding by union against employer
to enforce arbitration award requiring re-
instatement of, and payment of back pay to,
discharged employee. The Superior Court,
City and County of San Francisco, Edward
Molkenbuhr, J., entered judgment confirm-
ing award, and employer appealed. The
Supreme Court, Schauer, J., held that evi-
dence would not sustain Board's finding
that employee had been discharged for un-
ion activity.

Judgment reversed and cause remand-
ed for further proceeding consistent with
opinion.

Traynor, J., Gibson, C. J., and Car-
ter, J., dissented.

Prior opinion, 266 P.2d 92.

1. Labor Relations ⇨457

In arbitration proceeding, evidence
was sufficient to sustain board's finding that
employer had honestly and correctly be-
lieved employee it discharged to be a know-
ing and deliberately acting Communist.
West's Ann.Code Civ.Proc. §§ 1281, 1287,
1288, 1291-1293.

2. Labor Relations ⇨461

Arbitration award, which directs that
Communist Party member dedicated to
party's program of sabotage, force, vio-
lence, and the like, be reinstated to employ-
ment in a plant producing antibiotics used
by both military and civilians, is void as
against public policy as expressed in both
federal and state laws and will not be en-

forced. West's Ann.Code Civ.Proc. §§
1281, 1287, 1288, 1291-1293; Internal Se-
curity Act of 1950, § 1 et seq., 50 U.S.C.A.
§ 781 et seq.; 18 U.S.C.A. § 2385; Com-
munist Control Act of 1954, § 1 et seq., 50
U.S.C.A. § 841 et seq.; Government Code,
§§ 1027.5, 1028; Labor Management Rela-
tions Act, 1947, § 1 et seq., 29 U.S.C.A. §
141 et seq.

3. Insurrection and Sedition ⇨2

Membership in Communist Party, with
full implications of dedication to sabotage,
force, violence, and the like, which party
membership is believed to entail, consti-
tutes a violation of the Criminal Syndical-
ism Act. Government Code, § 1027.5; Pen.
Code, §§ 11400-11402.

4. Labor Relations ⇨372, 378

Private employer, particularly one
largely engaged in supplying manufactured
products to government, armed forces, and
retailers for distribution through hospitals
and doctors to public at large, should not
be required by state action through its
courts to retain in, or restore to, employ-
ment person who would not be entitled to
state employment and who is known to
have dedicated himself to service of for-
eign power and to practice of sabotage to
end of overthrowing the government.
Government Code, § 1028; Internal Secu-
rity Act of 1950, § 1 et seq., 50 U.S.C.A.
§ 781 et seq.; Communist Control Act of
1954, § 1 et seq., 50 U.S.C.A. § 841 et seq.;
Labor Management Relations Act, 1947,
§ 1 et seq., 29 U.S.C.A. § 141 et seq.

5. Evidence ⇨5(2)

From the array of congressional and
legislative findings, if not from common
knowledge of mankind, it must be accepted
as conclusively established that Communist
Party member cannot be loyal to his pri-
vate employer as against any directive of
his Communist masters. Government
Code, § 1027.5; Internal Security Act of
1950, § 1 et seq., 50 U.S.C.A. § 781 et seq.;
Communist Control Act of 1954, § 1 et seq.,
50 U.S.C.A. § 841 et seq.; Labor Manage-
ment Relations Act, 1947, § 1 et seq., 29
U.S.C.A. § 141 et seq.

6. Labor Relations ⇨372

Right to discharge employee because of Communist Party membership and sustained participation in Communist Party's activities is one which, as matter of public policy, employer should not be held to have waived by failure to discharge employee earlier than employer did. Internal Security Act of 1950, § 1 et seq., 50 U.S.C.A. § 781 et seq.; 18 U.S.C.A. § 2385; Communist Control Act of 1954, § 1 et seq., 50 U.S.C.A. § 841 et seq.; Government Code, § 1027.5; Labor Management Relations Act, 1947, § 1 et seq., 29 U.S.C.A. § 141 et seq.

7. Estoppel ⇨52

Parties cannot be estopped from relying on defenses based on considerations of public policy.

8. Labor Relations ⇨372

Employer engaged in manufacture and sale of goods for civilian and military use has right to protect itself and its customers against clear and present danger of continuing a Communist Party member in its employ, and has duty to take such action as it deems wise to preserve order in its plant and to protect its other employees, both union and nonunion, against the same danger and possibility of sabotage, force, violence, and the like.

9. Labor Relations ⇨372

Government is expected to step in only where employer has failed or is unable to act for himself, and employer is not obligated to await governmental decree before taking steps to protect himself or to exercise his right to discharge employees who, upon the established facts, are dedicated to be disloyal to him and to be likewise disloyal to the American labor union they may purport to serve and who constitute a continuing risk to both the employing company and the public depending upon the company's products.

10. Labor Relations ⇨485

In proceeding by union against employer to enforce arbitration award requiring reinstatement of and payment of back pay to discharged employee, evidence was not sufficient to sustain arbitration board's

findings that employee had been discharged because of her labor union activities. West's Ann.Code Civ.Proc. §§ 1281, 1287, 1288, 1291-1293.

Johnson & Stanton, Gardiner Johnson and Thomas E. Stanton, Jr., San Francisco, for appellant.

Edises & Treuhaft, Bertram Edises, Oakland, and Henry F. Saunders, Stockton, for respondents.

SCHAUER, Justice.

Cutter Laboratories, Inc., appeals from a judgment entered upon the granting of an order confirming the award of an arbitration board. (See Code of Civ.Proc. §§ 1291-1293.) By the award, rendered by two of the three arbitrators with the third dissenting, it was held that appellant (hereinafter sometimes termed the company) had discharged one of its employees in violation of a collective bargaining agreement between appellant and the Bio-Lab Union (hereinafter sometimes called the union) of Local 225, United Office and Professional Workers of America, and that the employee was entitled to reinstatement and to back pay limited by the bargaining agreement to eight weeks regular pay less any outside earnings or unemployment compensation received during such period. We have concluded that, upon the undisputed evidence and upon the facts found by the arbitration board, the company is correct in its contention that the arbitrators exceeded their powers, that the award is contrary to law, that it would contravene public policy for the courts of this State to enforce reinstatement of the discharged employee, and that the judgment must therefore be reversed.

From extensive findings made by the arbitration board it appears that the employer Cutter Laboratories, Inc., with offices and laboratories located in Berkeley, manufactures and sells throughout the United States and certain foreign countries vaccines, serums, antitoxins and other antibiotics for both civilian and military use. During World War II the company was subject to stringent security control by fed-

eral authorities, and its products and processes are said to be peculiarly subject to sabotage. Since World War II the company has been under no specific contract obligation to any governmental agency to discharge employees who are "bad security risks"; any obligation to take such steps grows out of the duties it owes generally to its customers, its dealers, its employees, and its stockholders.

The Bio-Lab Union of Local 225, United Office and Professional Workers of America C.I.O., was recognized in February, 1944, by the company pursuant to a National Labor Relations Board election. It is a union "generally denominated as 'left-wing'" and it as well as the U.O.P.W.A. was expelled from the C.I.O. in March, 1950.

The discharged employee, Mrs. Doris Walker, graduated from the University of California School of Jurisprudence in 1942, and is an active member of The State Bar of California. She was elected to Phi Beta Kappa and to the editorial board of the California Law Review. From 1942 to 1944 she was employed as an enforcement attorney with the federal Office of Price Administration in San Francisco and from 1944 to 1946 as an attorney with a firm of lawyers in the same city. She left the law firm and secured employment as a cannery worker sorting and trimming vegetables in three canneries in Oakland and San Francisco and (later in 1946) as an organizer for the Food and Tobacco & Agricultural Workers Union. She testified that she went to law school "because I was interested in becoming a labor lawyer" and that she left the law firm because her "time was spent on routine civil matters * * * and I became dissatisfied with my work and felt that I would rather take a more active role in the field in which I was interested and so I quit in order to take a job in a plant."

In October, 1946, Mrs. Walker sought employment at Cutter Laboratories and filled out an application form supplied by the company, on which under the heading of "Education" she concealed her attendance at law school, her law degree, and her admission to practice law in this State.

Under the heading "Previous Employment" she concealed her entire previous employment record and showed a false employment as file clerk for six or eight months in 1939 by "John Tripp Att'y," which the company later discovered to be a fictitious name. Mrs. Walker also gave a dentist and a lawyer in San Francisco as references, but at her request their letters of recommendation to the company did not reveal her subterfuge. She states that she intentionally deceived the company because of her belief it would not employ her if she were truthful. The company hired her as label clerk in its production planning department, and in April, 1949, she became a clerk typist in the purchasing department.

At the company plant Mrs. Walker became active in union affairs and in April, 1947, was elected shop chairman and also a member of the executive board of Local 225. Late in 1948 she was elected chief shop steward; her duties as steward took her to all departments in the plant except the executive and administrative departments and primarily entailed representing the union in grievances arising under its collective bargaining agreement with the company. In the spring of 1949 she was elected president of Local 225; her term expired December 15, 1949, and a new president was elected.

Meanwhile, in May, 1946, following proceedings before the National Labor Relations Board, the company and the union entered into a contract; in January, 1947, the wage provisions thereof were opened and a ten cent hourly wage increase agreed upon. In April, 1947, Mrs. Walker had been elected shop chairman and during the same month she and another union official learned that they were being investigated by the company as to past employment, character, and Communist affiliation. In June, 1947, the union served notice of intention to amend the contract and at the same time filed with the National Labor Relations Board an unfair labor practice charge against the company based on the investigations. A week-long strike ensued in August, 1947, which was settled following the intervention of Harry

Bridges and as a result of negotiation with him. June 9, 1949, the contract was again opened, solely as to wages, and November 30, 1949, a two-year contract was agreed upon; on October 6, 1949, during the negotiations and at a time when company officials were angry at certain activities of Mrs. Walker purportedly in connection with union demands, the company's discharge of Mrs. Walker which is here involved took place.

At the time of the discharge a company official read to Mrs. Walker the following notice:

"Mrs. Walker: As you are aware, the company has known for some time that when you applied for work with Cutter Laboratories on October 4 1946, you made a number of false representations on your 'Application for Employment'.

"As we know now, you falsified the statement of your education so as to conceal the fact that you had completed a law school [sic] course at the University of California's School of Jurisprudence at Berkeley in May, 1942. You concealed the facts that you received the degree of Bachelor of Laws in May, 1942, and that you were admitted to the State Bar of California on December 8, 1942. You concealed that since that date you have at all times been admitted and entitled to practice as an attorney before all of the Courts of California.

"We know now that by falsification of the name of a previous employer, you concealed the fact that from June, 1942 to February, 1944 you were employed by the Federal Government's Office of Price Administration, including employment as an Enforcement Attorney at a salary of about \$3,200.00 a year.

"We know now that you deliberately concealed from us that from February 1944 to December, 1945 you were employed as an attorney by Gladstein, Grossman, Sawyer and Edises, a well-known firm of lawyers specializing in labor cases.

"You know that a few weeks ago the 'Labor Herald', the official CIO newspaper, stated that the National Labor Relations Board had sustained a cannery firm that

had discharged you for refusing to answer whether or not you were a Communist.

"We have checked the records. We know now that you deliberately concealed that in 1946, just before you applied for work here, you were employed by a series of canneries and had been discharged by them.

"Ordinarily, an employee of the Company would be discharged immediately for falsifying material facts on an 'Application for Employment'. Because you were an officer of the Union we kept you on the pay roll rather than open ourselves to a charge of persecuting a union officer. We have given your case careful consideration because we know very well that no matter how strong the case against you there will be a claim of discrimination because of union activities.

"Because no employer wants to become involved in a dispute of that kind we have been patient and deliberate in our consideration of your misconduct.

"On October 1, 1948, when you testified under oath before a Trial Examiner of the National Labor Relations Board, you refused to answer the question as to whether or not you were a member of the Communist Party.

"You refused to answer under oath the question as to whether or not you were or had been a member of the Federal Workers' Branch No. 3 of the Communist Party.

"You refused to testify under oath whether or not you were or had been a member of the South Side Professional Club of the Communist Party.

"We are convinced now, that you were and still are a member of the Communist Party, that you were a member of the Federal Workers' Branch No. 3 of the Communist Party, and that you were a member of the South Side Professional Club of the Communist Party.

"Our recent investigation of your past record has uncovered previously unknown conduct that goes far beyond a mere concealment of material facts. We have just completed a thorough investigation and have a full report upon your past activities. We realize now the importance of the facts

that you concealed from us. We realize the full implications of your falsification and misrepresentations. A follow-up and investigation of the 'Labor Herald's' recent revelations has uncovered a situation far more grave than we expected.

"We are convinced now that for a number of years, you have been and still are a member of the Communist Party. We are convinced beyond any question that for a number of years you have participated actively in the Communist Party's activities.

"The nature of our company's business requires more than the usual precaution against sabotage and subversion. Upon a disclosure that any employee is a member of the Communist Party, or has participated in other subversive or revolutionary activity, we conceive it to be the responsibility of management to take action.

"Confronted with such a situation, any inclination to be lenient or to grant a union official special consideration is out. In the face of your record there is no alternative open to us except to terminate your services at once. Accordingly, you are notified now that you are discharged for the causes mentioned. You will be paid the full amount due to you promptly."

"Shortly after" the notice was read to Mrs. Walker, it was likewise read to plant employees at a meeting called by the company. At the meeting statements were made by company officials "either to the entire group or in private discussion afterward, advising employees 'to get out of that left-wing union' and telling them that 'nothing but a left-wing union would press for wage increases at this time.'" Following the discharge of Mrs. Walker negotiations between the union and the company continued, and as already mentioned a two-year contract was agreed upon on November 30, 1949; it provided for wage increases and other contract changes. The company also agreed to, and did, pending the holding of a union-shop election, join the union in urging all eligible employees and all newly-hired eligible employees to become and remain members in good standing of the union.

The arbitration board further found that on October 5, 1949, following a grievance meeting with union representatives earlier in the day and prior to discharging Mrs. Walker on October 6, officials of the company met with its attorneys and considered evidence which the attorneys had marshalled and which may be summarized as follows:

a. State Bar records showed no California lawyer named John Tripp (a name given by Mrs. Walker to the company, as a previous employer), but that there was such a lawyer with the given names of John Tripp; it developed that he was Mrs. Walker's supervisor in the O.P.A. (1942-1944).

b. A transcript of N.L.R.B. hearings of September 30 and October 1, 1948, in proceedings by discharged cannery workers, including Mrs. Walker, for reinstatement with back pay, showed a refusal by Mrs. Walker to answer the question, "are you or were you ever a member of the Communist Party?"

c. Statements to the following effect which appeared in certain of the Reports of the Joint Fact-Finding Committee on Un-American Activities in California for the years 1943, 1945, 1947, 1948 and 1949: That Mrs. Walker's O.P.A. supervisor associated with persons said to be "members of the Communist Party organization"; that "attorneys for the Communist Party are" the firm of labor lawyers by whom Mrs. Walker was employed in 1944 to 1946; reporting the identity of the Communist Political Association with the Communist Party despite a change of name "for strategic reasons May 20-23, 1944"; giving a biography of one Archie Brown, an admitted Communist Party member and a candidate for various public offices on that ticket and mentioning sponsors of his from various unions including the United Office and Professional Workers of America; and indicating that the "People's Daily World," a newspaper, is "the official organ of the Communist Party on the west coast."

d. Four issues of the "People's Daily World" contained items concerning Mrs.

Walker: her employment by the labor law firm in February, 1944, was mentioned; she was listed as a 1944 alternate delegate to a State Committee of "the Communist Political Association"; and in October, 1946, a radio program was noted which she conducted on behalf of a committee "for Archie Brown for Governor * * * the Communist write-in candidate."

e. A photostatic copy of an unaddressed handwritten letter dated "7/10/46" and signed with Mrs. Walker's maiden name discussed the propriety of the introduction of a resolution on the maritime strike at the Cannery Workers Club by the writer and another, and stated that "I tried to evaluate my action, as I try to evaluate whatever I do, from the point of view of the welfare of the working class and the strengthening of the Party."

f. Two "unidentified undated documents contained biographical material" about Mrs. Walker and stated, among other things, that she was issued 1945 Communist Party membership card No. 40360, that she joined the Communist Party in 1942 and had held various positions in various clubs and sections of the party including the "Cannery Club," that her present husband was a Communist Party member and organizer, and that in February, 1946, she listed on a Communist Party interview form the information that "she gave up law practice because it was frustrating to work with people she had to work with (namely, professional people)."

[1] Mrs. Walker was not shown the above described evidence when she was discharged, but was confronted with it at the arbitration board hearing, and company attorneys asked her a series of questions concerning it and her Communist affiliations and activities, including the questions, "Are you now or have you ever been a member of the Communist Party?" and "Isn't it a fact, Mrs. Walker * * * that the reason why you sought employment * * * at Cutter Laboratories was because you felt and believed, and had it in mind, that by obtaining that employment at that plant you could more actively and more effectively carry on the program and the activities of

the Communist Party?" Mrs. Walker's attorney objected to the questions on the grounds, among others, that the political affiliations of an employee are immaterial and that by not acting more promptly the company had waived the communism issue as a ground for discharge. The board overruled the objections but also announced that Mrs. Walker would not be instructed to answer the questions "if she did not care to do so, but that if she refused to answer we would draw all justifiable inferences from the refusal." Mrs. Walker thereupon refused to answer the questions as an "unwarranted invasion into my private beliefs." The evidence as to her Communist membership and acceptance of party principles, with all the implications that flow therefrom, thus stands unchallenged and uncontradicted by her and clearly supports the board's finding that the company honestly and correctly believed her to be a knowing and deliberately acting Communist.

It was further found by the board that the company's 1947 investigation of Mrs. Walker indicated that she was a Communist and also disclosed most of the omissions and falsifications in her application for employment, that "a strong case" had been made out that in 1948 the company learned of her cannery activities and of the cannery hearings, and that there was "at least a general indifference on the part of the Company about Doris Walker's activities until the autumn of 1949 and a specific indifference about obvious * * * clues to her background." The company stated that the reason they did not discharge Mrs. Walker in 1947 was because of a desire to "lean over backward" rather than to be accused of harassing union officials and because company attorneys advised that there was at that time insufficient evidence to support a discharge.

Under the provisions of the collective bargaining agreement in effect when Mrs. Walker was discharged, the company had agreed not to interfere with, restrain or coerce employees or discriminate against them because of *membership or lawful activity* in the union. It further agreed that, except for personnel reductions for lack of work or to effect economies, it would not

discharge an employe "except for just cause." Both the union and the company also agreed that they will not discriminate against "a present or prospective employee or member because of race, color, creed, national origin, religious belief, or Union affiliation"; formerly "political" as well as "religious belief" was listed in this contract provision, but by negotiation the word "political" was amended out of the agreement. The board held that although removal of the word "political" seemed to authorize the practice of discrimination because of "political belief," "we are unable to conclude" that the company's agreements not to discriminate because of union activity and not to discharge except for just cause were thereby limited or modified "in such a way as to dispose of this dispute." In this connection it is to be noted that the old hoax that the Communist Party is but a political party has been effectively exposed, as is hereinafter shown in some detail.

The company at the board hearings advanced two grounds as the basis for discharging Mrs. Walker: "the omissions and falsifications in the Application for Employment and membership in the Communist Party with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail." Although finding that the company "honestly believed all of these things," and that the "accuracy of those beliefs is established in the record," the board further found that the company had not satisfactorily explained the delay of two years (from 1947 to 1949) in asserting the grounds for discharge presented to the board and that such grounds were therefore stale. Finally, it was found by the board that the reasons assigned by the company were not its real reasons for discharging Mrs. Walker, and that actually the discharge, which occurred during wage negotiations, was "retaliatory in nature" and "interfered with, restrained and coerced an employee because of participation as an officer and negotiator on behalf of the Union in a wage negotiation." As already stated, the board's award, based on the above findings, was that the company's

discharge of Mrs. Walker violated the collective bargaining contract provisions against discrimination *because of union activity* and against discharging *except for just cause*, and that she is entitled to reinstatement and to limited back pay. The company failed to comply with the award, the union petitioned the superior court for its confirmation, and the company asked the court that it be vacated. (See Code Civ. Proc., §§ 1287, 1288.) After a hearing the trial court confirmed the award, and this appeal by the company followed.

Section 1288 of the Code of Civil Procedure provides, so far as here material, that "In either of the following cases the superior court * * * must make an order vacating the award, upon the application of any party to the arbitration: * * *

"(d) Where the arbitrators exceeded their powers * * *

[2] As ground for reversal the company contends, among other things and as it contended before the trial court in seeking vacation of the award, that an arbitration award which directs that a member of the Communist Party who is dedicated to that party's program of "sabotage, force, violence and the like" be reinstated to employment in a plant which produces antibiotics used by both the military and civilians is against public policy, as expressed in both federal and state laws, is therefore illegal and void and will not be enforced by the courts. With this contention we agree.

In the case of *Loving & Evans v. Blick* (1949), 33 Cal.2d 603, 204 P.2d 23, this court reversed a judgment confirming an arbitrator's award of a disputed sum owing under a building contract where it appeared that only one of the partners of the contracting firm was licensed as required by statute, and that neither the other partner nor the partnership held such a license. After referring to the principles that (33 Cal.2d p. 607, 204 P.2d p. 25) "a contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such contract" and that (33 Cal.2d p. 609, 204 P.2d p. 26)

"ordinarily with respect to arbitration proceedings 'the merits of the controversy between the parties are not subject to judicial review' [citation] and that 'arbitrators are not bound by strict adherence to legal procedure and to the rules on the admission of evidence expected in judicial trials,'" it was held (33 Cal.2d p. 610, 204 P.2d p. 27) that the "power of the arbitrator to determine the rights of the parties is dependent upon the existence of a valid contract under which such rights might arise," that "Section 1281 of the Code of Civil Procedure, providing for submission to arbitration of 'any controversy * * * which arises out of a contract,' does not contemplate that the parties may provide for the arbitration of controversies arising out of contracts which are expressly declared by law to be illegal and against the public policy of the state," that (33 Cal.2d p. 611, 204 P.2d p. 28) "an unlawful transaction cannot be given legal vitality by the arbitration process," that (33 Cal.2d p. 614, 204 P.2d p. 29) "the only evidence before the trial court showed without contradiction that the contract upon which the award was based was illegal and void because of respondents' failure to comply with the licensing requirements," and that therefore that court had erred in confirming the award. And in *Franklin v. Nat C. Goldstone Agency* (1949), 33 Cal.2d 628, 630-633, 204 P.2d 37, a judgment confirming an arbitration award in favor of unlicensed contractors was likewise reversed upon the ground that the basic contract was illegal because in violation of the statutes and of "the public policy of this state."

It is at once apparent that the controversy now before us presents an even stronger case for refusal to confirm the award than was involved in the *Loving & Evans* and in the *Franklin* cases. There the illegality was held to exist in the contracts upon which the awards were based, while here the very award itself is illegal in that it orders reinstatement as an employe of one whose dedication to and active support of Communist principles and practices stands proved and unchallenged in the record. As is hereinafter shown, the true implications of knowing member-

ship in and support of the Communist Party are no longer open to doubt, and the long overworked party line theme that communism is but a political activity has been exposed as a false and fraudulent stratagem designed particularly as a device for securing, in the free nations having government by law, legal support for the "party" in carrying on to the end of its illegal objectives.

The Congress of the United States, in adopting the Internal Security Act of 1950, declared the dangers of the Communist movement in the following terms (Act of Sept. 23, 1950, c. 1024, Title I, § 2, 64 Stat. 987; 50 U.S.C.A. § 781):

"As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds that—

"(1) There exists a world Communist movement which in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

"(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality. * * *

"(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement. * * *

"(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

And in the Smith Act (Act of June 25, 1948, c. 645, 62 Stat. 808; 18 U.S.C.A. § 2385) it was provided that (Whoever knowingly or willfully advocates, abets, advises, or teaches the * * * overthrowing or destroying the government of the United States or * * * of any State * * * by force or violence, or * * * Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who * * * encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such * * * assembly of persons, knowing the purposes thereof" is guilty of a crime.

More recently, in adopting the Communist Control Act of 1954 (Chapter 886, Public Law 637, approved August 24, 1954, 50 U.S.

C.A. § 841 et seq.), our Congress further expressed its, and necessitates our, awareness of the true nature of the party program and methods, in these findings of fact: "Sec. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby

individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed."

A similar awareness was shown by the President of the United States in his State of the Union message delivered before a joint session of the Senate and the House of Representatives on January 7, 1954 (100 Congressional Record 62, H.Doc. 251), wherein he declared, "The subversive character of the Communist Party in the United States has been clearly demonstrated in many ways, including court proceedings. We should recognize by law a fact that is plain to all thoughtful citizens—that we are dealing here with actions akin to treason—that when a citizen knowingly participates in the Communist conspiracy he no longer holds allegiance to the United States."

[3] And in this State the courts have recognized that the type of activity found by the board here to have been engaged in by Mrs. Walker—i. e., membership "in the Communist Party with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail"—constitutes a violation of the California Criminal Syndicalism Act. (Pen.Code, §§ 11400-11402, formerly Deering's General Laws Act 8428; see *People v. McCormick* (1951), 102 Cal.App.2d Supp. 954, 962, 228 P.2d 349; *People v. Chambers* (1937), 22 Cal.App.2d 687, 709-713, 72 P.2d 746.)

The Legislature of California itself has found as facts, and has so declared in section 1027.5 of the Government Code, that " * * * (a) There exists a worldwide revolutionary movement to establish a totalitarian dictatorship based upon force and violence rather than upon law. * * *

"(d) Within the boundaries of the State of California there are active disciplined communist organizations presently functioning for the primary purpose of advancing the objectives of the world communism movement, which organizations promulgate, advocate, and adhere to the precepts and the principles and doctrines of the world

communism movement. These communist organizations are characterized by identification of their programs, policies, and objectives with those of the world communism movement, and they regularly and consistently cooperate with and endeavor to carry into execution programs, policies and objectives substantially identical to programs, policies, and objectives of such world communism movement. * * *

"There is a clear and present danger, which the Legislature of the State of California finds is great and imminent, that in order to advance the program, policies and objectives of the world communism movement, communist organizations in the State of California and their members will engage in concerted effort to hamper, restrict, interfere with, impede, or nullify the efforts of the State and the public agencies of the State to comply with and enforce the laws of the State of California * * *."

[4] Further evidencing the implications of membership in the Communist Party and the policy of the State in respect thereto, the Legislature has declared that (Gov. Code, § 1028): "It shall be sufficient cause for the dismissal of any public employee when such public employee advocates or is knowingly a member of the Communist Party or of an organization which during the time of his membership he knows advocates overthrow of the Government of the United States or of any state by force or violence." (See also *Board of Education of City of Los Angeles v. Wilkinson* (1954), 125 Cal.App.2d 100, 270 P.2d 82.) A private employer, particularly one largely engaged in supplying manufactured products to the government, to its armed forces, and to retailers for distribution through hospitals and doctors to the public at large, should not be required by state action through its courts (see *Shelley v. Kraemer* (1948), 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161; *Hurd v. Hodge* (1948), 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187) to retain in or restore to employment a person who would not be entitled to state employment and who is known to have dedicated herself to the service of a foreign power and to the practice of sabotage to the end of overthrowing our government.

Graphically depictive of the nature of the Communist conspiracy and of the extremes to which it is prepared to resort are the following statements by Mr. Justice Jackson, concurring in *Dennis v. United States* (1951), 341 U.S. 494, 564-565, 71 S.Ct. 857, 95 L.Ed. 1137, 1181: "The Communist Party, nevertheless, does not seek its strength primarily in numbers. Its aim is a relatively small party whose strength is in selected, dedicated, indoctrinated, and rigidly disciplined members. From established policy it tolerates no deviation and no debate. It seeks members that are, or may be, secreted in strategic posts in transportation, communications, industry, government, and especially in labor unions where it can compel employers to accept and retain its members. It also seeks to infiltrate and control organizations of professional and other groups. Through these placements in positions of power it seeks a leverage over society that will make up in power of coercion what it lacks in power of persuasion.

"The Communists have no scruples against sabotage, terrorism, assassination, or mob disorder; but violence is not with them, as with the anarchists, an end in itself. The Communist Party advocates force only when prudent and profitable. Their strategy of stealth precludes premature or uncoordinated outbursts of violence, except, of course, when the blame will be placed on shoulders other than their own. They resort to violence as to truth, not as a principle but as an expedient. Force or violence, as they would resort to it, may never be necessary, because infiltration and deception may be enough.

"Force would be utilized by the Communist Party not to destroy government but for its capture. The Communist recognizes that an established government in control of modern technology cannot be overthrown by force until it is about ready to fall of its own weight. Concerted uprising, therefore, is to await that contingency and revolution is seen, not as a sudden episode, but as the consummation of a long process."

Other instances of recognition by the courts of the clear and present danger to

this country and to its institutions presented by the Communist Party and its adherents may be found in decisions upholding the provisions of the Labor Management Relations Act of 1947, also known as the Taft-Hartley Act (Act, June 23, 1947, c. 120, § 1, et seq., 61 Stat. 136 et seq., 29 U.S.C.A. § 141 et seq.), which deny the privilege of being chosen as exclusive bargaining agent to a union whose officers have not filed with the National Labor Relations Board their affidavits denying membership or affiliation with the Communist Party and denying belief in the overthrow of the United States Government by force (see *American Communications Ass'n v. Douds* (1950), 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925, affirming *Inland Steel Co. v. National Labor Relations Board* (7 Cir.1948), 170 F.2d 247, 264-267, 12 A.L.R.2d 240; *National Maritime Union of America v. Herzog* (D.C.1948), 78 F.Supp. 146, affirmed 334 U.S. 854, 68 S.Ct. 1529, 92 L.Ed. 1776) as well as in cases sustaining other legislation or Congressional inquiry directed at exposing and controlling Communist activities in this country. (See *Lawson v. United States* (1949), 85 U.S.App.D.C. 167, 176 F.2d 49, certiorari denied, 339 U.S. 934, 70 S.Ct. 663, 94 L.Ed. 1352; *United States v. Dennis* (2 Cir.1950), 183 F.2d 201, 212-213, affirmed, *Dennis v. United States* (1951), supra, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137; *Barsky v. United States* (1948), 83 U.S.App.D.C. 127, 167 F.2d 241, 247, certiorari denied, 334 U.S. 843, 68 S.Ct. 1511, 92 L.Ed. 1767; *Galvan v. Press* (1953), 347 U.S. 522, 529, 74 S.Ct. 737.) In the *Douds* case, supra, the court pointed out that before enacting the Taft-Hartley Act "Congress had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action." (P. 389 of 339 U.S., p. 679 of 70 S.Ct.)

[5] Also relevant are the following comments of the court in *Garner v. Board*

of Public Works (1950), 98 Cal.App.2d 493, 498, 220 P.2d 958, affirmed, 1951, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317, in upholding an ordinance requiring a loyalty oath for municipal employees: "One of the foundation stones of private business is that the employee must be loyal to his employer. Loyalty is implicit in the contract of hiring. No private business can long succeed without the conscientious, undivided support of its employees. The man or woman who denies allegiance to his employment is, and should be, soon separated from it. * * * And, so long as the employment continues, every employer has the right at any time to ask his employee to declare his loyalty." To the same effect is the holding in *National Labor Relations Board v. Local Union No. 1229, International Brotherhood of Electrical Workers* (1953), 346 U.S. 464, 472, 74 S.Ct. 172, "There is no more elemental cause for discharge of an employee than disloyalty to his employer." (See also *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937), 301 U.S. 1, 45-46, 57 S.Ct. 615, 81 L.Ed. 893; *RKO Radio Pictures, Inc., v. Jarrico* (1954), 128 Cal.App.2d 172, 274 P.2d 928.) From the array of congressional and legislative findings which have been quoted above, if not from the common knowledge of mankind, it must be accepted as conclusively established that a member of the Communist Party cannot be loyal to his private employer as against any directive of his Communist master.

[6-8] We are of the view, further, that the type of activity engaged in by the employe here—membership in the Communist Party and sustained participation in its activities—is one which as a matter of public policy the company should not be held to have waived by its failure to discharge her earlier than it did. In the first place, it is an established principle that parties cannot be estopped from relying on defenses based on considerations of public policy, such as illegal contracts. (See *Fewel & Dawes, Inc., v. Pratt* (1941), 17 Cal.2d 85, 91, 109 P.2d 650; *American Nat. Bank v. A. G. Sommerville, Inc.* (1923), 191 Cal. 364, 371, 216 P. 376.) In

the second place, the employee's party membership was not shown or even asserted by her to have been an instance of past error but appears, rather, to have been the studied and calculated choice of a person of some intellectual attainment, and to have been persisted in on an active and devoted basis even at the time of the board hearings. Thus an entirely adequate ground for refusing to employ her (whether by original refusal to hire or by discharge) was a continuing one which was available to the employer at any time during its existence. In this connection it may also be noted that the employer had not only the right to protect itself and its customers against the clear and present danger of continuing a Communist Party member in its employ, but also the duty to take such action as it deemed wise to preserve order in its plant and to protect its other employes, both union and nonunion, against the same danger and the possibility of "sabotage, force, violence and the like." The company properly stated in its notice of discharge, as related above, "The nature of our company's business requires more than the usual precaution against sabotage and subversion. Upon a disclosure that any employee is a member of the Communist Party * * * we conceive it to be the responsibility of management to take action." Knowing the facts which the company knew, it is difficult to conceive of any tenable defense which it could make, or which would be entertained in this court, as against an action for damages in a personal injury or wrongful death case arising from the wilful adulteration of any of its products by Mrs. Walker if it continued her in its employ and she should thereafter take that means of party activity. That acts of sabotage by Communists are reasonably to be expected at any time such acts may be directed by the party leader is not open to question, as has already been shown.

[9] The fact that the company was not specifically obliged by any governmental regulation to discharge Mrs. Walker affects in no wise its right to do so or the impelling public policy which militates against the order for her reinstatement;

in this country, built as it has been upon the initiative and self-reliance of its citizens, the government is expected to step in only where the employer has failed or is unable to act for himself, and he is not obligated to await a governmental decree before taking steps to protect himself or to exercise his right to discharge employees who upon the established facts are dedicated to be disloyal to him, to be likewise disloyal to the American labor union they may purport to serve, and who constitute a continuing risk to both the employing company and the public depending upon the company's products.

This is not the first time that this court has been called upon to recognize and give specific effect to the public policy where its duty in the premises is clear. (See *James v. Marinship Corp.* (1944), 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900; *Hughes v. Superior Court* (1948), 32 Cal.2d 850, 198 P.2d 885, affirmed 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985; *Safeway Stores v. Retail Clerks, etc., Ass'n* (1953), 41 Cal.2d 567, 574-575, 261 P.2d 721; see also *National Labor Relations Board v. Cincinnati Chemical Works*, 6 Cir. (1944), 144 F.2d 597; *National Labor Relations Board v. Kelco Corporation*, 4 Cir. (1949), 178 F.2d 578.)

[10] Lastly, in the light of the undisputed evidence and of the specific findings of fact made by the arbitration board, it clearly appears that the conclusional finding that Mrs. Walker was discharged because of her labor union activities is untenable. We have here an exemplification of that which Justice Jackson (in *Dennis v. United States* (1941), supra, 341 U.S. 494, 564, 71 S.Ct. 857, 95 L.Ed. 1137, 1181) so clearly envisaged when he said of the Communist Party: "From established policy it tolerates no deviation and no debate. It seeks members that are, or may be secreted in strategic posts in * * * industry * * * and especially in labor unions where it can compel employers to accept and retain its members," and of that to which the court referred when it stated in *American Communications Ass'n v. Douds* (1950), supra, 339 U.S. 382, 389, 70 S.Ct. 674, 94 L.Ed. 925: "Congress [in enacting the Taft-Hartley Act] had a great mass of material before

it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives * * * but to make them a device by which commerce and industry might be disrupted * * *." The issue of labor union activity herein is manifestly a false one, a subterfuge injected not to promote the cause of American labor but to further the Communist Party line. Mrs. Walker, as a Communist, was not at any time or in any of her activities truly serving the cause of an American labor union or the interests of an American laboring man; she was but doing the bidding and serving the cause of her foreign master who "tolerates no deviation and no debate." Her activities, therefore, upon any reasonable view of the evidence and the specific findings of fact, were not in truth union labor activities but were Communist Party activities.

Of no small significance in this connection is the fact that at the arbitration board hearing Mrs. Walker was asked, and she refused to answer the question, "Isn't it a fact, Mrs. Walker * * * that the reason why you sought employment * * * at Cutter Laboratories was because you felt and believed, and had it in mind, that by obtaining that employment at that plant you could more actively and more effectively carry on the program and the activities of the Communist Party?" It is, we think, indisputable that if Mrs. Walker sought and obtained employment at Cutter Laboratories so that she "could more actively and more effectively carry on the program and the activities of the Communist Party," her reinstatement in that employment would serve no cause save that of the Communist conspiracy. The courts of this country by making such an order would be but aiding toward destruction of the government they are sworn to uphold. The contract between Cutter Laboratories and the Bio-Lab Union cannot be construed, and will not be enforced, to protect activities by a Communist on behalf of her party whether in the guise of unionism or otherwise.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

SHENK, EDMONDS, and SPENCE, JJ., concur.

TRAYNOR, Justice (dissenting).

All the members of the court agree that we are bound by the determination of the arbitrators¹ that for two and one-half years Doris Walker's communist affiliations were a matter of indifference to Cutter,

that Cutter therefore waived her communist affiliations as a ground for discharging her, that it discharged her solely because of her lawful union activity, and that in doing so it violated its collective bargaining agreement with the Union. Code Civ. Proc. §§ 1280-1293; *Pacific Vegetable Oil Corp. v. C.S.T. Ltd.*, 29 Cal.2d 228, 233, 174 P.2d 441; *Sapp v. Barenfeld*, 34 Cal.2d

1. "While there is a work stoppage and a strike in this collective bargaining history [during Doris Walker's employment], both were directed at wage and contract issues. There is no evidence of any work stoppage, strike or other interference with production, the avowed objective of which was political, philosophical, subversive or revolutionary * * *.

"It is admitted that Doris Walker's conduct and the quality of her work were no different in 1949 from what they were in 1947. It is uncontradicted on the record that all of the essential facts upon which the discharge was based were in existence in 1947 and some years before. And finally it is established to our satisfaction, by admissions of the Company and by proof, that the reasons assigned in 1949 by the Company for the discharge were both known and believed by the Company in 1947.

"This state of the record raises a doubt that the Company ever took the assigned grounds for discharge seriously. * * *

"Finally, it appears, by admission of the Company, that notwithstanding the 1947 investigative report, there was no further investigation until the autumn of 1949. This is inexplicable to us if there was real concern about the combination of Communist Party membership and the omissions and falsifications disclosed by the 1947 investigative report.

"From all of this we are unable to find any satisfactory excuse for the Company's delay of over two years in asserting the grounds for discharge presented here. Contract relationships lose effectiveness if grievances about performance are not promptly discussed, settled or brought to an issue. This cuts both ways: unadjusted dissatisfactions of either employer or employees cumulate and exaggerate the importance of ensuing minor dissatisfactions. It seems to us that a commonplace of any 'just' system of discipline is the swift imposition of the penalty upon the heels of discovery of the offense. Under an agreement like this one, an employer should not be entitled to carry mutually known grounds for dis-

charge in his hip pocket indefinitely for future convenient use.

"In view of the foregoing considerations, we find that the grounds asserted by the Company for the discharge were stale. * * *

"The discharge of a top Union official and negotiator at a passionate climax in the middle of a stubbornly contested wage negotiation, standing alone, raises an inference that the discharge is retaliatory in nature and designed to restrain, coerce or interfere with the employee because of lawful Union activity. And we find convincing circumstantial evidence to support this inference.

"Two things that had lain fallow appear to have come to life when the Union opened the agreement for wage adjustment in June of 1949. The Company then put into use a new form of Application for Employment which for the first time asked questions about religion and Communist affiliation. Then also, for the first time in over two years, the Company ordered a fresh investigation into Doris Walker's Communist affiliations.

"The discharge took place in a wave of heat over a radio broadcast and a newspaper advertisement, neither of which was complimentary. But they do not appear to have made any original contribution to the usual exchanges that go on during most wage negotiations.

"While the quality of Doris Walker's conduct and performance on the job remained unchanged for three years, her position of importance in the Union had progressively increased. It was only a few months before the wage negotiation opened that she was elected President of the Local; and she was a member of the Union negotiating committee. * * *

"In view of all of the foregoing considerations, we find that Doris Walker was unjustly discharged, that the reasons assigned by the Company for the discharge were not the real reasons and had been waived, and that the discharge interfered with, restrained and coerced an employee because of participation as an officer and negotiator on behalf of the Union in a wage negotiation."

515, 523, 212 P.2d 233; Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 185, 260 P.2d 156; see Loving & Evans v. Blick, 33 Cal.2d 603, 609, 204 P.2d 23. It would seem necessarily to follow that we should affirm the judgment of the superior court confirming the award. The majority opinion holds, however, "that an arbitration award which directs that a member of the Communist Party who is dedicated to that party's program of 'sabotage, force, violence and the like' be reinstated to employment in a plant which produces antibiotics used by both the military and civilians is against public policy, as expressed in both federal and state laws, is therefore illegal and void and will not be enforced by the courts." Thus, even though an employer is indifferent to the fact that an employee is a Communist and is therefore no longer free under a collective bargaining contract to discharge him for being a Communist, it can nevertheless violate its contract not to discharge him for lawful union activity and use the fact that he is a Communist as an excuse for its unlawful action. It can do so because this court holds that the employment of a Communist poses such a threat to the security of the country that a contract by an employer with a union to keep a known Communist in its employ is against public policy and is therefore illegal. *A fortiori* such a contract by an employer with the employee is illegal. Thus by judicial fiat, but without the temerity to declare that Communists are deprived of civil rights (see, Civ.Code, § 1556), the court abrogates not only the right of employers and unions to contract for the employment of Communists, but the right of Communists as a class to enter into binding contracts. It does so by invoking public policy, in violation of clearly stated policies of the Legislature, Civ.Code, § 1556; Labor Code, § 923; Code Civ.Proc. §§ 1280-1293, and in a field in which Congress and the Legislature have clearly indicated their competence to deal with the problems involved.

Section 1556 of the Civil Code provides that "All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights."

See also, 1 Williston on Contracts [Rev. ed.] § 222, pp. 669-670. To deny persons other than those mentioned in this section the right to enter into employment contracts is to repeal pro tanto its provisions with respect to the class of contracts of greatest importance to those who must work for a living. Even if this court were at liberty so to repeal the statute, there are compelling reasons why it should not do so.

It is true that in this case only an employment contract is involved. There is nothing in the rationale of the majority opinion, however, that limits its application to such contracts. If it is illegal to employ a Communist, is it illegal to allow a Communist unemployment benefits? If the threat of communist activity makes an employment contract with a known Communist illegal as against public policy, does it not also invalidate other contracts? Thus, can a landlord break his lease with a Communist on the ground that his building may be sabotaged? Can a buyer refuse to accept and pay for goods purchased from a Communist on the ground that they may contain cleverly concealed defects? Can a seller refuse to deliver goods sold to a Communist on the ground that they may be used to promote communist activities? Can an owner refuse to pay for construction work by a licensed contractor who is a Communist? Indeed, can a Communist be licensed as a contractor? If contracts with Communists are illegal, cannot Communists themselves violate them with impunity?

If breaches of contract can be defended on the ground that one of the parties is a Communist, certainly a hearing will not be denied the alleged Communist on the issue of whether or not he is a Communist. The communist problem, which the court has thus injected into private litigation, may therefore dominate all such litigation and become one of the principal preoccupations of courts. To what end? Certainly private litigation does not lend itself to the formulation of a solution to the problem of what to do with Communists. It is a rash assumption that Congress and the Legislature have been inept in their consideration of the problem, or are incapable

of meeting it, or that astride the "unruly horse" of public policy, *National Automobile Ins. Co. v. Winter*, 58 Cal.App.2d 11, 22, 136 P.2d 22, courts are better able to meet it.

It is obvious that Cutter cannot properly invoke public policy on its own behalf. Doris Walker's work was satisfactory and her union activities were consistent with legitimate trade-union objectives. Her presence at Cutter presented at most a threat that she might attempt to use her position for subversive activities. That risk, however, was one that Cutter itself did not consider serious enough to disqualify her for employment, and it has been materially lessened by the fact that her communism has been thoroughly exposed. As an afterthought, Cutter now uses this threat as an excuse not only for discharging her for lawful union activity in violation of its contract, but for attacking an arbitration award that it had agreed should be "final and binding" upon it. By sanctioning these violations of Cutter's contract this court not only defeats the public policy in favor of employee organization free of employer interference and coercion, Labor Code, § 923; National Labor Relations Act, 29 U.S.C.A. § 151 et seq., and the public policy in favor of the settlement of disputes by arbitration, Code Civ.Proc. §§ 1280-1293, but needlessly introduces confusion into a field in which Congress has already undertaken to formulate a workable policy. 50 U.S.C.A. § 781 et seq.

It is true that there are sensitive areas in which no Communist should be employed. We cannot assume, however, that the security system established by the federal government is not adequate to protect these areas from subversive persons. As the very authorities cited in the majority opinion make clear, neither Congress in enacting subversive control legislation nor the executive department in enforcing it has been insensitive to the nation's securi-

ty. To date, however, Congress has not seen fit to make mere membership in the Communist Party a crime or to prohibit persons from entering into employment or other contracts with Communists. Similarly, the executive department has not undertaken to prosecute all Communists under the Smith Act. 18 U.S.C.A. § 2385. It is not the policy of the United States that all Communists are without legal rights and should be interned. So long as they may legally remain at large they should be allowed to earn a living. Even resident enemy aliens, whose activities have not been restricted by Congress or the President, may engage in time of war in ordinary activities and make binding contracts of employment or other contracts. *Ex parte Kumezo Kawato*, 317 U.S. 69, 74, 63 S.Ct. 115, 87 L.Ed. 58; *Heiler v. Goodman's Motor Express Van & Storage Co.*, 92 N.J.L. 415, 105 A. 233, 235-236, 3 A.L.R. 336; *Techt v. Hughes*, 229 N.Y. 222, 239, 128 N.E. 185, 11 A.L.R. 166; *State ex rel. Constanti v. Darwin*, 102 Wash. 402, 173 P. 29, 30-31, L.R.A.1918F, 1012.

It must be obvious that in passing on the validity of ordinary employment contracts in litigation between private parties, courts are in no position effectively to evaluate the security factors that should determine what jobs Communists should or should not hold. In its finding of necessity for the enactment of the Internal Security Act of 1950, 50 U.S.C.A. § 781 et seq., Congress demonstrated its awareness of the communist problem and specifically established in that act the policy of the United States with respect to the employment of Communists. It did not prohibit all hiring of Communists nor did it leave to the courts the decision as to what jobs Communists might hold. It provided instead that the Secretary of Defense should determine and designate the defense facilities in which members of Communist-action organizations should not be employed.² Cutter

2. Section 784(a) of the Act provides that "When a Communist organization * * * is registered or there is in effect a final order of the [Subversive Activities Control] Board requiring such organization to register, it shall be un-

lawful—(1) For any member of such organization * * * (D) if such organization is a Communist-action organization, to engage in any employment in any defense facility." Section 784(b) provides that "The Secretary of Defense is

has not been so designated, and we may therefore assume that the employment of a Communist at Cutter poses no threat to the security of the country. I see no evidence of Congressional incompetence or of executive negligence in this respect, nor do I see any evidence of superior wisdom, facilities, or techniques available to this court that would justify its intrusion into policy making in this field. It is my opinion that we can still safely leave to the legislative branch of the government the formulation of policies for the security of the country, and I would therefore affirm the judgment.

GIBSON, C. J., and CARTER, J., concur.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



130 Cal.App.2d 384

Charles TESSEYMAN and C. A. Sohn,
Plaintiffs and Appellants,
v.

George H. JOVICK, Leonard R. Jacobson,
John D. Moore, Jack P. Shaffer, Kenneth
Keyes, California Pacific Title Insurance
Company, Nash Building Co., Inc., and
W. K. Ephraim, Defendants,

California Pacific Title Insurance Company,
Respondent.
Civ. 15826.

District Court of Appeal, First District,
Division 1, California.
Jan. 26, 1955.

Rehearing Denied Feb. 25, 1955.

Hearing Denied March 22, 1955.

Action to quiet title or to impose a constructive trust on certain real property. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., rendered judgment for defendant, and plain-

tiffs appealed. The District Court of Appeal, Peters, P. J., held, inter alia, that evidence whether sale had been induced by brokers' breach of fiduciary relationship or by misrepresentations was sufficient to support findings for defendant.

Judgment affirmed.

1. Quieting Title ⇨38, 51

Where a plaintiff prevails in a quiet title action, it is error not to quiet his title against disclaiming defendants or to grant a disclaiming defendant affirmative relief

2. Quieting Title ⇨50

Where it was determined, in quiet title action, that a defendant was owner of property, trial court properly refused to grant plaintiffs affirmative relief against disclaiming defendants.

3. Trusts ⇨110

In vendors' action to impose trust on land held by escrow holder, which had taken title at close of escrow, evidence whether sale had been induced by brokers' breach of fiduciary relationship or by misrepresentations was sufficient to support findings for escrow holder.

4. Appeal and Error ⇨931(1)

In absence of a showing to the contrary, trial court's findings were presumed to be supported.

5. Trusts ⇨371(2, 8)

No cause of action to impose a constructive trust against a title holder, who is not charged with wrongdoing, may be established without pleading and proof of some relationship between title holder and alleged tortfeasors.

6. Trusts ⇨110

In vendor's action to impose trust on property held by escrow company, which had taken title at close of escrow, on ground that sale had been induced by alleged fraud on part of brokers, evidence on issue of absence of connection between alleged fraud and escrow company was sufficient to support findings for escrow company.

authorized and directed to designate and proclaim * * * a list of facilities * * * with respect to the operation of which he finds and determines that the

security of the United States requires the application of the provisions of subsection (a) of this section."

7. Trusts \Rightarrow 110

In vendors' action to impose trust on property held by escrow company, which had taken title at close of escrow, on ground that sale had been induced by brokers' misrepresentations, evidence supported finding that no misrepresentations had been made.

H. J. Kleefisch, San Francisco, for appellants.

Landels & Weigel, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiffs brought this action to quiet their title to or to impose a constructive trust on certain real property. The trial court denied the requested relief and plaintiffs appeal.

The plaintiffs are Charles Tesseyman and C. A. Sohn. Tesseyman owned equities in the Hotel Angelus, the Hotel La Salle and the Motel Inn. Titles to these properties were in the name of Mrs. Sohn, Tesseyman's manager. Defendants George H. Jovick and Leonard R. Jacobson were interested in purchasing the hotel properties. Their demurrer to the third amended complaint was sustained without leave to amend. They are not parties to this appeal. John Moore and Jack Shaffer, also named as defendants, were real estate brokers who negotiated the sale. Although neither was served, each filed a disclaimer. Defendant Kenneth Keyes, although not served, also filed a disclaimer. He was a janitor who permitted himself to be used as the nominee of the purchasers. The Nash Building Co., Inc. was the employer of Keyes, and the operator of the Nash Building in which Moore and Shaffer had their offices. Its demurrer to the second amended complaint was sustained without leave to amend, so it is not a party to this appeal. Defendant W. K. Ephraim was dismissed as a party at the opening of the trial. The California Pacific Title Insurance Company acted as one of the escrow depositaries in the sale of the properties, and took title to them at the conclusion of the escrow. It was the only defendant

appearing at the trial, and is the only respondent involved on the appeal.

The facts are as follows: Until July of 1950 Tesseyman owned the three properties here involved. For convenience of management he had placed record title to them in the name of his manager, Mrs. Sohn. Sometime in July, 1950, Moore, a real estate broker, acting for undisclosed principals, made an offer to purchase Tesseyman's equities in the three properties for \$115,000, and Tesseyman accepted. A uniform deposit receipt dated July 25, 1950, was signed, Moore representing that one Kenneth Keyes was the nominal purchaser. Keyes was, in fact, a dummy for the undisclosed buyers. Moore testified that he had been directed to make the offer by George Jovick and Leonard Jacobson, but, as the story unfolded at the trial, the intended buyers were Helen and Patty Offield who are not parties to this action. The agreement called for a \$5,000 deposit with the title company, and this sum was, in fact, deposited with California Pacific by the Offields. The agreement also provided that Tesseyman should pay Moore a broker's commission on the sale.

Pursuant to the provisions of the agreement, Mrs. Sohn deposited in escrow with the City Title Company the documents called for by the agreement. By these documents titles to the hotels and to their contents were to be conveyed to the California Pacific upon payment to City Title of \$115,000.

Attached to the sales agreement were typed sheets purporting to itemize the encumbrances on the three properties assumed by the buyer. Among other things, as to the encumbrances on Hotel Angelus, it was stated: "Subject to the first deed of trust of record and a balance owing to Eva L. Wilson on account of the purchase price of a one-fourth interest in the above property, the amount of which said balance is about \$18,000 * * *." It appears that Mrs. Wilson did hold a deed of trust against this property, but she was unwilling to sell her interest unless she also received an additional \$2,550 which she claimed Tesseyman owed her as a result of other

deals they had had together. This \$2,550 claim of Mrs. Wilson was not listed as an encumbrance in the sales agreement, but to get Mrs. Wilson out of the picture the buyers agreed to include Mrs. Wilson's additional claim for \$2,550 in the assumed obligations. Thereupon, Mrs. Sohn modified her instructions to the City Title Company to provide that one of the conditions of the transaction was that California Pacific should secure a receipt from Mrs. Wilson acknowledging payment of the \$2,550. California Pacific did pay this claim out of the escrow set up by the Offields and received the requested receipt from Mrs. Wilson.

As to the Hotel La Salle property, the addenda of encumbrances listed two deeds of trust. Not revealed by Tesseyman was a third deed of trust in the sum of \$22,359 held by one Mrs. Lloyd. Sometime after the agreement of sale was signed Moore told Tesseyman's attorney that his principal had discovered this third deed of trust and a chattel mortgage, that his principal was willing to pay \$15,000 to Mrs. Lloyd, but that the deal was off unless Tesseyman agreed to pay the balance of \$7,359. Tesseyman agreed to this modification, and in September, 1950, the City Title Company notified California Pacific that the purchase price had been reduced \$7,359. During the trial Tesseyman asserted that he did not know whether Mrs. Lloyd had ever been paid, but he admitted, somewhat equivocally, that, prior to the agreement to reduce the purchase price, Mrs. Lloyd had demanded her money, and he conceded that since the amended instructions had been filed he had not been called upon to pay this debt, nor had any demand been made that he do so.

Also in September, 1950, Moore told Tesseyman that his principal would like to exclude the Motel Inn from the purchase agreement. Tesseyman agreed, and Sohn signed modifying instructions removing the Motel Inn from the deal, and reducing the purchase price to \$70,000, less the \$2,550 debt owed to Mrs. Wilson. On October 3, 1950, California Pacific paid the purchase price, including the Wilson receipt, to the City Title, and received from it the deeds naming California Pacific as grantee, and

the other documents called for by the purchase agreement.

The cause proceeded to trial on the issues set forth in two causes of action in the third amended complaint. Both causes involve only the Hotel La Salle, it being alleged that the defendants no longer own the Hotel Angelus. The first cause of action seeks to quiet appellants' title to the Hotel La Salle against the claims of the defendants. The second cause of action seeks to impose a trust on the Hotel La Salle in favor of appellants, based on allegations that the individuals named as defendants secured title by false representations and fraud. The alleged fraud relates mainly to the transaction involving Mrs. Lloyd by which appellants reduced the purchase price \$7,359, it being claimed that the promise that this sum was to be paid to Mrs. Lloyd was false. There is no allegation that respondent California Pacific participated in such claimed fraud.

Because of the disclaimers, the dismissal of one defendant, and the sustaining of the demurrers of other defendants, California Pacific was the sole defendant to appear at the trial. The plaintiffs failed to call Mrs. Lloyd as a witness or to prove to the satisfaction of the court that the statements made by the defendants in reference to her were false. California Pacific produced no evidence, being content to submit the case on the evidence produced by appellants, it being claimed by respondent and found by the trial court that there was a failure of proof. The trial court found in favor of California Pacific, and made findings substantially in accord with the statement of facts above set forth. The judgment declared that California Pacific was the owner of Hotel La Salle, and that neither plaintiffs nor the other defendants had any claim thereto adverse to California Pacific.

[1,2] Appellants insist that, because Moore and Shaffer appeared and filed disclaimers, it was error not to enter judgment against them and in favor of appellants. Of course, if the trial court had determined that appellants owned the property it would have been error not to have

quieted appellants' title against the disclaiming defendants. It would also have been error to grant a disclaiming defendant affirmative relief. *Bradley Co. v. Ridgeway*, 14 Cal.App.2d 326, 58 P.2d 194. But the fact that certain defendants disclaimed any interest in Hotel La Salle did not establish that appellants were the owners of it. It would have been highly inconsistent and improper for the trial court to have determined that title should be quieted in California Pacific against appellants' claims, and against the claims of the other defendants, and then to have quieted title in appellants as against the disclaiming defendants. The appellants had no title to quiet against anyone. The trial court completely and correctly disposed of the title issue by finding that none of the parties, except respondent, had any interest in the property.

[3,4] Appellants next purport to challenge the sufficiency of the evidence to support the findings. They contend that a fiduciary relationship existed between the brokers and appellants, and that such relationship was breached, apparently by the brokers making arrangements to resell Hotel Angelus for an amount in excess of what it was being sold for by Tesseyman, and that Tesseyman would never have consented to the lower price had a full disclosure been made. Objection is also made as to the securing of a lower price by claimed misrepresentations as to the Mrs. Lloyd transaction. These arguments are made without any transcript references. No specific evidence in the transcript is referred to, which, it is claimed, shows the charged wrongdoing. Outside of bare argumentation, there is no specific evidence referred to in appellants' brief that even suggests wrongdoing on the part of anyone, far less demonstrates such wrongdoing. There is nothing referred to that contradicts the findings. In the absence of a showing to the contrary, those findings are presumed to be supported.

See *Tesseyman v. Fisher*, 113 Cal.App.2d 404, 248 P.2d 471, where appellant Tesseyman unsuccessfully made this same general contention in an appeal involving the sale of another of his properties.

Without transcript references appellant urges that the trial court erroneously excluded offered evidence as to the relationships between Moore and Shaffer and Jovick, Jacobson and Helen Offield. It is also contended that error was committed in excluding evidence of the escrow officer of California Pacific in connection with the claimed resale of the property by the brokers' undisclosed principals.

[5-7] Aside from the fact that neither of these points has been properly or adequately presented, there is no merit in either of them. The proffered testimony was not germane to any cause of action pleaded against California Pacific. Jovick and Jacobson were not before the court, their demurrers having been sustained without leave to amend. Helen Offield was not even named as a party. California Pacific was not charged with any wrongdoing, it being one of the two escrow depositaries. No cause of action to impose a constructive trust against California Pacific could successfully be established without pleading and proof of some relationship between the tort-feasors and the title holder. There is no such pleading, nor are we referred to any such proof. The evidence shows that California Pacific met every condition of the escrow given by the seller's agent, and took delivery of the deed in question pursuant to the escrow instructions. There is a complete failure to prove any connection between the alleged fraud and the title holder. Moreover, the finding that no misrepresentations at all were made by anyone is amply supported.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

130 Cal.App.2d 336

Ray GOTTBEHUET, Plaintiff, Appellant
and Respondent,

v.

Edwin J. FOX and Charles Cramer, Defendants, Respondents and Appellants.

Civ. 20464.

District Court of Appeal, Second District,
Division 1, California.

Jan. 24, 1955.

Rehearing Denied Feb. 15, 1955.

Action on two notes executed and delivered to defendants by plaintiff. The Superior Court, Los Angeles County, Philbrick McCoy, J., granted defendants a nonsuit on one cause of action and entered judgment against defendants on other cause of action, and both parties appealed. The District Court of Appeal, Drapeau, J., held, inter alia, that, where plaintiff testified, and documentary evidence proved, that plaintiff, who had withheld money from collections he was making for corporation, had received full amount of such note, plaintiff failed to prove cause of action on such note.

Order and judgment affirmed.

1. Bills and Notes \hookrightarrow 527(1)

Where, in action by employee against corporation's president and secretary for amount allegedly due under note executed by president and secretary, employee testified, and documentary evidence proved, that plaintiff, who had withheld money from collections he was making for corporation, had received full amount of such note, plaintiff failed to prove cause of action on such note.

2. Appeal and Error \hookrightarrow 1056(2)

In action on another note, evidence, which was offered by defendants after they had been nonsuited, and which allegedly would have impeached plaintiff's testimony regarding withholdings made in payment of defendants' note, was immaterial, and its rejection not prejudicial to defendants.

3. New Trial \hookrightarrow 164

Upon denial of motion for new trial, court was authorized to vacate its prior findings, conclusions, and judgment and to make new findings and conclusions and

to render a new judgment. *West's Ann. Code Civ.Proc.* § 662.

Milton A. Krug, Los Angeles, for plaintiff-appellant.

Macfarlane, Schaefer & Haun, E. J. Caldecott, Henry Schaefer, Jr., Los Angeles, for defendants-respondents.

DRAPEAU, Justice.

By a complaint containing two causes of action plaintiff sought to recover on two promissory notes for \$15,000 each, executed and delivered to him by defendants. One was dated September 6, 1946 and was set out in the first cause of action. The other, dated September 9, 1946, was the subject of the second cause of action.

The answer admitted the execution and delivery of the two notes. As an affirmative defense, defendants alleged that they received the sum of \$15,000 and gave plaintiff the note set out in the second cause of action. That some time thereafter, plaintiff represented to them that he had lost this note. No one could remember the date of it. As a result, defendants executed a new note, dated September 6, 1946, as set forth in the first cause of action. Defendants also alleged and claimed throughout the trial that there was but one loan of \$15,000 made to them by plaintiff; that there was only one note evidencing such loan and that this note was reissued on the representation of the loss of the original note. It was further alleged that the loan had been fully paid and discharged.

Plaintiff testified at the trial that he lent defendants \$15,000 on January 28, 1946, by delivering to them two checks: one for \$10,000 and the other for \$5,000. A few months later, he asked defendants to give him a note to cover this loan, which they did, paying the interest from January 28th in cash. A month or so later, plaintiff lost this note and in August he mentioned this fact to defendants. The note for \$15,000 dated September 6, 1946 was given to plaintiff to replace the lost note. On September 9, 1946, plaintiff delivered to defendants another \$15,000 and they gave him the note of even date as security.

Defendants were president and secretary, respectively, of Mayfair Companies. Plaintiff was employed by the corporation. In 1948, when the notes were about two years old, plaintiff pressed defendants for payment. Defendants directed that he withhold \$100 to \$200 each week from collections he was making for the Mayfair Companies, and "they in turn would reimburse Mayfair Companies for the amount I was withholding."

From that time until September 18, 1950, plaintiff withheld from collections a total of \$14,190 which he credited to principal and interest of the note of September 6, 1946, reporting such withholdings to defendants' secretary.

On September 18, 1950, plaintiff presented a statement to defendants showing a balance of \$4,410 due on the \$15,000 note of September 6th. Defendants thereupon gave him a note for this balance. A notation across the face thereof shows payment as of March 15, 1951.

At the close of plaintiff's case, the trial court granted defendants' motion for nonsuit as to the note dated September 6, 1946, as set forth in the first cause of action, on the ground that it had been paid. The trial proceeded on the second cause of action and on December 15, 1953, the court gave judgment in favor of defendants.

Thereafter plaintiff moved for a new trial. On February 15, 1954, the motion was denied and the trial court vacated and annulled the findings of fact and the judgment of December 15, 1953 in favor of defendants. And the court rendered a judgment in favor of plaintiff on the \$15,000 note set forth in the second cause of action, together with attorneys' fees, interests and costs.

Plaintiff here appeals from the order and judgments of nonsuit as to the first cause of action. Defendants appeal from the judgment adverse to them on the second cause of action.

Plaintiff's Appeal.

Plaintiff asserts that the nonsuit was improperly granted because the evidence did not establish payment of the note.

In this connection, he admits that he received sufficient money from his withholdings to pay off the note sued upon and that he so applied it. However, he takes the position that such payment was upon condition that defendants should reimburse the corporation for the amounts withheld. And since there is no evidence of performance of the condition, the condition failed. As a result, he is liable to Mayfair for the money withheld and it cannot constitute payment of the note.

In other words, that he is under a contingent liability to reimburse Mayfair for the money withheld and credited against the note.

"In ruling upon a motion for a nonsuit the evidence must be viewed in the light most favorable to plaintiff. The evidence herein, viewed in accordance with that rule, was not of sufficient substantiality to support a finding for plaintiff." *Beckerman v. Huteson*, 125 Cal.App.2d 79, 81, 269 P.2d 906, 907.

Likewise in the case under consideration. The first cause of action is strictly one at law to recover a specific sum of money on a promissory note. It is directed against the makers of the note alone. Mayfair was not joined as a party. Neither conditional payment nor failure of the condition was alleged.

Plaintiff took the stand and testified that he had received the full amount of the note sued upon. Documentary evidence was introduced which proved it, to wit:

(a) A renewal statement dated September 18, 1950, showing a balance of \$4,410 due on the note of September 6, 1946.

(b) A note of even date for \$4,410 marked paid as of March 15, 1951.

(c) The cancelled note of September 6, 1946.

[1] In the circumstances presented, the trial court properly granted the motion for nonsuit.

Defendants' Appeal.

Defendants urge error by the court in sustaining plaintiff's objections to evidence offered by them. They offered to prove by

Mrs. Helen Saunders, one of their employees, that the testimony of plaintiff regarding the withholdings from Mayfair was not true.

They insist that this impeaching evidence "would have convinced the court that there was in fact only one loan * * * and would have been conclusive of the fact that the testimony of the plaintiff was not worthy of belief in any particular whatsoever."

The offered evidence had reference to the first cause of action and the offer was not made until after the motion for nonsuit as to that cause of action had been granted.

Counsel for defendants explained: "I perhaps am offering that because of an ethical sense. These people are virtually charged with entering into what I would consider an illicit and illegal arrangement to defraud the company and to permit someone to make collections. I am desirous of having them refute that charge and to have the testimony in Court to refute it.

"The Court: There is no issue of that sort before me. Sustained." Counsel then withdrew the witness and acquiesced in the ruling.

[2] At the time it was offered, this evidence was clearly immaterial, and its rejection was not prejudicial to defendants.

[3] It is also asserted that the court erred in signing a new and a different judgment. This was done upon the hearing of plaintiff's motion for a new trial.

In discussing this subject in *Pacific Home v. County of Los Angeles*, 41 Cal. 2d 855, 857, 264 P.2d 544, 546, our Supreme Court stated:

"Upon denying the motion for a new trial, the court was authorized to vacate the prior findings, conclusions and judgment, and to make new findings and conclusions, and to render a new judgment. Code Civ.Proc. § 662; *Spier v. Lang*, 4 Cal.2d 711, 713-714, 53 P.2d 138; see, also, *In re Estate of Busteed*, 105 Cal.App.2d 14, 16-18, 232 P.2d 881. Accordingly, the new judgment entered April 17, 1952, superseded the judgment entered February 18, 1952. Defendants' appeal from the

superseded judgment is therefore a nullity and will be dismissed."

In accord with the foregoing, plaintiff's purported appeal from the superseded judgment of December 15, 1953, is dismissed.

The order granting defendants' motion for judgment of nonsuit, and the judgment of February 15, 1954, are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.



130 Cal.App.2d 452

Mons M. NICHOLL and Fred D. Johnson,
Plaintiffs and Respondents,

v.

Adele IPSEN, Defendant and Appellant,
Erik S. Reinert, Defendant.

Civ. 5047.

District Court of Appeal, Fourth District,
California.

Jan. 26, 1955.

Action on five promissory notes. The Superior Court of Orange County, John Shea, J., rendered judgment against one of defendants, and she appealed. The District Court of Appeal, Griffin, J., held that where, pursuant to written memorandum, plaintiffs advanced money to defendants in return for interest in partnership business and assets, with understanding that business was to be incorporated and plaintiffs issued certain amount of stock, and where parties agreed that such advancements on investment were to be considered loans, to be represented by promissory notes payable in six months, and that if shares of stock were issued as understood, loans would be considered paid, transaction involved no violation of Corporate Securities Law.

Judgment affirmed.

1. Licenses ⇌ 18½(13)

Where, pursuant to written memorandum, plaintiffs advanced money to defend-

ants in return for interest in partnership business and assets, with understanding that business was to be incorporated and plaintiffs issued certain amount of stock, and where parties agreed that such advancements on investment were to be considered loans, to be represented by promissory notes payable in six months, and that if shares of stock were issued as understood, loans would be considered paid, transaction involved no violation of Corporate Securities Law. Corporations Code, §§ 25153, 26100; Gen. Laws, Act 3814, §§ 2(a), subd. 7, 2(b), subd. 10, 11, 33.

2. Bills and Notes \S 97(1)

Where plaintiffs and defendants signed partnership agreement which was subject to approval of a copartner, and where, pursuant to agreement plaintiffs advanced money, for which defendants signed notes, with understanding that such loans were to be considered paid if partnership incorporated and issued certain amount of stock to plaintiffs, but where copartner never approved agreement, and partnership never incorporated, agreement was binding on signers to extent that it was executed, and defendants could not escape liability on notes on ground that money advanced was voluntarily paid.

Otto K. Paulus, Laguna Beach, for appellant.

John W. Solomon, Laguna Beach, for respondents.

GRIFFIN, Justice.

Plaintiffs, as payees, brought this action upon five separate promissory notes signed by defendants Adele Ipsen and Erik S. Reinert. No service was had upon Reinert. Judgment was entered only against defendant Ipsen for \$5,893.66, plus attorneys' fees and interest.

Prior to July 15, 1949, defendants Ipsen and Reinert had acquired the United States rights (denominated Buen Patents) in certain Norwegian patents covering a mechanical invention pertaining to a certain method of constructing houses from logs and other materials by means of interlock-

ing ends. On July 15, 1949, defendants signed a memorandum of agreement with plaintiff Johnson, a general contractor, and Anne Nicholl (wife of plaintiff Mons M. Nicholl, who was substituted for her in a supplemental agreement dated August 2, 1949). The original memorandum recites that "for the purpose of reducing to writing the understanding of the various parties to this memorandum, the following terms and conditions are tentatively agreed upon"; that Reinert and Ipsen have in their joint names a certain contract with the Buen Houses, Limited, of Norway, granting to them the right to manufacture and sell products manufactured by the machine covered by the Norwegian and American patent rights; that in acquiring said patent rights, and, in addition, a machine designed in accordance with the patents, Reinert, Ipsen and A. E. Olss have entered into a tentative oral partnership agreement based on the investment of the new parties, Johnson and Nicholl, by the terms of which Reinert has a 25 per cent interest, Ipsen 25 per cent, and Olss 30 per cent. It then provides that Johnson and Nicholl propose investing in the partnership and business, including all the assets thereof, the sum of \$3,000 each, for which they are each to receive a 10 per cent interest in said partnership business, and assets above mentioned. The investment of the \$6,000 by plaintiffs is conditioned upon satisfactory examination of the patent rights agreement, the machine, and its production ability, to be determined by plaintiffs within 16 days of the date of the memorandum. It then provided if plaintiffs decided to make the investment the partnership business was to be immediately incorporated, and there was to be issued to plaintiffs, corporation stock in an amount equal to 20 per cent of \$30,000, the proposed authorized capitalization. It was then agreed that Olss was not in the United States at the time and accordingly final details of the business agreement between the parties were to be subject to his consent and approval. This agreement was signed by all parties except Olss. On August 2d, 1949, a supplemental memorandum was signed by the same parties. It referred to the original written agreement and provided

that plaintiffs acknowledged their willingness to advance the \$6,000 under certain conditions, including: (1) That such advancement was to be made at such time as the business is incorporated and shares of stock of the value of \$6,000 are issued to them in accordance with the provisions of the agreement. (2) That pending the incorporation plaintiffs would advance portions of the \$6,000 by way of loan to Ipsen and Reinert to be represented by promissory notes payable in six months. (3) That when the business is completed and stock available to plaintiffs, as indicated, the promissory notes were to be cancelled and credited against the investment by Johnson and Nicholl. (4) That plaintiffs would pay their own attorney to investigate the validity and availability of the claimed patent rights and in case they were not, in the opinion of the attorney, acceptable for any reason prior to the incorporation of the business, the obligation of plaintiffs to invest \$6,000 in the business is to be canceled and the promissory notes here involved are to be payable when due. (5) A provision is then made that since Olss was out of the United States it was mutually understood between those who signed the agreements that the terms and conditions thereof were subject to his consent and approval.

It appears that immediately upon the signing of the first memoranda by the parties indicated, plaintiffs commenced spending money in behalf of the enterprise, made plans for, and took general charge of the operation of the business. It was provided in the agreement that after plaintiffs invested their funds they must approve all expenditures of any funds by the partnership until the corporation was formed. The general method of payment of bills was for plaintiffs to contract the obligations and then make checks payable to Mrs. Ipsen or Reinert, who would endorse them and pay the bills and after an accumulated amount was shown, Ipsen and Reinert executed the series of notes indicated, payable to plaintiffs. It was stipulated that all sums advanced went into the business. Some money was paid to Reinert for personal living expenses, etc. while

he was in Oregon endeavoring to set up the machinery for its operation. No corporation was ever formed, and accordingly no stock was issued. The agreements in question were never signed by Olss.

From the evidence, the reason the agreements were never carried out by the respective parties is problematical and uncertain. Olss claimed his refusal to participate was because Reinert always insisted on having a 51 per cent interest in the business without any investment. He testified that he (Olss) never did own a 30 per cent interest in it and that he never had any interest in the so-called Buen Patent rights.

It is the testimony of Johnson that in reference to the patent on the "log house proposition" he never received any information from the patent attorneys indicating that the Buen organization had more than one patent; that they did have an application pertaining to a type of machinery but that it had no relation to the business of building houses.

There is a letter in evidence dated August 25, 1949, from those attorneys reciting that application for patent serial number 792,291 was one of the patent rights assigned to defendants, but it was not a *Buen* application and that accordingly some error existed in this respect.

There is in evidence a letter dated October 12, 1949, indicating that plaintiffs had had no news in reference to the validity of the patent rights as of that date.

Defendants offered in evidence a certificate of the Commissioner of Patents dated December 21, 1951, certifying that there had been no assignment of letters patent granted Buen interests "Patent No. 2,558,036, dated June 26, 1951. Templet—Guided Cutter for Shaping Log Ends" since December 17, 1945.

The answer of Ipsen, by way of defense to the causes of action, is that under the two memorandum agreements above mentioned, the notes here in question were and are securities under Act 3814, Deerings General Laws, section 2(a), subdivision 7; that under section 33 of said Act and Corporations Code sections 25153 and 26100,

the notes are null and void. It is there also claimed that under an oral agreement and by virtue of the provisions of the memorandum agreements, defendants were to assume no liability for the payment of the notes unless plaintiffs sustained a loss by reason of the Buen Patents infringing on other United States patents, and since no loss occurred thereby no liability for payment of the notes accrued; that the written agreements, accompanying the notes, must be considered a part of the conditions of payment of the notes, and since those agreements were never fully executed, due to lack of the signature of Olss, the entire transaction, including the signed notes, must be considered as of no force and effect.

After trial, the court found generally for plaintiffs and specifically found that the notes were duly executed and that the memoranda agreements were executed by and delivered to the respective signatory parties; that the memoranda agreements were drawn by the attorney for Olss; that neither memorandum agreement was approved or accepted by Olss, and by their terms they were not effective unless so approved, but that the parties to these memoranda agreements, by their conduct, have given effect to them and, to the extent they have been executed, they were valid and binding on the parties; that the sums of money advanced by plaintiffs to defendants were loans by the plaintiffs to the defendants individually; that these notes were never offered to the public for sale and that none of the transactions involving the promissory notes were in violation of the Corporate Securities Act; that the principal sums of said notes, together with interest, were wholly unpaid. It then found that the allegations of defendant's answer were untrue except as to those allegations which were specifically found to be true.

Judgment was rendered accordingly and defendant Ipsen appealed.

The first argument is that notes given for money paid on an illegal stock subscription are invalid, void, and not collectible where the parties are in *pari delicto*, or where no permit is secured for their sale, citing the authorities referred to in

her answer and *Tervis v. Blanchard*, 122 Cal. App.2d 731, 266 P.2d 85; *Imperial Live-stock & Mortgage Co. v. Tracy*, 208 Cal. 205, 281 P. 50; *Menke v. Rand Mining Co.*, 81 Cal.App.2d 169, 183 P.2d 755; and *Miller v. California Roofing Co.*, 55 Cal.App.2d 136, 130 P.2d 740. It is further contended that the notes were not exempted under Act 3814, Deering's General Laws, section 2(b), subdivisions 10 and 11, effective as of the date of this transaction, citing *People v. Oliver*, 102 Cal.App. 29, 36, 282 P. 813; *People v. Davenport*, 13 Cal.2d 681, 91 P.2d 892; *People v. Sidwell*, 27 Cal. 2d 121, 128, 162 P.2d 913; and *Cecil B. De Mille Productions v. Woolery*, 9 Cir., 61 F.2d 45.

The general holding of the authorities relied upon by defendant establishes that a promissory note given by a stranger to a corporation, or to an incorporator, in payment of stock, without, or in violation of, a permit to issue such stock is uncollectible by the corporation or by the incorporator. *Miller v. California Roofing Co.*, supra, involved an action by the manager of a corporation against the corporation for money paid for stock of the corporation. Judgment for defendant corporation was sustained principally upon the ground that plaintiff was in *pari delicto* with defendant corporation and could not recover.

[1] From the evidence produced and findings made thereon, it appears that the transaction here involved was not a security within the meaning of the Corporate Securities Law.

In *People v. Davenport*, supra, 13 Cal.2d at page 686, 91 P.2d at page 895, it is said that since "the legislature specifically excepted from the operation of the act 'promissory notes', falling within the provisions of section 2(b), subdivisions 10 and 11 * * * it plainly was not the legislative intent that 'every' note or evidence of indebtedness, regardless of its nature and of the circumstances surrounding its execution, should be considered as included within the meaning and purpose of the act." It quotes from 37 Corpus Juris, at page 275, and said: "It means the investment of

funds in a designated portion of the assets and capital of a concern, with a view of receiving a profit through the efforts of others than the investor; and in this sense includes what are termed 'security' or 'investment' contracts or 'speculative securities'. But it does not extend to ordinary commercial contracts, nor does it include interest income from the lending of money, or the profits which one might make by his own efforts as the result of any ordinary commercial contract.' See, also, 53 C.J.S., Licenses, § 75.

It was held in the Cecil B. De Mille Productions case, *supra*, that the purpose of the Corporate Securities Law was to protect the public, as well as to safeguard individual purchasers and subscribers or creditors, and that an ordinary note, whether secured or unsecured, not offered to the public or sold to an underwriter for resale, is not 'security' requiring a permit. In the instant case it appears that the business first contemplated was a joint adventure or partnership, and plaintiffs were to engage in such joint adventure or partnership with defendants. In fact, nearly all planning and business arrangements were done by plaintiffs after the agreements were signed and plaintiffs were to have control over the expenditures of any money by said partnership. It should be here noted that at least \$1,201.10, the amount set forth in note No. 1, was advanced prior to the date of the amended memorandum. It might be well believed that these advances were made and that this note was issued under the original memorandum agreement. Under it, the respective interests of the parties in the "tentative oral partnership" were agreed upon and therein indicated. It recites that plaintiffs "propose investing in said partnership and business" the sum of \$6,000, for which they were each to receive a "10 per cent" interest in the "partnership" and that they agreed to invest that sum. Therein it was also agreed that thereafter they would immediately incorporate. By the subsequent agreement, plaintiffs endeavored to attach a condition to the investment of their \$6,000 in cash in the partnership, dependent upon the business being incorporated and shares of stock of that value be-

ing issued to them. They agreed, however, that pending the incorporation, they would advance portions of it, by way of a loan to defendants, to be represented by the promissory notes indicated. The only time this investment was not to be considered a loan would be if the shares of stock were issued and were transferrable, in which case it was to be considered that the loan was paid.

A similar situation was discussed in *Polizzi v. Porcaro*, 110 Cal.App.2d 395, 242 P.2d 949. There defendant was in a food brokerage business. Plaintiff was in the restaurant business. Defendant and his son wanted to operate a cannery. No such cannery was operated prior to a written agreement subsequently signed by plaintiff and defendant. Plaintiff agreed to invest \$12,500 for a one-fourth interest therein and a corporation was to be formed. Plaintiff, as one of the organizers, was to have one-fourth of the capital stock, and defendant was to supervise the work and deliver the certificate of stock covering the \$12,500 to plaintiff "as soon as the papers were ready". Plaintiff was privileged within one year to seek a return or a refund of his capital, plus 5 per cent interest. Plaintiff paid the money and defendant used it in the business. Plaintiff never received the stock nor was any such stock issued or authorized for this purpose. An action followed by plaintiff to recover the \$12,500, and he contended that the agreement was a corporation stock subscription agreement, and accordingly in violation of the Corporate Securities Act. Judgment in favor of defendant was affirmed on appeal. The court held that where a document providing that for a specific sum of money plaintiff was to have a certain percentage interest in a corporation, of which he was an organizer, and could, within a certain time, refuse the stock and terminate the agreement, it was an agreement for a joint adventure in which the adventurer would form a corporation, and not a stock subscription agreement.

In *Sargent v. Coppage*, 47 Cal.App.2d 122, 117 P.2d 412, it was held that an agreement under which the plaintiff is assigned a percentage in a mine with the right to

his assignors to form a corporation and to assign to him a percentage interest in the capital stock is not the sale of a security for which a permit is required under the Corporate Securities Act; that the agreement is a temporary expedient only to provide a record of the interests of the parties pending formation of the corporation.

In *Austin v. Hallmark Oil Co.*, 21 Cal.2d 718, 134 P.2d 777, it was held that the Corporate Securities Act rendering invalid securities issued without the requisite permit does not apply to an assignment where the assignee is not a *mere investor* but is *to share in the conduct of the enterprise*.

For the purposes indicated, the distinction between a joint adventure and partnership is difficult to define. The memorandum agreement referred to the arrangement as a partnership. The acts actually performed thereunder may have amounted only to a joint adventure. As the two relations are similar, the rights of the joint adventurers, as between themselves, are governed by practically the same rules that govern the relation of partners. 14 Cal.Jur. p. 761, sec. 2.

In *Oakley v. Rosen*, 1946, 76 Cal.App.2d 310, 173 P.2d 55 it was said, quoting from the syllabus:

"While it may be a legal conclusion to differentiate an agreement for joint venture from a contract for a copartnership or a corporate organization, yet it becomes a finding of fact when it distinguishes a contract for a joint venture from a certificate of stock, a bond or other type of security referred to in the Corporate Securities Act." And that "An agreement for a joint venture cannot reasonably be construed as a security within the meaning of the Corporate Securities Act. The facts that no such instrument as the agreement in question was listed as a security in the statute and that it has never been construed as a security, justifies the inference that the Legislature had no intention that it should be so regarded." (See Sec. 25100, subdivision (n), Corporations Code.)

"While a contract for a joint venture might be used as a subterfuge whereby to evade the requirements of the Corporate Securities Act, yet such attempted evasion must be found as a fact before the author of the scheme may be subjected to the penalties that flow from such violation. No such evasion was shown where the agreement was not intended to be a security."

In the instant case no such attempted evasion was found by the trial court to exist, nor is it indicated. The finding was that there was no violation of the Corporate Securities Law. The trial court was justified in so finding.

There is some evidence that the two patents involved were not as represented, or at least were not acceptable, and accordingly, under the terms of the agreement, plaintiffs were not obligated to invest the \$6,000, in which case the notes were to be payable when due. There is no direct finding on this issue. Plaintiffs set up the notes in their complaint and alleged that they were due and payable and had not been paid. Defendant's answer denies these allegations, sets up the written memorandum as a complete defense, by which it is claimed defendants were relieved of liability because there was no infringement of patents and thereby no loss resulted to plaintiffs. The court specifically found that the allegations of plaintiffs' complaint were true, and that the allegations of defendant's answer, in this respect, were untrue, but did find that no "opinion of said patent counsel was introduced in evidence" in this respect. In view of the conclusion reached as to the nature of the transaction, it becomes unimportant to determine the effect of the court's finding on this issue.

[2] The last claim is that the notes were part of an invalid and unconsummated agreement and therefore the money invested was voluntarily paid and cannot be recovered. The court found that, as between the parties, the signing of the memoranda agreements gave effect to them to the extent that they were executed and carried out by them and, to that extent were

valid and binding. This finding has evidentiary support. In view of this conclusion, and since the court found upon sufficient evidence that the monies advanced by plaintiffs to defendants were individual loans to them and that no violation of the Corporate Securities Law resulted, the contention that the money invested was voluntarily paid is without merit. *Simon Newman Co. v. Fink*, 206 Cal. 143, 146, 273 P. 565. It cannot be held, as a matter of law, that the contract here involved was illegal and that plaintiffs and defendants were in *pari delicto*. *Norwood v. Judd*, 93 Cal.App.2d 276, 284, 209 P.2d 24; *Western Oil & Refining Co. v. Venago Oil Corp.*, 218 Cal. 733, 745, 24 P.2d 971, 88 A.L.R. 1271.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



130 Cal.App.2d 430

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Robert W. O'LEARY, David Lyde Weaver,
and Arthur Jerome Watson, Defendants.

Arthur Jerome Watson, Defendant and
Appellant.
Cr. 5156.

District Court of Appeal, Second District,
Division 3, California.

Jan. 26, 1955.

Hearing Denied Feb. 24, 1955.

One of three defendants was convicted of armed robbery. The Superior Court of Los Angeles County, Harold W. Schweitzer, J., rendered judgment on the jury's verdict, and such defendant appealed. The District Court of Appeal, Shinn, P. J., held that the convicted defendant's motion to dismiss the cause as to him because of

failure to bring it to trial within sixty days after filing of the information was properly denied, where he made no objection to the later trial date or motion for severance of his and co-defendants' trials within such period, and that he was not prejudiced by the trial court's error in sending him to trial jointly with his co-defendants, who pleaded guilty out of the jury's presence and testified on behalf of convicted defendant.

Judgment affirmed.

1. Criminal Law ⇨576(5)

A defendant intending to stand on his right to trial within statutory 60-day period after filing of information must take some action to inform court that he does not waive such right, and his failure to object to later trial until after such period is equivalent of consent thereto. Pen.Code, § 1382.

2. Criminal Law ⇨576(5)

A motion by one of three defendants to dismiss cause as to him because of failure to bring it to trial within sixty days after filing of information was properly denied, where he made no objection to later trial date or motion for severance of trials of himself and two co-defendants within such period, though he acted in entire good faith throughout. Pen.Code, § 1382.

3. Criminal Law ⇨913(1)

The provisions of Judicial Council's rule for superior courts that there shall be sufficient departments to hear criminal cases within time required by law and statutory provision that chairman of Council shall be notified of any court's inability to hear all criminal cases pending before it within thirty days after entry of defendants' pleas are not mandatory, and failure to comply with them does not entitle defendant to new trial after conviction. Pen. Code, § 1050; Judicial Council Rules for Superior Courts, rule 35.

4. Criminal Law ⇨1166(6)

A defendant charged with armed robbery was not prejudiced by superior court's error in sending him to trial jointly with two co-defendants, charged in same information with separate unconnected armed

robberies of different people at different times, where co-defendants pleaded guilty out of jury's presence, no evidence respecting their crimes was produced on people's behalf, and they testified on other defendant's behalf that he did not participate in robbery of which he and one of such co-defendants were jointly accused.

Bonpane & Dillon, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., San Francisco, for respondent.

SHINN, Presiding Justice.

July 30, 1953, by information Arthur Jerome Watson was charged jointly with David Lyde Weaver with armed robbery committed June 20, 1953; in Count II Weaver and Robert W. O'Leary were jointly accused of armed robbery on June 21, 1953, and in Count IV O'Leary was charged with armed robbery on June 26, 1953. Each count related to a crime separate from the others. It was alleged that Watson had suffered four prior felony convictions, that Weaver had suffered three, and that O'Leary had suffered three, for all of which the several defendants had served terms in State Prison. August 10th defendants were arraigned on the amended information. Watson made a motion under section 995 of the Penal Code for dismissal for insufficiency of evidence. O'Leary and Weaver pleaded not guilty, denied the former convictions, and their trial was set for September 29th, each defendant waiving the "statutory period." August 18th Watson's motion under section 995 was denied, he pleaded not guilty, denied the prior convictions, and the trial was set for September 29th. August 21st each defendant moved for reduction of bail. The cause was advanced from September 29th for purpose of the motion and each defendant's motion was denied. The minutes of September 29th read, in part: "On account of the congested condition of the calendar, cause is

to trial to September 30, 1953 at 9:00 a.m. for trial." The three defendants were represented by one attorney, Douglas Hitchcock. September 30th in the court's chambers and outside the presence of the prospective jury, Mr. Hitchcock was relieved as counsel for O'Leary and Weaver; Mr. Eugene V. McPherson was appointed as attorney for O'Leary and a deputy public defender as attorney for Weaver. Defendant Watson made a motion to dismiss the cause for lack of prosecution and for reduction of bail, which motions were denied. At the time of adjournment there were twelve prospective jurors in the jury box. The trial was continued to October 1st on which date, over the objection of Watson, trial was continued until October 5th. On the latter date outside the presence of the prospective jury, O'Leary and Weaver each pleaded guilty to one count of the information and admitted certain prior convictions. The trial proceeded as to Watson. O'Leary testified for defendant Watson October 6th and 7th. The latter testified on his own behalf and Weaver on Watson's behalf October 7th. October 8th a verdict of guilty was returned with findings that the allegations as to former convictions were true.

Appellant Watson contends that the cause should have been dismissed as to him pursuant to section 1382 of the Penal Code for the reason that the action was not brought to trial within 60 days after the filing of the information. September 29th was the 61st day after the information was filed. The point is well taken unless appellant waived his right to be brought to trial within the 60-day period. The minutes of the court do not show that appellant at any time expressly waived his right. The reporter's supplemental transcript is somewhat confusing. On August 10th, in the department of Judge Nye, the People were represented by Malcolm Harris, Deputy District Attorney, the defendants by Douglas Hitchcock. After O'Leary and Weaver had pleaded not guilty and the time for hearing Watson's motion under section 995 and for entry of plea had been continued until August 18th, there was a

discussion as to the date of trial.¹ This setting related only to the trial of O'Leary and Weaver. On August 18th, after Watson pleaded not guilty and denied the former convictions, the trial date was set.² These proceedings took place in Department 40 before Judge Nye. On September 29th the case of the three defendants was called in Department 42, Judge Ambrose presiding. At the request of Mr. Hitchcock the case was continued until 2 o'clock that afternoon and was set over until the following morning.³ On September 30th Judge Ambrose said, "We are making an effort to find a place to transfer the case because we cannot try it here" and Mr. Hitchcock said, "The defendants are ready." The case was then transferred to Department 44 for trial, Judge Schweitzer presiding. Proceedings were commenced September 30th at 10:00 a. m., all prospective jurors were sworn and twelve jurors took their seats in the jury box. An unreported discussion between the court and counsel occurred outside the hearing of the jury and certain proceedings were had in chambers. Following this the prospective jurors were recalled to the box and the court summarized

for the benefit of the jury the allegations of the information stating that it charged separate, unrelated offenses. The court stated the allegations with respect to the former convictions of each defendant with a statement that the same were denied. The several defendants were ordered to stand and were identified to the jurors. Trial was adjourned until 2:00 p. m. at which time there was a discussion with the court outside the hearing of the jury and a recess was taken. Then followed a lengthy colloquy in chambers. Both O'Leary and Weaver stated that they wished independent counsel; that while the services of Mr. Hitchcock had been satisfactory to that time there was yet a conflict of interest between themselves and defendant Watson which made it impossible for Mr. Hitchcock to properly represent them. Mr. Hitchcock agreed and requested that he be relieved of representation of O'Leary and Weaver and that other counsel be appointed. Mr. Eugene V. McPherson was appointed as counsel for O'Leary and a public defender for Weaver. Mr. Hitchcock continued to represent Watson. Neither Mr. McPherson nor a public defender

1. "Mr. Harris: July 30th. [Information filed] The Court: September 29th in Department 42. Mr. Harris: Your Honor, that is one day over the statutory time. The Court: That date is one day beyond the 60 day period. Which one is O'Leary? Defendant O'Leary: I am, sir. The Court: That date I set is one day beyond the 60-day period. Will you waive your right to a trial within 60 days from the date of the filing of the information? Defendant O'Leary: Yes. The Court: Do you join in the waiver, Mr. Hitchcock? Mr. Hitchcock: Yes. The Court: All right, that will be the order. David Lyde Weaver, do you waive your right to trial within 60 days from the date of the filing of the information? Defendant Weaver: Yes, your Honor. Mr. Hitchcock: Join in the waiver. The Court: All right, that will be the order."

2. "The Court: September 29, 1953 in Department 42. The Defendant: Your Honor, could I—there are circumstances that my lawyer is not aware. The Court: Well, it would be a good idea to tell him about it, wouldn't it? The Defendant: It is in reference to the date of my trial.

I would like to have it set as far ahead towards the present date as I could, sir. The Court: Of course, that is a matter for him to take up, because you are charged jointly with these other two men, and I presume what you are asking for is a separate trial? The Defendant: A separate trial. The Court: That is a matter for your counsel to take up with the trial court. Mr. Hitchcock: We have already discussed that and the motion will be granted. The Court: It will be? Mr. Hitchcock: Yes. I have already discussed that. The Court: You have discussed that with Judge Ambrose? Mr. Hitchcock: Yes. The Court: All right. September 29 in Department 42."

3. "The Court: Recalling the case of O'Leary, Weaver and Watson. It is apparent that we will not be able to reach this case today. I understand the defendants do not care to waive their right to a continuance? Mr. Hitchcock: That is correct, your Honor. The Court: Then we will have to continue the case until tomorrow morning at 9:00 o'clock as there is no place to transfer the case."

was present. There was further discussion.⁴ Mr. Erskine, Deputy Public Defender, appeared and requested a continuance.⁵ The court ordered the trial continued to October 5th.⁶ The order of continuance to October 5th was vacated and at about 4:30 the trial was recessed until 10:00 a. m., October 1st. When the court reconvened Mr. McPherson was present and accepted

his appointment as counsel for O'Leary. During the proceedings of September 30th and October 1st, twelve prospective jurors were in the jury box and others were in attendance. Mr. McPherson was engaged in trial in another department on October 1st. The cause was again ordered continued to October 5th at the request of the newly appointed attorneys but over the objection

4. "The court: * * * As I understand, at this time the defendant Arthur Jerome Watson is insisting upon going to trial immediately. Is that correct? Mr. Hitchcock: Yes, he refuses to waive his time. Defendant Watson: I don't want a delay. I can see it tomorrow or the next day, but I won't take anything past. I waited ninety days now from the start of this. My bond has been set so high that I can't possibly make it. The Court: Let me ask this question of Mr. Hitchcock. You have represented these three defendants up until this time? Mr. Hitchcock: Yes, right. The Court: From the time that they were arraigned up until today, the day of the trial? Mr. Hitchcock: That is right. The Court: Has this matter of conflict of interest, or the matter as to a possible substitution of attorneys, been raised before this time? Mr. Hitchcock: No, not this stage. The Court: In other words, this is the first time? Mr. Hitchcock: This afternoon. The Court: This is after the jury, the original jurors have been placed in the jury box, and the case— Mr. Hitchcock: Yes, yes. The Court: —the case called for trial. * * * The Court: All right. Now I understand the defendant Watson is insisting upon going to trial? Mr. Hitchcock: That is correct. I might say, for the record, I talked to the District Attorney a week ago concerning the severance, and talked to the Judge, and in chambers on the record, and he said that he wouldn't consider the motion until he saw whether or not the trial was going to be held in his court. The Court: That is Judge Ambrose? Mr. Hitchcock: That is Judge Ambrose, yes, last week. The Court: The matter was transferred to my court today from Judge Ambrose, so no one has talked to me about the case. Mr. Hitchcock: That is right. It hasn't been discussed with you. * * * The Court: Without passing at this time upon the question of possible severance of the several counts set forth in the amended Information, I see that the defendant Watson, who is insisting on going to trial immediately, is the defendant in Count I only. Mr. Hitchcock: That

is right. The Court: And that the defendant David Lyde Weaver is a co-defendant in Count I? Mr. Hitchcock: That is true."

5. "The Court: You want the Public Defender to represent you, and I want somebody to represent you, to see that your legal rights are protected. It is not fair for any attorney, regardless of how good a man he is, to come in cold on a case of this kind, involving serious offenses, without a little chance to see what the facts are."
6. "And in connection with this continuance, Mr. Hitchcock, as far as the defendant Watson is concerned, the Court realizes this continuance to Monday, the 5th of October, is against the consent of the defendant Watson, and his legal rights have not been waived in any manner. Mr. Hitchcock: For that reason I move that the complaint as to the defendant Watson be dismissed because of the sixty-day period, and I wish the record to show that he does not consent to it, and that he wants his case severed from that of the other two; and also that he makes formal motion for a bail reduction because his rights are prejudiced. The Court: Let's take your motions one at a time. The motion for dismissal will be denied. And in connection therewith, let the record further show that the prospective jurors are now in the jury box, and that the trial has commenced; and that this continuance is only being made during the early stages of trial prior to voir dire examination of the jurors by counsel. Now, do you want another motion? Mr. Hitchcock: I would like to make a motion to reduce bail, in view of the fact that he has done ninety days already, and the possibility of further continuances, and he cannot possibly make \$15,000.00, but if it could be cut he possibly could, in which case he would be willing to waive it, and his rights not interfered with or hampered in any way. Defendant Watson: It's impossible for me to make \$15,000.00. Mr. Hitchcock: That is right. The Court: The motion for reduced bail will be denied."

of Watson. October 5th, out of the presence of the jury, O'Leary and Weaver each pleaded guilty to one charge of the information and each admitted the former convictions as alleged in the information. The remaining charges were dismissed.

Turning to the proceedings of August 18th before Judge Nye, we find that the reason urged by Watson for an early trial was that he did not wish to be tried with his co-defendants. The court was assured by Mr. Hitchcock that a motion for separate trial would be granted. Judge Nye was presiding in Department 40, Judge Ambrose in Department 42, and Judge Schweitzer in Department 44. The trial as to O'Leary and Weaver was set in the department of Judge Ambrose. However, Watson's motion under section 995 and the matter of his plea were retained in the department of Judge Nye. When these matters came up it was stated by Mr. Hitchcock that he had discussed the matter of severance with Judge Ambrose and that a motion would be granted. Thereupon the court repeated that the cause was set for trial September 29th. No objection was made by defendant or his attorney after the court had stated that the date would be September 29th. The court was therefore given to understand that the date would be satisfactory for the reason that defendant and his attorney believed that Judge Ambrose would grant a motion for severance. It will be recalled that when September 29th was first selected for the trial, both O'Leary and Weaver waived their right to trial within 60 days after the filing of the information. We believe that the omission of this formality on August 18th was due to the court's understanding that the setting was satisfactory to Watson and that it is not open to doubt that the date would have been changed if it had been suggested to the court that Watson stood upon his right to a trial within the 60-day period. It is true that Mr. Hitchcock was mistaken with respect to his first conversation with Judge Ambrose. On September 30th, after the cause had been transferred from Judge Ambrose to Judge Schweitzer, Mr. Hitchcock stated that in the preceding

week Judge Ambrose had declined to consider a motion for severance until he knew that the trial would be had in his department. Even though Mr. Hitchcock was mistaken, the fact remains that neither he nor his client objected to the September 29th date upon the ground that it was not within the 60-day period.

[1] It is settled that if a defendant intends to stand upon his right to a trial within the 60-day period, he must take some action to inform the court that he does not waive his right. Failure to object is the equivalent of consent. *People v. Romero*, 13 Cal.App.2d 667, 57 P.2d 557; *Krouse v. Justice's Court*, 103 Cal.App.2d 311, 229 P.2d 806; *Ray v. Superior Court*, 208 Cal. 357, 281 P. 391.

[2] September 29th Mr. Hitchcock requested a continuance until 2:00 p. m. which was granted. No objection was made to a continuance of the trial until September 30th. No motion for severance of trial was made on September 29th before Judge Ambrose. On September 30th, when the court stated its understanding that Watson wished to go to trial immediately, Watson replied: "I don't want a delay. I can see it tomorrow or the next day, but I won't take anything past" etc. Thereupon, the trial was continued to October 1st, on which date, after the court had announced its intention to recess the trial to October 5th over the objection of defendant, Mr. Hitchcock stated: "For that reason I move that the complaint as to the defendant Watson be dismissed because of the sixty-day period and I wish the record to show that he does not consent to it and that he wants his case severed from that of the other two" etc.

The motion for dismissal was properly denied. It could not properly have been granted on September 29th or thereafter if the defendant had acquiesced in all the former proceedings. The purpose of an objection to a trial date beyond the 60-day period is to give the court an opportunity to fix an earlier date. If an objection is not made within the 60-day period, it cannot validly be made at all. Although Mr. Hitchcock acted in entire good faith

throughout, he did not within the 60-day period make an objection to the trial date or make a motion for severance of trials on October 1st.

[3] Furthermore, all the discussions on September 30th, of which we have quoted but a small part, took place after the trial had commenced. All the prospective jurors had been sworn and twelve had taken their seats in the jury box. No new or extraordinary development had occurred which would have justified the delay in making a motion for severance until after the trial had commenced. Appellant calls attention to rule 35 of the Judicial Council rules for superior courts, which requires that there shall be sufficient departments handling criminal cases to hear them within the time required by law and to section 1050 of the Penal Code which requires that the Chairman of the Judicial Council be notified if any court is unable to hear all criminal cases pending before it within thirty days after the respective defendants have entered their pleas. These requirements are not mandatory and a failure to comply with them does not entitle defendant to a new trial. *People v. Tenedor*, 107 Cal.App. 2d 581, 237 P.2d 679.

Appellant's contention that the action should have been dismissed cannot be sustained.

[4] Appellant's final point is that it was error to send him to trial jointly with his co-defendants. He says there is no authority of law for joining in a single indictment, or trial, charges against several individuals accused of having committed separate unconnected crimes at different times and upon different people. He cites *People v. Davis*, 42 Cal.App.2d 70, 108 P.2d 85. The *Davis* case fully supports appellant's claim of error. In that case the attorney general did not deny the error but contended it was nonprejudicial. Such is his position in the present case. We are disposed to agree that defendant suffered no prejudice by reason of the error.

Although there was no formal motion for severance, Watson's desire for a separate trial had been stated to the court.

Even if a formal motion had been made and denied, defendant would not have suffered prejudice.

At the commencement of the trial the court summarized to the prospective jurors the allegations of the information with respect to all three defendants, including the allegations of their former convictions. If the three defendants had gone to trial and evidence had been introduced in support of the allegation of the information, Watson's contention would have been sustainable for reasons which were stated fully in *People v. Davis*, supra, and cases therein cited. But O'Leary and Weaver, out of the presence of the jury, pleaded guilty; no evidence was produced on behalf of the People with respect to their crimes. Both O'Leary and Weaver testified on behalf of the defendant. They admitted having robbed a barroom, a robbery in which numerous individuals were robbed. This was the robbery of which Watson and Weaver were jointly accused. They testified that Watson and his wife were at another cafe and that Watson did not participate in the robbery; each one testified on cross-examination as to his conviction of the several felonies charged against him in the information. O'Leary had known Watson since 1946 and was intimately acquainted with him. Weaver had known him only a few weeks. According to these witnesses and also to the testimony of Watson, the latter shipped three guns from Denver to California, furnished them to O'Leary and Weaver and the latter picked them up at a lock box at a bus depot in Los Angeles. There was testimony that while they were in the jail O'Leary and Weaver talked over the charges with Watson. On the stand Watson admitted the several former convictions.

It is obvious that if the foregoing facts with respect to the crimes of O'Leary and Weaver had been developed in a joint trial of the three defendants, the case of Watson would have been seriously prejudiced. But the facts which appellant says prejudiced him in the eyes of the jury were those which he developed through his own witnesses. Otherwise none of those facts would have been known to the jury. Several witnesses

identified Watson as one of the participants in the robbery with which he was charged. He was shown every consideration in the trial court. This court appointed an attorney to represent him on the appeal and he has been represented with diligence and ability. No cause exists for disturbing the judgment or order denying motion for new trial.

The judgment and order are affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.

Hearing denied; SCHAUER, J., dissenting.



130 Cal.App.2d 414

Walter Clark SHUMAKER, Petitioner
and Respondent,

v.

Eugene W. BISCAILUZ, Sheriff of Los
Angeles County, Defendant.

Edith May Foster, also known as Edith May
Shumaker, Real Party in Interest,
Appellant.
Civ. 20631.

District Court of Appeal, Second District,
Division 1, California.

Jan. 26, 1955.

Proceeding on petition by man for writ of mandate directing sheriff to sell property of woman, claiming to be his wife, against whom man had previously obtained judgment in civil action. The Superior Court, Los Angeles County, Frank G. Swain, J., entered judgment for petitioner, and defendant appealed. The District Court of Appeal, Drapeau, J., held that homestead declaration made by purported wife as head of family for benefit of herself and her husband was not sufficient to be upheld as declaration by one not head of family, when it appeared that purported wife's marriage was invalid.

Judgment affirmed.

See also 276 P.2d 876.

1. Mandamus ¶187(7)

On appeal from judgment ordering peremptory writ of mandate, no reporter's transcript having been furnished, recitals in judgment and findings of fact were deemed to be true and were binding on reviewing court.

2. Homestead ¶43

Homestead declaration by wife which fails to state every requirement specified in code is fatally defective.

3. Homestead ¶43

Homestead declaration made by purported wife as head of family for benefit of herself and her husband was not sufficient to be upheld as declaration by one not head of family, when it appeared that purported wife's marriage was invalid.

Ratzer & Bridge, Los Angeles, for appellant.

Robert B. Heggen, Los Angeles, for respondent.

DRAPEAU, Justice.¹

[1] Appeal from a judgment ordering a peremptory writ of mandate. No reporter's transcript having been furnished, the recitals in the judgment and the findings of fact must be deemed true, and are binding upon this Court. *Rinker v. McKinley*, 65 Cal.App.2d 109, 149 P.2d 859.

The facts are as follows: Petitioner obtained a judgment against the real party in interest in this case, who claimed to be his wife. She will hereafter be referred to as "defendant."

Writ of execution on the judgment was given to the sheriff of Los Angeles county, with instructions to levy upon and to sell a one-half interest in real property owned by defendant. The other half interest was owned by petitioner.

Defendant advised the sheriff that she had a homestead upon the property. In her declaration of homestead she alleged that she was the wife of petitioner, that she was the head of a family, that she claimed the homestead for her benefit and for her husband, and that he had not de-

clared a homestead upon the property. Prior to that defendant had recorded another declaration of homestead upon the same property, containing substantially the same recitals.

When the sheriff was so advised he refused to proceed with the sale of the property. Petitioner brought this action for a writ of mandate directing the sheriff to sell the property.

The court found and adjudged that defendant was not, and never had been married to petitioner, that a marriage ceremony between the parties in Mexico was invalid, and that petitioner was entitled to a peremptory writ of mandate, directing the sheriff to sell the property under the writ of execution.

Petitioner contends that this case comes squarely within the rule declared in *Rich v. Ervin*, 86 Cal.App.2d 386, 194 P.2d 809. In that case it was held that although a liberal construction should be given, when a declaration of homestead contains a statement as to an essential requirement that the declarant knew to be false it is not good.

Defendant relies upon the case of *Feintech v. Weaver*, 50 Cal.App.2d 181, 122 P.2d 606. In that case a mother who was living with an adult son upon the premises to be homesteaded filled in blanks in a printed form for the head of a family. Disregarding the recital that the declarant was the head of a family, sufficient recitals appeared in the declaration to make a good claim for homestead by one not the head of a family.

[2] In this case the declaration is made by the wife as head of the family for the benefit of herself and her husband. It has uniformly been held that such a declaration by a wife which fails to state every requirement specified in the Code is fatally defective. *Crenshaw v. Smith*, 74 Cal.App.2d 255, 168 P.2d 752; *Hansen v. Union Savings Bank*, 148 Cal. 157, 82 P. 768; *Cunha v. Hughes*, 122 Cal. 111, 54 P. 535.

[3] To hold that the declaration in this case is sufficient to claim a homestead by one not the head of a family would be to

carry the doctrine of liberality applied in the *Feintech* case too far.

There is nothing in the record to support defendant's further contention that an appeal from petitioner's judgment stayed the execution.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



130 Cal.App.2d 426

Herman JAPPE, Plaintiff and Appellant,

v.

Charles F. MANDT, Defendant and Respondent.

Civ. 20525.

District Court of Appeal, Second District
Division 2, California.

Jan. 26, 1955.

Action was brought for damages for alleged fraud, on ground that at time parties entered into contract for sale of rubbish route by defendant to plaintiff, defendant knew that city, in which the route was located, contemplated letting a contract to pick up combustible rubbish. The Superior Court of Los Angeles County, Philbrick McCoy, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Fox, J., held that evidence sustained implied finding that defendant did not know that city contemplated letting a contract to pick up combustible rubbish.

Judgment affirmed.

1. Appeal and Error \S 931(3)

Where findings of fact and conclusions of law were waived, every intendment on appeal is in favor of the judgment.

2. Appeal and Error \S 931(3)

Where findings of fact and conclusions of law were waived, reviewing court will assume that trial court found every fact essential to support the judgment.

3. Appeal and Error Ⓒ846(2, 5)

Where findings of fact and conclusions of law were waived, and a transcript of the evidence is before the reviewing court, it will not weigh the evidence to determine what is true and what is not, but will search record only to determine whether there is substantial evidence supporting judgment and will resolve all doubts in favor of judgment.

4. Fraud Ⓒ58(2)

In action for damages for alleged fraud, on ground that when plaintiff and defendant entered into contract for sale of rubbish route by defendant to plaintiff, defendant knew that city, in which route was located, contemplated letting a contract to pick up combustible rubbish, but did not disclose such fact to plaintiff, evidence sustained implied finding that defendant did not have knowledge that city contemplated letting contract to pick up combustible rubbish.

5. Fraud Ⓒ17

Where there was no fiduciary or other relation of trust or confidence between plaintiff and defendant, who entered into a contract for sale by defendant to plaintiff of a rubbish route, and plaintiff had full opportunity to make complete investigation of all facets of the business he was seeking to buy, defendant was not legally bound to tell plaintiff of any rumors or reports that were in the wind, that city might possibly let a contract for disposal of combustible rubbish, and defendant was not liable for damages for alleged fraud because of failure to tell plaintiff of rumors or reports.

Lionel Richman, San Bernardino, for appellant.

Majorell & Majorell, Hawthorne, for respondent.

FOX, Justice.

This appeal arises out of an action for damages for fraud in which plaintiff alleged that he had been induced by misrepresentations of defendant to enter into a contract to purchase a rubbish route.

These alleged misrepresentations fall into two classes. The first class is affirmative in character. Generally speaking, they assert defendant represented that the business consisted of at least 1,200 customers and that the business was very profitable and the route valuable. In rendering its oral decision the court "found" these allegations were not true. Plaintiff does not, therefore, seek a reversal of the judgment against him on account of these charges.

The second class of alleged misrepresentations is of a negative nature, a failure to reveal material facts which defendant had a duty to disclose. In this respect plaintiff's complaint alleges defendant knew that the city of Hawthorne, in which the route was located, contemplated letting a contract for the disposal of rubbish but failed to disclose this fact to him. Plaintiff's appeal relates solely to this phase of the case.

Prior to June, 1952, defendant Mandt owned and operated a rubbish collection service. The business consisted of customer accounts, trucks, and other necessary equipment. The territory covered was Imperial Village, the entire city of Hawthorne, and a few accounts in Los Angeles city and county territory. In April, 1952, plaintiff Jappe met Mandt at a welding shop in Hawthorne operated by Ted Burwick and Ray Donnelly. The latter were discussing with Mandt the possible purchase of a part of his rubbish disposal business. Jappe indicated his interest in also purchasing a part of Mandt's business. Burwick and Donnelly purchased the Imperial Village route on May 1, 1952, since it was the less expensive of the two routes and thus within their financial capacity. Thereafter, following a conversation with Burwick, Jappe contacted Mandt with respect to the purchase of the Hawthorne segment of his business. As a result, a contract for the purchase and sale of this portion of Mandt's business was executed by the parties on June 10, 1952. In the meantime, Jappe had examined the customer files, counted the cards and audited the accounts. He had full opportunity to make whatever investigation he thought was necessary.

By reason of certain conversations, plaintiff contends that "prior to June 10, 1952," defendant "had knowledge that the city of Hawthorne contemplated letting a contract to pick up combustible rubbish." In fact, he asserts that the trial court so found, and that it erroneously concluded that defendant's "knowledge did not constitute facts which he was duty bound to disclose to" plaintiff. The record, however, does not sustain his position.

[1-4] Findings of fact and conclusions of law were waived. It therefore follows that every intendment is in favor of the judgment. *Bryant v. Marstelle*, 76 Cal.App. 2d 740, 744, 173 P.2d 846. In such circumstances "the reviewing court will assume that the trial court found every fact essential to support the judgment, and when a transcript of the evidence is before the reviewing court it will not weigh the evidence to determine what is true and what is not, but it will search the record for the purpose only of determining whether there is substantial evidence supporting the judgment and will resolve all doubts in favor of the judgment." *Baker v. Baker*, 98 Cal. App.2d 424, 426, 220 P.2d 576, 578; *Price v. Price*, 114 Cal.App.2d 176, 179, 249 P.2d 841; *In re Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689. Thus searching the record pursuant to this rule we find that the defendant testified that prior to the time he sold the business to Jappe he did not know the city of Hawthorne contemplated letting a contract for the disposal of rubbish and had solicited bids therefor.¹ He was later asked: "When did you first learn that the City of Hawthorne actually as a matter of fact contemplated the letting of any contract in the City of Hawthorne?" He replied: "I believe that was about the middle part of July of 1952." He was also asked:

1. Following is an excerpt from defendant's testimony on this subject:

"Did you know that the City of Hawthorne contemplated letting a contract for the disposal of rubbish within the City of Hawthorne and had solicited bids for said contract? A. Not to my knowledge. As far as contemplating a contract, it is a matter of public record.

"Q. Did you know? A. Did I know they were contemplating a contract?

"Now, prior to June 10, 1952, did you have a conversation with anyone with regard to the city awarding a contract for the collecting of rubbish to Mr. Kazarian or anyone else?" His answer was "No, I did not." In summarizing and evaluating the evidence at the conclusion of the trial the judge observed that "As far as Mr. Mandt's knowledge is concerned of the facts, he had none until sometime at the earliest in the middle of July, about the 18th * * *"² The testimony to which we have referred justifies the trial judge's appraisal of the evidence and supports the implied finding that Mandt did not have knowledge prior to June 10, 1952, that the City contemplated letting a contract to pick up combustible rubbish. Such an implied finding is sufficient to sustain the judgment in defendant's favor.

[5] The conversations with respect to the possibility of the City's going into the field of collecting combustible rubbish and letting a contract therefor indicate that the idea was in a nebulous state. They also produced conflicting reports and rumors. In analyzing this phase of the evidence the trial judge remarked that defendant was aware that a contract to pick up combustible rubbish "was possibly in the wind." This strikes us as being a fair appraisal of the situation, particularly in view of the court's clear indication that he could not give full credence to the testimony of one of plaintiff's witnesses on this subject. No action, either formal or informal, had been taken by the city council. It does not appear that a majority of the city council had committed themselves or even expressed an opinion in favor of such a venture on the part of the City. The idea was still in the conversation and rumor stage. The parties were dealing at arm's length. There

"Q. For the disposal of rubbish within the city, and had solicited bids for such contract. A. Before the sale of the business?

"Q. Yes. A. No."

2. Shortly after this date a contract, effective in the early part of August, was entered into by the City and Mr. Kazarian for the collection of such rubbish.

was no fiduciary or other relation of trust or confidence between them. Plaintiff had full opportunity to make a complete investigation of all facets of the business he was seeking to buy. Under such circumstances defendant was not legally bound to tell the prospective buyer of any rumors or reports that were "in the wind," that the City might "possibly" enter this field. *Carter v. Seaboard Finance Co.*, 33 Cal.2d 564, 569, 203 P.2d 758; *Amend v. Hurley*, 293 N.Y. 587, 59 N.E.2d 416, 419; *Grenlac Holding Corp. v. Kahn*, Sup., 106 N.Y.S.2d 83, 85.

This case is clearly distinguishable from *Dyke v. Zaiser*, 80 Cal.App.2d 639, 182 P.2d 344, for in that case the defendant was a city councilman who, by virtue of his position, knew of official action that had already been decided upon which would be definitely executed within 24 hours and which would and did have the effect of greatly depreciating the value of the subject matter of the transaction.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



THE ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, a (California) corporation, Petitioner, v.

CITY OF PIEDMONT, a municipal corporation, et al., Respondents.*

Civ. 16466.

District Court of Appeal, First District, Division 2, California.

Jan. 24, 1955.

As Corrected Feb. 2, 1955.

Rehearing Denied Feb. 23, 1955.

Hearing Granted March 22, 1955.

Petitioner brought mandamus proceeding against city to compel issuance of a building permit for construction of school. The District Court of Appeal, Dooling J., held that city ordinance, which prohibited the conduct of any school within certain

* Opinion vacated 239 P.2d 438.

Cal. Rep. 277-278 P.2d—47

zone, except public schools under the jurisdiction of the Board of Education of the city, was unconstitutional.

Peremptory writ of mandate issued.

1. Schools and School Districts ⇨160

Parents have the basic constitutional right to have their children educated in schools of their own choice, subject to reasonable regulations as to the subjects required to be taught, manner of instruction, etc.

2. Municipal Corporations ⇨601(7)

City ordinance, which prohibited the conduct of any school within certain zone, except public schools under the jurisdiction of the Board of Education of the city, was unconstitutional.

3. Constitutional Law ⇨42

Fact that petitioner was a corporation did not deprive it of right of asserting its basic constitutional rights.

Andrew F. Burke, San Francisco, for petitioner.

J. Marcus Hardin, City Atty. for the City of Piedmont, Oakland, for respondents.

Irving Shore, Marvel Shore, Lawrence Speiser, Philip Adams, Wayne M. Collins, William Coblenz, Kamina K. Gupta, Ruth Church Gupta, George G. Olshausen, San Francisco, amici curiae for American Civil Liberties Union of Northern Cal.

Albert C. Agnew, San Francisco, amicus curiae for Protestant Episcopal Bishop of California, a corporation sole.

Ira W. Barr, San Francisco, Leo Pfeffer, New York City, Philip Baum, of counsel, amici curiae for American Jewish Congress.

J. W. O'Neill, Oakland, amicus curiae for certain property owners.

DOOLING, Justice.

Petitioner owns a parcel of real property in the City of Piedmont upon which it wishes to erect a building for the purpose of conducting therein "instruction in the secular subjects which are taught in the public elementary schools of the State of

California, and, in addition, to provide * * * a systematic course of religious training according to the tenets of the Roman Catholic Church." It was denied a building permit on the sole ground that the Zoning Ordinance of the City of Piedmont prohibits the conduct of any school within Zone A, wherein petitioner's land is situated, except public schools under the jurisdiction of the Board of Education of the City of Piedmont. There are in Zone A three elementary schools, one junior high school and one high school, under the jurisdiction of the Board of Education of respondent City. Zone A comprises over 98% (98.71%) of the entire area of the City of Piedmont.

While the parties and amici curiae discuss other questions we limit ourselves to the consideration of the single narrow question, which in our judgment is determinative: May the respondent City of Piedmont permit public elementary schools in Zone A and at the same time constitutionally prohibit the conduct of all other elementary schools in the same area? In limiting our consideration to this narrow question we need not decide such collateral questions as: May a City constitutionally exclude all schools without exception from a certain area? May a City permit public elementary, junior high and high schools in an area and constitutionally prohibit private schools not engaged in the same type of education or teaching the same age groups, e. g., colleges, universities, barber schools, dancing schools, business schools etc.? We also eliminate any question of religious discrimination.

[1,2] It is settled that parents have the basic constitutional right to have their children educated in schools of their own choice, subject to reasonable regulations as to subjects required to be taught, manner of instruction, etc. *Pierce v. Society of the Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070. Having this basic right in mind no reasonable ground for permitting public schools to be conducted in Zone A and prohibiting all other schools teaching the same subjects to the same age groups

can be suggested. The question has not before been passed upon by the California courts but the courts of other jurisdictions have been unanimous in striking down similar legislation. *Catholic Bishop of Chicago v. Kingery*, 371 Ill. 257, 20 N.E.2d 583; *City of Miami Beach v. State*, 128 Fla. 750, 175 So. 537; *State v. Northwestern Preparatory School*, 228 Minn. 363, 37 N.W.2d 370; *Phillips v. City of Homewood*, 255 Ala. 180, 50 So.2d 267; *Lumpkin v. Township Committee of Bernard's Township*, 134 N.J.L. 428, 48 A.2d 798; *Roman Catholic Archbishop of Diocese of Oregon v. Baker*, 140 Or. 600, 15 P.2d 391. The rationale of these decisions is that no reasonable basis of classification exists between, or among, schools furnishing the same type of education to the same class of students.

Strong reliance is placed by respondents and amicus curiae for certain property owners on *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*, 90 Cal.App.2d 656, 203 P.2d 823. In that case an ordinance excluding all churches from a certain zone was upheld. The case is not in point. If respondent City excluded all schools from a certain zone this case would be more relevant, although the exclusion of all elementary schools from over 98% of the City, or from the residence sections thereof (having in mind that most school children normally live in such residence sections), would seem to present a serious question. That, however, is a question that we are not called upon to decide in this case.

[3] The fact that petitioner is a corporation does not deprive it of asserting its basic constitutional rights. Since the *Dartmouth College* case corporations have always been afforded the protection of basic constitutional provisions.

Let a peremptory writ of mandate issue as prayed.

NOURSE, P. J., and KAUFMAN, J., concur.

130 Cal.App.2d 328

Clara Mae LONG, Plaintiff and Appellant,
v.

MOUNTAIN VIEW CEMETERY ASSOCIATION, Defendant and Respondent.

Civ. 16141.

District Court of Appeal, First District,
Division 2, California.

Jan. 24, 1955.

Action for damages against cemetery association which refused to bury plaintiff's husband in mausoleum restricted to members of Caucasian race. The Superior Court, Alameda County, Cecil Mosbacher, J., gave judgment for cemetery association. Plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that section of Civil Code providing that all citizens within the state are entitled to full and equal accommodation did not include cemeteries in phrase "all other places of public accommodation," and plaintiff was not entitled to damages under that statute.

Judgment affirmed.

1. Appeal and Error ⇨704(2)

Where plaintiff in action for damages against cemetery association which refused to bury her husband in mausoleum restricted to members of Caucasian race appealed on judgment roll alone, she was bound by findings of fact, and if judgment based on those findings was a proper judgment no other issue was triable on appeal.

2. Civil Rights ⇨4

In construing statute providing that all citizens within state are entitled to full and equal accommodations in certain named places, and all other places of public accommodation, phrase "all other places" means all other places of like nature to those enumerated. West's Ann.Civ.Code, § 51.

See publication Words and Phrases, for other judicial constructions and definitions of "All Other Places".

3. Civil Rights ⇨4

Under statute providing that all citizens are entitled to full and equal accommodations in places of "public accommo-

dation", wife could not recover from cemetery association which refused to bury her husband in mausoleum restricted to members of Caucasian race. West's Ann. Civ.Code, § 51.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Accommodation".

Vaughns, Dixon & Smith, George R. Vaughns, William C. Dixon, Oakland, for appellant.

Clark & Heafey and Leon A. Clark, Oakland, Gerald P. Martin, Oakland, of counsel, for respondent.

NOURSE, Presiding Justice.

[1] The plaintiff and appellant herein has appealed from an adverse judgment on the judgment roll alone. She is therefore bound by the findings of fact and if the judgment based on those findings is a proper judgment as a matter of law, no other issue is triable on this appeal.

These facts are: The defendant maintained a cemetery in which were burial plots, a crematorium, and three mausoleums, one of which was set aside for the exclusive use of members of the Caucasian race. The plaintiff demanded that her husband's remains be deposited in this restricted mausoleum. There is no contention that the other two were not just as suitable and as properly maintained as the third. There is no evidence of any kind showing why the plaintiff rejected this offer.

[2,3] The only question of law involved here is whether section 51 of the Civil Code applies to this case. That section reads: "All citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, eating houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances and all other places of public accommodation or amusement, subject only to the conditions and

limitations established by law, and applicable alike to all citizens."

The settled rule of law is that the expression "all other places" means all other places of a like nature to those enumerated, i. e., "restaurants, hotels" etc. In a similar case involving a like statute the Supreme Court of Illinois held that the expression "'all other places of public accommodation and amusement'" did not include cemeteries. *People ex rel. Gaskill v. Forest Home Cemetery Co.*, 258 Ill. 36, 101 N.E. 219, 220, L.R.A.1917B, 946. Directly in point is the recent case of *Rice v. Sioux City Memorial Park Cemetery*, Iowa, 60 N.W.2d 110, where the same rule was applied to the refusal of the cemetery to accept for burial the remains of an Indian in a plot of land restricted to the use of members of the Caucasian race.

There is no merit in any of the arguments of appellant.

Judgment affirmed.

KAUFMAN, Justice (concurring).

I concur on the authority of *Rice v. Sioux City Memorial Park Cemetery*, 60 N.W.2d 110, where the Supreme Court of Iowa construed the Iowa Civil Rights Statute which is very similar to Sections 51 and 52 of the Civil Code of California and determined questions of constitutional law involved.

The court held that a provision in a contract for the purchase of a burial lot in a private cemetery permitting only members of the Caucasian race to be buried therein was not void as being violative of equal protection clauses of either Federal or State Constitutions and is not void as being violative of public policy. Further, that Iowa's Civil Rights Statute was not violated.

I also agree with the view that Sections 51 and 52 of our Civil Code only apply to living citizens of this state. Plaintiff was not denied the right to enter the cemetery but was merely refused permission to bury her husband in the cemetery. Accordingly no rights given to plaintiff by Sections 51 and 52 of the Civil Code have been violated by defendant.

DOOLING, Justice.

I concur, but I cannot resist a word of protest. I cannot believe that a man's mortal remains will disintegrate any less peaceably because of the close proximity of the body of a member of another race, and in that inevitable disintegration I am sure that the pigmentation of the skin cannot long endure. It strikes me that the carrying of racial discrimination into the burial grounds is a particularly stupid form of human arrogance and intolerance. If life does not do so, the universal fellowship of death should teach humility. The good people who insist on the racial segregation of what is mortal in man may be shocked to learn when their own lives end that God has reserved no racially exclusive position for them in the hereafter.



130 Cal.App.2d 304

Charles W. SUDDUTH, Plaintiff and
Appellant,
v.

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION, and John Doe I, John Doe II, John Doe III, John Doe IV, John Doe V, Richard Roe, and John Doe Commission, Defendants and Respondents.

Civ. 16269.

District Court of Appeal, First District,
Division 2, California.

Jan. 21, 1955.

Distributor of vacuum cleaners brought action against the California Stabilization Commission and the members thereof to recover taxes paid under protest pursuant to the Unemployment Insurance Act, on ground that distributor's dealers were not employees within meaning of the Unemployment Insurance Act but were independent contractors. The Superior Court of the City and County of San Francisco, William T. Sweigert, J., entered judgment adverse

to distributor, and he appealed. The District Court of Appeal, Kaufman, J., held that evidence sustained finding that dealers were employees and that therefore distributor was liable for taxes on earnings of dealers.

Judgment affirmed.

1. Taxation ☞543(7)

Where Superior Court, in action by distributor of vacuum cleaners to recover taxes paid under protest pursuant to the Unemployment Insurance Act, found that an employment relationship existed between distributor and his dealers and that therefore distributor was liable for the tax, distributor, in order to obtain a reversal of judgment against him, was required to show that finding of employment relationship was unsupported, and that evidence was not in conflict, and was not reasonably subject to conflicting inferences, and, as a matter of law, supported only a finding of an independent contractor status. Unemployment Insurance Code, § 601.

2. Taxation ☞543(7)

In action by distributor of vacuum cleaners against the California Employment Stabilization Commission to recover taxes paid under protest pursuant to the Unemployment Insurance Act, on ground that distributor's dealers were not employees but were independent contractors, burden of proof was on distributor to prove that the taxes had been illegally assessed.

3. Taxation ☞111.20

In determining whether one who performs services for another is an employee, within meaning of the Unemployment Insurance Act, or an independent contractor, the most important factor is right to control manner and means of accomplishing results desired, and, if employer has authority to exercise complete control, whether or not right is exercised with respect to all of details, one performing services is an "employee" and not an "independent contractor." Unemployment Insurance Code, § 601.

See publication Words and Phrases, for other judicial constructions and definitions of "Employee" and "Independent Contractor".

4. Taxation ☞111.20

Secondary factors to be considered in determining whether one, who performs services for another, is an employee within meaning of the Unemployment Insurance Act, or an independent contractor, is whether one performing services is engaged in a distinct occupation or business, kind of occupation, skill required, whether principal or workmen supplied tools and place of work, length of time for which services are to be performed, method of payment, whether work is part of regular business of principal, and whether parties believed they were creating relationship of employer-employee. Unemployment Insurance Code, § 601.

5. Taxation ☞543(7)

In action by distributor of vacuum cleaners against the California Employment Stabilization Commission to recover taxes paid under protest pursuant to the Unemployment Insurance Act, on ground that distributor's dealers were not employees but were independent contractors, evidence sustained finding that dealers were employees within meaning of the Unemployment Insurance Act rather than independent contractors, and that therefore taxes were payable by distributor on earnings of dealers. Unemployment Insurance Code, § 601.

O'Hara, Randall, Castagnetto & Kilpatrick, Ellis R. Randall, Robert L. Leggett, Vallejo, for appellant.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw, Vincent P. Lafferty, Deputies Atty. Gen., for respondent.

KAUFMAN, Justice.

This is an appeal by Charles W. Sudduth from a judgment of the Superior Court in and for the County of San Francisco in favor of respondent California Employment Stabilization Commission and the members thereof after trial by the court. Plaintiff and appellant filed this action for the recovery of taxes in the sum of \$4,874.85, plus accrued interest, paid under protest pursu-

ant to the California Unemployment Insurance Act for the period April 1, 1948 through June 30, 1951. It is conceded that appellant exhausted his administrative remedies prior to filing suit.

Sudduth, who was the owner of the Kirby Company in Sacramento, which sold and distributed Kirby vacuum cleaners, contended that an independent contractor status existed between himself and certain salesmen or dealers engaged by him to sell Kirby vacuum cleaners to the general public. The Commission contended that those persons were employees and the tax contributions under the Unemployment Insurance Act were payable by appellant upon their earnings.

At the trial, the referee's transcript of the administrative hearings was received in evidence. Attached to the Answer were Exhibits A and B, Tax Decisions 1523 and 1600, the final decisions of the Unemployment Insurance Appeal Board.

Appellant held the distributorship rights from the manufacturer of the Kirby vacuum cleaner for its sale in Sacramento and fifteen counties in the central part of California. Salesmen who were designated "dealers" were engaged through newspaper advertising and personal contacts. Each dealer entered into a written contract with appellant which was entitled "Dealer's Agreement". This contract provided that the distributor would sell to the dealer his requirements of Kirby products, accessories, supplies, etc., at the prices set forth in the distributors' price list at the time of delivery of the products to him.

Other principal provisions of the agreement were as follows:

"B. The Dealer will pay the Distributor cash on delivery for parts, supplies, and accessories; may either pay the Distributor cash on delivery for Kirby Cleaners and other complete devices or purchase the same on open account; and shall bear all expenses, taxes, license fees, and other charges incurred in the resale of such merchandise.

"C. The distributor will extend credit to the dealer on open account only in accordance with the Distributor's credit system.

"D. The Dealer is and will continue to be an independent merchant and is not to be considered in any way subject to control by the Distributor. He is not and is never to be an agent or employee of the Distributor, and he shall have no power or authority to pledge or attempt to pledge or to bind or obligate the Distributor in any manner or for any purpose. The Distributor shall not furnish him with stationery, transportation, clerical or secretarial help, or office or desk space, expenses, or advertising expenses; guarantee any amounts to him or permit him to have a drawing account or any advance from the Distributor, except merchandise purchased on open account in accordance with the Distributor's credit system. The Distributor has no right to and shall not require him to attend at any place or time for any purpose; to devote any particular time or hours to his business; to confine his activities to any particular type of customers or any particular territory; to follow schedules, routes, or itineraries; to make reports of any character or follow leads; to make collections of accounts or check credit standings, or the like; or to refrain from engaging in any other type of business.

"E. As security and in good faith for the performance of this agreement and compliance with the Distributor's credit regulations, the Dealer will furnish the Distributor with bond, or a letter of credit, conditioned to secure him against loss from Dealer's breach of this agreement or failure to comply with the Distributor's credit regulations, and will maintain said bond or letter of credit at his own expense during the life of this agreement.

"F. As further security and good faith for the performance of this agreement and compliance with the Distributor's credit rules, the Dealer hereby sells and assigns to the Distributor the entire proceeds of the resale of all merchandise purchased by him from the Distributor on open account; hereby grants the Distributor a first and best lien on all merchandise purchased on open account by him from the Distributor and on the proceeds of its resale; and hereby authorizes the Distributor or his repre-

sentatives, to enforce said lien and to transfer and collect the proceeds of said resale by him; all as security to the Distributor against any loss from breach by him of this agreement or said credit regulations.

"G. This agreement shall continue in force for a period of one year from date hereof, and thereafter from month to month, unless terminated by thirty days' written notice of one party to the other; but the Distributor may terminate this agreement at any time on breach of the provisions of Paragraph 'E' or the occurrence of any event entitling the Distributor to recover thereunder, or if during any thirty-day period the Dealer has not paid the Distributor in cash or by delivery of the proceeds of resale thereof for at least one Kirby Cleaner.

"H. The Dealer has read this agreement carefully, and understands that his relations with the Distributor are to be covered solely by the provisions of this agreement, one copy of which he has retained."

Beginning in 1951, appellant and the dealers executed an additional agreement entitled "Dealers Repurchase Agreement." Prior to 1951, oral agreements substantially the same as the written Repurchase Agreement had been in effect. Under this agreement the distributor agreed to purchase "acceptable conditional sales contracts and/or promissory notes secured by chattel mortgages and/or leases, together with accompanying agreements and other documents (hereinafter referred to as 'contracts') representing sales or lease of new merchandise by Dealer", under certain terms and conditions subsequently stated in minute detail. The dealer agreed that all contracts offered to the distributor would be on the form approved by the distributor; that the down payments made by purchasers or lessees on such contracts had been made in cash and not its equivalent and that no part thereof had been loaned directly or indirectly by the dealer to the purchasers or lessees. The dealer agreed to provide and maintain service on all merchandise subject to the agreement in accordance with practices and policies established by the manufacturer and/or distributor. All

contracts purchased by the distributor were to be without recourse except those becoming delinquent for a period of 65 days, in which case the dealer agreed to pay the balance on demand to the Distributor. It was provided that the agreed purchase price was to be paid to the dealer or credited to his account when the paper was purchased, whereupon full title to the paper would pass to the distributor. Paragraph 6 of the agreement covered details in case of bankruptcy or insolvency of a dealer. Paragraph 7 provided that the distributor was under no obligation to notify the dealer of any default on the dealer's part or on the part of purchasers under contracts sold by the dealer to the distributor and the distributor might "make any compromise or adjustment that may seem reasonable to it with the purchasers or lessees named in the aforementioned contracts without consent of Dealer and without in any manner affecting the guaranty of Dealer herein contained."

In Paragraph 9 the dealer agreed not to accept payments under any contract that had been sold to the distributor, but was to refer such purchaser to the distributor. This agreement might be terminated by either party by notice in writing to the other at any time.

Persons who applied to appellant to become dealers received a demonstration of the Kirby products and were given an aptitude test. If an applicant was accepted he was trained in the operation of the machine and in sales methods for a period of from one to three days. Instructions were given on the completion of sales contracts and credit statements. The forms were provided by a banking concern.

When the period of training was completed the new dealer was accompanied by an experienced salesman designated as a "trainer" for a day or two. As a rule he then became a member of a group or crew consisting of from four to twelve men. This group or crew had one person known as a trainer, crew chief, crew leader or crew manager who was responsible for training the field men as to sales methods and presentation. The territories being

worked by the various crews and the dates were shown by a map on the wall in the office of appellant.

Dealers were furnished business cards bearing the names, address and telephone number of appellant, on which they could write, stamp, or have printed their own names and telephone numbers. The designation of "dealer" did not appear on this card. Dealers' kits were available to the men if they wished to use them. They paid \$5.00 for them, and received that amount back from the company when they were turned in.

A room was furnished for training sessions and meetings. Many of the groups worked from appointment schedules made by girls who made the initial contacts with customers for the dealers. The men in each crew contributed to pay the cost of employing these girls. The girls received whatever training was necessary from a crew chief or trainer.

In the meeting room there were blackboards and bulletin boards on which contests were announced and scores kept. Appellant maintained a radio quiz program at his own expense which was devoted to advertising Kirby products, and which facilitated the securing of appointments for demonstrations. The dealers were not compelled to attend the morning meetings which were held between 8:00 and 9:00 a. m., but it was emphasized that they would be greatly benefited by such attendance. Appellant stated that an attendance of two-thirds of the dealers at such meetings were considered excellent.

Dealers furnished their own cars and gas and oil. They were not required to put in any certain number of hours, and they could engage in other work while under contract to appellant.

The provisions in the "Dealers Agreement" pertaining to bonds, letters of credit and minimum number of sales were not enforced.

A dealer was consigned a machine and his account was charged with it when he took one out in the field. Beginning dealers were allowed to take out only one machine at a time. Some dealers who were

well established with appellant were allowed to take out several at one time. A dealer could pay cash, but this rarely occurred. The dealer's account was credited when he turned in proceeds of a cash sale, returned the equipment or turned over to appellant contracts of sales of equipment. A lower price was set to the dealer as he sold more equipment. Sales contracts which were turned over to appellant were usually discounted at the bank, but in some instances appellant himself financed them. If a customer defaulted before the first three payments were made, the dealer incurred some of the loss, but if after the third payment the appellant suffered the remaining loss.

It is emphasized by respondent that sales by the dealers were financed through the Bank of America at Sacramento under the name of appellant as distributor. Respondent's Exhibit "D" in evidence, a finance agreement, is signed by only two parties, Sudduth as owner-seller, and the bank as financier. This agreement designates appellant as the seller of all vacuum cleaners to be financed by the bank.

All sales taxes on vacuum cleaners sold by the dealers were reported to the State under one name, the Kirby Company of Sacramento. Appellant explained that he did this for the convenience of the Board of Equalization, indicating that said Board preferred one report to several separate small reports that might be difficult to locate.

Appellant admitted that the trainers or crew chiefs were his employees during the hours they were instructing other dealers. He testified that he maintained a ratio of one trainer to every five to ten dealers in the field.

Appellant maintained a permanent service department to handle complaints from customers. Dealers were not responsible for handling any complaints on equipment or servicing. If ever any such service was rendered by them, it was purely on a volunteer basis.

There is no reference to Workmen's Compensation in either the Dealer's Agreement or Dealers Repurchase Agreement.

The trial court found that appellant engaged the services of the dealers in an employment relationship; that said dealers were controlled in the existing employment relationship in all material details of their rendition of services, and that at no time was there a status of independent contract between appellant and the dealers; and that the tax was therefore properly imposed on appellant by respondent.

Appellant contends that the Kirby dealers were clearly independent contractors and hence excluded from coverage under the Unemployment Insurance Act. The Unemployment Insurance Code provides in Section 601 that "‘Employment,’ means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied." The section is substantially the same as Section 6.5 of Deering's General Laws, Act 8780d, which was interpreted in *Bemis v. People*, 109 Cal.App.2d 253, 240 P.2d 638. That case noted that the Supreme Court cases of this state have adopted the rule that the common law distinction between servant and independent contractor, that is, the distinction based upon the right of control is the test to be applied under the act. And that question is primarily one of fact. However, in *Isenberg v. California Employment Stabilization Commission*, 30 Cal.2d 34, 180 P.2d 11, it was said that when the evidence is not in conflict and not reasonably susceptible of conflicting inferences, then the contention that the question of whether or not a person is an employee under the Unemployment Insurance Act is wholly one of fact, is untenable. The court there pointed out that if such were the rule, various trial courts under identical facts might make conflicting interpretations, thus making effective enforcement of the act impossible. It was noted that in public law cases uniformity of decision is important, and where essential facts are not in conflict the question of the legal relations arising therefrom is a question of law.

[1] Under the rules of these cases, in order to reverse the judgment of the trial court, appellant must show that the trial court's finding of an employment relationship is unsupported, and that the evidence

herein is not in conflict, is not reasonably subject to conflicting inferences, and as a matter of law supports only a finding of an independent contract status.

[2] It is established that in this type of case, the burden of proof is on the party seeking to recover a tax to prove that it has been illegally assessed. *Isenberg v. California Employment Stabilization Commission*, supra; *Robinson v. George*, 16 Cal.2d 238, 244, 105 P.2d 914.

[3,4] In the leading case of *Empire Star Mines Co. v. California Employment Commission*, 28 Cal.2d 33, 43, 168 P.2d 686, 692, it is said that in determining whether one who performs services for another is an employee or an independent contractor, "the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause." The cited case then proceeds to lay down certain secondary factors which are to be taken into consideration in studying the relationship: (1) whether the one performing services is engaged in a distinct occupation or business; (2) the kind of occupation, with reference to whether it is usually done by a specialist without supervision or under the direction of a principal; (3) the skill required in the particular occupation; (4) whether principal or workman supplied the tools, instrumentalities and place of work; (5) length of time for which services are to be performed; method of payment, whether by time or by the job; (6) whether or not the work is part of the regular business of the principal; (7) whether or not the parties believe they are creating the relationship of employer-employee.

Applying the tests of the *Empire Star Mines' Case*, it can readily be seen from the facts heretofore narrated, that the evidence is certainly subject to the inference that appellant maintained control of the dealers in the methods of carrying on their work

through the medium of the trainers or crew chiefs who were, while acting in such capacity, admittedly employees. Thus the detail of the work of the less skilled dealers, insofar as it is feasible to control a type of service involving salesmanship in house to house canvassing, was controlled by appellant through the trainers in the field, and through group meetings in his office. Equipment to be sold was secured piece by piece from appellant's establishment. New dealers could take only one, and the average dealer who was better established with the company would take usually two or three vacuum cleaners.

The salesmen or dealers herein were not engaged in an occupation or business distinct from that of the appellant, but were the instruments by which he achieved the sale of the product of which he was distributor. A review of the background of the dealers reveals that no great skill was required to engage in this occupation. On the job training was relied on to develop the skill of the dealers.

Some of the factors, such as the fact of payment on the basis of each piece of equipment sold; the payment of the "appointment girls" by the dealers, the freedom of the dealers as to the hours which they worked, and the testimony of certain witnesses that they believed that the dealers were independent contractors, as well as the statement to that effect in the "Dealers Agreement", all point, it is true, more toward the status of independent contractor than employee. However, these are merely conflicting factors in the evidence which were weighed by the trial judge and found not to outweigh the factors pointing toward an employment relationship.

Although the Dealer's Agreement provided that the contract was to continue in force for a period of one year from date, and thereafter from month to month unless terminated by thirty days written notice of either party, the distributor could terminate at any time for breach of Paragraph E. Paragraph E provided that dealers were to furnish a bond or letter of credit to the distributor, and the evidence showed that this was never done. Respondent points out that appellant in effect could therefore terminate

the agreement with any dealer at any time as none of them had complied with Paragraph E.

Appellant cites *Garrison v. California Employment Stabilization Commission*, 64 Cal.App.2d 820, 149 P.2d 711, *California Employment Stabilization Commission v. Morris*, 28 Cal.2d 812, 172 P.2d 497, and *California Employment Stabilization Commission v. Norins Realty Co.*, 29 Cal.2d 419, 175 P.2d 217, to the effect that a commission salesman relationship is not inconsistent with an independent contractor relationship. In the *Garrison Case*, district agents of an insurance company were held to be independent contractors, and that decision was affirmed on appeal. In the other two cases cited certain real estate salesmen were held to be independent contractors and those decisions were affirmed. It might very well be held under different circumstances that real estate salesmen are employees. In fact, in *California Employment Stabilization Commission v. Morris*, supra, it was said, 28 Cal.2d at page 818, 172 P.2d at page 500, that "the occupation of real estate salesman, insofar as the Unemployment Insurance Act is concerned, is one that may be classified as that of an employee, or an independent contractor, depending upon the facts of the particular case."

Appellant reviews several other cases, arguing as to each that the facts are substantially similar where an independent contractor relationship has been upheld, and substantially different where an employment relationship has been upheld. It would serve no useful purpose to discuss these cases in detail for each case must be decided on its own facts. The instant case is not exactly parallel on its facts to any of the cited cases.

In his Reply Brief appellant contends that respondent by his argument in the trial court, which is repeated in his brief on appeal, misled the trial court as to the nature of the review involved, and that the trial court consequently did not exercise its independent judgment on the facts. We must presume that the trial court regularly performed its duty to exercise an independent judgment on the entire record before it.

It is true that respondent states in its brief that the issue before this court may be whether or not the weight of the evidence in the referee's transcript and in the stipulated facts set forth in Tax Decision No. 1523 supports the final administrative ruling. The issue here, however, is whether the entire record supports the findings of the trial judge in the exercise of his independent judgment that an employer-employee relationship existed.

[5] It appears from our review of the record herein, that the trial court's finding of the employment relationship between appellant and the dealers is supported by substantial evidence.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.



130 Cal.App.2d 401

D. SOARES, Plaintiff and Respondent,

v.

C. E. STEIDTMANN, Defendant and Appellant.

Civ. 16137.

District Court of Appeal, First District,
Division 1, California.

Jan. 26, 1955.

Rehearing Denied Feb. 25, 1955.

Hearing Denied March 22, 1955.

Action to quiet title. The Superior Court, County of Contra Costa, Harold Jacoby, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Peters, P. J., held that where grantor was her husband's sole heir and his estate was less than \$25,000, quitclaim deed by grantor, executed before grantor exercised her right to have estate set aside for her, conveyed her inchoate right to estate and this interest ripened upon grantor's exercise of right and was not defeated by grant deed executed to third party subsequent to execution of quitclaim

deed but before grantor's exercise of her right.

Judgment reversed.

1. Estoppel ⇨39

An after-acquired title does not pass under a quitclaim deed as it does under a grant deed.

2. Descent and Distribution ⇨74

Upon husband's death, title to his property vested immediately in his widow as his sole surviving heir. Probate Code, § 300.

3. Executors and Administrators ⇨173, 184

A widow's right to set aside husband's estate, if it does not exceed \$2,500, is similar to a widow's right to family allowance and to a probate homestead, and all three rights are conferred for same general purposes of protecting widows and children, but may be waived by conduct or express agreement. Probate Code, §§ 645, 660, 680.

4. Executors and Administrators ⇨173

A widow's right to have husband's estate set aside to her, if it does not exceed \$2,500, comes into existence at time of husband's death, and, until exercised, is at least an inchoate right. Probate Code, § 645.

5. Deeds ⇨121

A quitclaim deed passes whatever interest, legal or equitable, grantor possesses at time of grant, including rights which are inchoate at time of grant but which later ripen into a vested estate.

6. Descent and Distribution ⇨84

Where grantor was her husband's sole heir and his estate was less than \$25,000, quitclaim deed by grantor, executed before grantor exercised her right to have estate set aside for her, conveyed her inchoate right to estate and this interest ripened upon grantor's exercise of right and was not defeated by grant deed executed to third party subsequent to execution of quitclaim deed but before grantor's exercise of her right.

Frisbie & Hoogs, Berkeley, for appellant.

Sturgis, Den-Dulk, Douglass & Henes, John D. Den-Dulk, Oakland, for respondent.

PETERS, Presiding Justice.

The parties to this quiet title action claim title to a parcel of real property through deeds from the same grantor. The defendant, C. E. Steidtmann, claims through a prior quitclaim deed. The plaintiff, D. Soares, claims through a subsequent grant deed. The trial court quieted the title of the plaintiff. Defendant appeals.

The facts are not in dispute. Sometime prior to June 5, 1946, one C. F. MacKenzie owned certain real property in Contra Costa County. He died prior to the date mentioned, leaving his widow, Henrietta MacKenzie, surviving him as his heir. On June 5, 1946, the title to the real property still standing of record in the name of the deceased husband, the widow and heir quitclaimed all her right, title and interest in the property to one C. H. Collier. Thereafter, Collier quitclaimed his interest to Steidtmann, the appellant. Some six years later, on July 1, 1952, the widow, by grant deed, conveyed her interest in the same property to D. Soares, the respondent, who recorded his grant deed on July 18, 1952. It is admitted that Soares, when he accepted the grant deed, had actual notice of the earlier quitclaim deed.

After the grant deed had been executed and delivered to Soares, the Probate Court in Los Angeles, on petition of the widow, pursuant to section 645 of the Probate Code, made its order setting aside the entire estate of C. F. MacKenzie to the widow on the ground that said estate, including the property here involved, was of the value of less than \$2,500.

[1] To remove the cloud on the title created by the two outstanding deeds to the same property, Soares, the holder of the grant deed, brought this action. The trial court held that, as between appellant, the transferee of the prior quitclaim deed, and respondent, the grantee in the subsequent grant deed, the latter should prevail. The theory of the trial court was that the title received by the widow under section 645 of the Probate Code was a new title which passed, as an after-acquired title to the holder of the grant deed. An after-acquired title, of course, does not pass under

a quitclaim deed, as it does under a grant deed. See cases collected 15 Cal.Jur.2d p. 620, § 214.

[2-5] Appellant contends that, as the one claiming through the prior quitclaim deed, he should prevail over the grantee of the subsequent grant deed. With this contention we agree. Upon MacKenzie's death, title to his property, including title to the real property here involved, immediately vested under the provisions of section 300 of the Probate Code in his widow as his sole surviving heir. *Bates v. Howard*, 105 Cal. 173, 38 P. 715; *Fountain v. Bank of America*, 109 Cal.App.2d 90, 240 P.2d 414; *In re Estate of Laurence*, 84 Cal.App.2d 500, 191 P.2d 109. Thus, title to this property vested in Mrs. MacKenzie upon the death of her husband, subject to the lien of the administrator for the purposes of administration, which purposes include, upon a widow's petition, the duty of setting aside to the widow the decedent's estate if it does not exceed \$2,500, regardless of the claims of legatees or of general creditors, except for last illness, funeral and administration expenses. Thus, when MacKenzie died prior to June 5, 1946, Mrs. MacKenzie was vested with title to the property as sole surviving heir of her husband, which title was subject to debts and claims against the decedent. But she had another right—the right to petition the court to set the estate aside to her under section 645 of the Probate Code. This right is similar to the right of a widow to a family allowance, under section 680 of the Probate Code, and the right to a probate homestead under section 660 of the Probate Code. All three rights are conferred for the same general purposes of protecting widows and children. These rights may be waived by conduct or by express agreement. *In re Estate of Brooks*, 28 Cal.2d 748, 171 P.2d 724. They are rights which the widow may exercise if she so desires, except in limited circumstances. The right to have the estate set aside to her, under the circumstances set forth in the code sections, comes into existence at the time of death of the husband. Until exercised by the widow it is at least an inchoate right, that comes into fruition by the exercise of the power by the widow.

A quitclaim deed, of course, passes whatever interest, legal or equitable, that the grantor possesses at the time of the grant. *Rosenthal v. Landau*, 90 Cal.App.2d 310, 202 P.2d 810. This includes the passing of rights only inchoate at the time of the grant but which later ripen into a vested estate. Thus, in *Crane v. Salmon*, 41 Cal. 63, a quitclaim was executed before the grantor had acquired title to a government patent. It was held that the after-acquired patent operated to feed the quitclaim deed. See discussion 15 Cal.Jur.2d p. 622, § 215.

In contending that title acquired under section 645 of the Probate Code is a new title that as an after-acquired title did not pass under the prior quitclaim deed, respondent places his main reliance on the case of *In re Estate of Woodburn*, 212 Cal. 683, 300 P. 22. There the wife, by antenuptial agreement, waived any right in property then or thereafter owned by her husband, and specifically waived any right of inheritance in her husband's property. After the husband's death the wife attempted to have the property set aside to her as an estate of less than \$2,500. It was contended that the widow had waived this right by the antenuptial agreement. In holding that such agreement did not constitute a waiver of the right of the widow to have an estate of less than \$2,500 set aside to her, the Supreme Court stated, 212 Cal. at page 687, 300 P. at page 23:

"* * * we are of the opinion that the antenuptial settlement * * * cannot be held to have accomplished a waiver of those rights to which the widow or minor children, if any, of a decedent are entitled under the provisions of article 1, chapter 5, part 3, title 11 of the Code of Civil Procedure [now in the Probate Code]. The provisions of said chapter and article expressly relate to the support of the family of a decedent, and to which the widow and minor children of said decedent become entitled upon his death and the probate of his estate, without regard to any interest which they or any of them may have had in the property of said decedent during his lifetime, and without reference to their heirship or right of

inheritance therein. When a decedent dies leaving a widow, or a widow and minor child or minor children, the widow and minor child or children, if any, become entitled under the foregoing provisions of said Code to have the entire property and estate of the decedent set apart for the use and support of his family upon the return of the inventory and appraisal of his estate, showing that the total value thereof is less than the sum of \$2,500. The rights to which this widow became entitled under the foregoing provisions of the Code were in no sense either the rights of inheritance or rights depending upon any previous interest in the property of the decedent owned by him during his lifetime, and which she may or may not have surrendered by virtue of the terms of their antenuptial agreement. The trial court was therefore correct in ordering the whole estate of the decedent set apart to his widow upon the showing made * * *."

It is argued that if an antenuptial agreement waiving all rights in the property of her husband does not amount to a waiver of rights under section 645 of the Probate Code, then the wife must have had no rights of any kind to waive insofar as section 645 is concerned prior to the time she petitioned for the relief permitted by the code section. Therefore, a quitclaim deed, before the wife exercises the privileges conferred by section 645, could not have affected the widow's right to exert the privilege. Of course, in the *Woodburn* case the antenuptial agreement was entered into prior to the death of the husband, and the Supreme Court very properly pointed out that a waiver at that time did not affect the right of the wife under section 645, because the rights under such code section did come into existence only "upon his death." In the instant case the quitclaim deed was not executed until after those rights had come into existence, namely, after the death of C. F. MacKenzie. Thus, the *Woodburn* case is distinguishable from the instant case.

Interestingly enough, the *Woodburn* case did not cite one authority in support of its conclusions. Although it is distinguishable

from the instant case for the reason already stated, there are some early cases more directly in point, which hold that such waivers do not affect the right conferred under section 645. Thus, in *re Estate of Moore*, 57 Cal. 437, two days after the death of her husband, the widow executed a quitclaim deed to the property in the estate. Thereafter, she successfully sought to have a probate homestead declared on the property. See also *Phelan v. Smith*, 100 Cal. 158, 34 P. 667. Other cases along the same line could be quoted. If these cases were still the law such cases would be conclusive in the present controversy, and would require an affirmance in favor of respondent, but such cases no longer represent the law of California. All such cases were directly or indirectly overruled in *re Estate of Brooks*, 28 Cal.2d 748, 171 P.2d 724. That case involved an application for a family allowance and a probate homestead. The Supreme Court, after a careful review of all the authorities, expressly repudiated, directly or indirectly, the authorities above cited, and others, and elected to follow the rule that the right to such benefits is not absolute but can be waived by conduct or by express agreement. See also *In re Estate of Schwartz*, 79 Cal.App.2d 308, 179 P.2d 868. In the *Brooks* case, the wife, prior to the death of her husband, had separated from him, was not entitled to support, and the interlocutory decree so provided, and she had waived any right to support. All these things occurred before the death of the husband. They were held to constitute a bar to the right to a probate homestead or family allowance. The same rule should apply to rights conferred by section 645 of the Probate Code. Certainly, if a waiver can be made before the death of the husband, a waiver can surely be made thereafter.

[6] In the instant case there was a waiver as a matter of law. After the widow had inherited the property, and after the right to have the estate set aside to her had accrued by her husband's death, she conveyed by quitclaim deed all of her interest in the property to appellant. Six years later she sought to completely defeat her deed by conveying to another, and then

sought to make the second deed effective by applying to have the estate set aside to her under section 645 of the Probate Code. Whether it be held that the widow is estopped, has waived her rights, or had already conveyed away this right to the holder of the quitclaim deed is immaterial. In any event she cannot, nor can the respondent as the subsequent grantee with knowledge, assert any rights in the property based upon section 645 of the Probate Code. The successor in interest to the quitclaim grantee must prevail.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.



130 Cal.App.2d 314

Sidney E. DAVIS and Mildred M. Davls,
Plaintiffs and Respondents,

v.

Charles Lewis OLDENDORPH, Arnold J. Oldendorph, Clara Oldendorph and Ewell Lawrence Smith, Defendants,

Charles Lewis Oldendorph, Arnold J. Oldendorph and Clara Oldendorph, Appellants.

Civ. 20296.

District Court of Appeal, Second District,
Division 3, California.

Jan. 21, 1955.

Hearing Denied March 16, 1955.

Action for the death of plaintiff's minor son from injuries received in a collision with one defendant's truck while riding as a guest in an automobile owned and driven by a minor defendant, whose application for an operator's license was signed by his codefendant parents. From a judgment of the Superior Court of Los Angeles County, Harold B. Jeffery, J., on a jury's verdict for plaintiffs against defendant driver and his parents, such defendants appealed. The District Court of Appeal, Parker Wood, J., held that the evidence was sufficient to support the jury's

implied finding that the minor defendant was guilty of wilful misconduct, proximately causing the accident, in driving at excessive speed on the left side of a two lane roadway within two hundred yards from the crest of a grade while trying to pass two or three automobiles traveling in the same direction and traveling for about 600 feet on such side of the roadway after reaching the crest, which the truck was approaching from the opposite direction on its proper side of the roadway.

Judgment affirmed.

1. Automobiles ⇨181(1)

"Wilful misconduct," rendering automobile driver liable under statute to his guest for resulting injuries, is intentional doing of an act with knowledge that serious injury is probable, as distinguished from possible, result thereof, or with wanton and reckless disregard of its possible result. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Wilful Misconduct".

2. Automobiles ⇨181(1)

An automobile driver knowingly flirting with danger and, without necessity or compelling emergency, taking a chance of killing or injuring himself and others riding with him, is guilty of "wilful misconduct" rendering him liable under statute for resulting injuries to or death of guest. Vehicle Code, § 403.

3. Automobiles ⇨245(24)

Whether motorist intentionally drove automobile at high speed on wrong side of roadway over crest of grade with wanton and reckless disregard of possible resulting injury to guest therein or with express or implied knowledge that serious injury to guest would be a probable, as distinguished from possible, result thereof, was a fact question for jury in action for death of guest from injuries sustained in collision with another automobile. Vehicle Code, § 403.

4. Automobiles ⇨244(20, 37)

In action for death of guest in defendant's automobile from injuries sustained in

collision with truck, evidence was sufficient to support jury's finding, implied from verdict for plaintiffs, that defendant was guilty of wilful misconduct, proximately causing accident, in driving automobile at excessive speed on left side of roadway within 200 yards from crest of grade while trying to pass two or three automobiles traveling in the same direction and traveling for about 600 feet on same side of roadway, without attempting to return to proper side, after reaching crest, which truck was approaching on its proper side of roadway from opposite direction. Vehicle Code, § 403.

5. Trial ⇨261

In action for death of guest in automobile, driven by one of defendants, as result of injuries received in collision with truck, refusal of defendants' requested instruction to jury that defendant driver's violation of any or all of certain vehicle code sections, read to jury by court, would not, "in and of itself," constitute wilful misconduct, was not error, as expression "in and of itself" was not clear. Vehicle Code, §§ 403, 528, 530, 671.

6. Trial ⇨260(8)

In action for death of guest in automobile, driven by one of defendants, as result of injuries received in collision with truck, defendant's given instruction to jury, defining wilful misconduct and stating that such conduct of defendant driver was not established, even if he did something wrongful in operation of automobile, unless his conduct was characterized by wantonness and reckless disregard of possible results, adequately instructed jury on such issue, even if court erred in refusing defendant's requested instruction that violation of any or all of vehicle code sections read to jury by court would not in and of itself constitute wilful misconduct. Vehicle Code, §§ 403, 528, 530, 671.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for appellants.

Krag & Sweet, and Donald R. Krag, Alhambra, for respondents.

PARKER WOOD, Justice.

Action for damages for wrongful death of the son of plaintiffs allegedly caused by the wilful misconduct of defendant Charles Oldendorph in the operation of his automobile while the son was a guest in the automobile. Motion for nonsuit was granted as to defendant Smith. In a trial by jury judgment was for plaintiffs against defendants Charles Oldendorph and his parents who signed his application for an operator's license. Defendants' motion for a new trial was denied, and they appeal from the judgment.

Appellants contend that the evidence is insufficient to establish wilful misconduct.

The accident occurred on Sunday, May 25, 1952, about 3:30 p. m., three miles south of Palmdale. The main traveled portion of the highway is 20 feet wide, is paved, and has 2 traffic lanes. A paved shoulder about 8 feet wide is on each side thereof. On the highway, near the scene of the accident, there is a crest of a grade. The grade on the north side of the crest is much steeper than the grade on the south side. The grade on the south side is about 400 feet in length, and at a point about a quarter of a mile south of that grade there is a curve in the highway. Subject to the provisions of the basic speed law, Vehicle Code, sec. 510, the prima facie speed limit in the vicinity of the accident was 55 miles an hour. It was a clear day.

Defendant Charles Oldendorph, who was then 20 years of age, was driving his Mercury automobile south on the highway. John Davis (son of plaintiffs), who was 17 years of age, was sitting in the front seat beside Charles. Defendant Smith was driving his Ford pickup truck north on the highway.

Defendant Charles Oldendorph testified that as he was traveling in a southerly direction up the grade he went into the lane for northbound traffic and started to pass two or three automobiles which had been traveling ahead of him in the southbound lane. It is possible that he was about 200 yards from the crest of the hill when he started to pass. He could not see over the crest of the hill but he thought he would be

able to go around the automobiles and then get back into the southbound lane before he reached the crest of the hill. He did not sound his horn. When he was going up the grade and was alongside the front automobile (the front one of those he was trying to pass) he saw the pickup truck (in the lane for northbound traffic) and it seemed that it "popped over" the crest, and "it looked pretty far away." He (Charles) applied his brakes but did not try to get back to his right (the southbound lane). His automobile and the truck collided on the (east) shoulder of the highway. He testified further that prior to the accident he was traveling 40 or 45 miles an hour and his automobile was in overdrive. He possibly accelerated his speed while passing the automobiles. He did not try to get his automobile out of overdrive and into high gear—so that he could go faster. John did not protest or find any fault with the way Charles was driving.

John died as a result of injuries received in the collision.

Defendant Smith testified that after he came around the curve in the highway he saw three automobiles in the southbound lane and then he saw the Mercury which was coming over the top of the crest, about a quarter of a mile away, on his (Smith's) side of the highway and passing the third automobile "back" (from Smith) in the southbound lane. It was traveling 60 to 70 miles an hour. It "got even with the second car," but did not get around it. He (Smith) saw that Charles was not going to make it and Smith swung his automobile to the right and applied his brakes. At that time he was 250 or 300 feet from the Mercury, and the collision occurred about 5 seconds thereafter. He (Smith) thought that Charles had plenty of time to get between the second automobile he was passing and the one ahead of it—there were 40 to 50 feet between those automobiles.

A police officer, called as a witness by plaintiffs, testified that he arrived at the scene of the accident about 4:05 p. m. The truck and the Mercury had not been moved after the collision, and they were close together. The front of the truck was badly

damaged and the right side of the Mercury was caved in. The impact of the vehicles occurred approximately 600 feet south of the crest of the grade. The point of impact was about 18 feet east of the center line of the highway on the (outside) edge of the paved shoulder where it joins the dirt. The truck left skid marks which commenced 6 feet east of the center line of the highway and continued for a distance of 78 feet. The Mercury left skid marks which also commenced on the east side of the center line and continued for a distance of 141 feet. He testified further that about two hours after he left the scene of the accident he went to the hospital and had a conversation with Charles. Charles told him he was going uphill passing two or three automobiles, and when he came over the crest he saw the truck. He could not complete the passing without crowding one of the southbound cars off the highway so he headed for the left shoulder.

Plaintiff Sidney Davis testified that about two weeks after the accident, Charles told plaintiffs, in the presence of Charles' parents, that he believed that John was asleep at the time of the accident—that he had made no motion or comment just prior to the accident.

Section 403 of the Vehicle Code provides that "No person who as a guest accepts a ride in any vehicle * * * has any right of action for civil damages against the driver of such vehicle * * * on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the * * * wilful misconduct of said driver."

[1, 2] Appellants argue, as above stated, that the evidence is insufficient to establish wilful misconduct; and in the case at bar, "at best, nothing except the violation of the overtaking statute on an ascending grade appears." It was stated in *Jones v. Harris*, 104 Cal.App.2d 347, 351, 231 P.2d 561, 563, that "Wilful misconduct is divided into two distinct lines of action, either of which will render a driver liable to his

guest for its results, as follows: first, "the intentional doing of something * * with a knowledge that serious injury is a *probable* (as distinguished from a possible) result"; and second, "the intentional doing of an act with a wanton and reckless disregard of its *possible* result." It was further stated therein 104 Cal.App.2d at page 352, 231 P.2d at page 564, in quoting from another case, that "one who, while driving an automobile, knowingly flirts with danger and, without necessity or emergency compelling him, 'takes a chance' on killing or injuring himself and others, who may be so unfortunate as to be riding with him, is guilty of wilful misconduct." "

[3, 4] In the present case the evidence shows that defendant Charles, while driving at a speed of approximately 70 miles an hour on the wrong side of a two-lane roadway and within 200 yards of the crest of a grade, was trying to pass two or three automobiles which were traveling in the same direction he was traveling. His view was obstructed as he so approached the crest of the grade. There was evidence that as he came over the crest of the grade he was passing the automobile which had been immediately in front of him in the southbound lane. He traveled about 600 feet on the wrong side of the roadway after he reached the crest, and then he collided with the truck which was on its proper side of the roadway. There was no evidence that he made any attempt to return to his proper side of the roadway. As was stated in *Hastings v. Serleto*, 61 Cal.App.2d 672, 682-683, 143 P.2d 956, 961, "[T]he question of whether the defendant driver herein intentionally drove his automobile with a wanton and reckless disregard of the possible result of such driving or whether he intentionally drove his automobile with a knowledge, express or implied, that serious injury would be a probable (as distinguished from a possible) result thereof, is essentially one of fact for determination by the fact finder." The implied finding of the jury that defendant Charles was guilty of wilful misconduct which was a proximate cause of the accident is amply supported by the evidence.

[5, 6] Appellants contend further that the court erred in reading sections 528, 530 and 671 of the Vehicle Code to the jury and in refusing to instruct the jury that "the mere violation of these sections" did not constitute wilful misconduct.

Section 528 provides, in part, that, "a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle."

Section 530 provides, in part, that on a roadway having two lanes, "no vehicle shall be driven to the left side of the center line * * * in * * * passing another vehicle proceeding in the same direction unless such left side is * * * free of oncoming traffic for a sufficient distance * * * to permit such * * * passing * * * without interfering with the safe operation of any vehicle * * *. [T]he overtaking vehicle must return to the right-hand side of the roadway before coming within one hundred feet of any vehicle approaching from the opposite direction. (b) No vehicle shall at any time be driven to the left side of the roadway * * *: 1. When approaching the crest of a grade * * * where the driver's view is obstructed within such distance as to create a hazard in the

event another vehicle might approach from the opposite direction."

Section 671 provides, in part, that "(a) Every motor vehicle when operated upon a highway shall be equipped with a horn in good working order * * *. (b) The driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn. * *"

Appellants argue to the effect that since those sections were read to the jury, the court should have given appellants' requested instruction which was as follows: "You have been, or will be, instructed in regard to certain vehicle code sections. You are hereby instructed that a violation in and of itself of any or all of the vehicle code sections referred to in these instructions would not constitute wilful misconduct." It was not error to refuse to give that instruction. The expression "a violation in and of itself" is not clear. That expression does not convey any meaning with respect to what kind of violation was intended to be referred to or with respect to the kind of conduct that might be involved in violating the sections. Of course, under certain circumstances, the conduct of a driver in violating section 528 or section 530 might constitute wilful misconduct. In any event, the court gave an instruction,¹ requested by defendants, de-

1. "It is admitted * * * that at the time of the accident * * * deceased Davis was a guest in the automobile operated by Charles Lewis Oldendorph. Under our law the driver Charles Lewis Oldendorph, was not obligated to exercise ordinary care in the operation of the automobile he was driving at the time of the accident. His only legal obligation was to refrain from * * * wilful misconduct. * * * Therefore * * * you could award damages to the plaintiffs * * * only in the event you should first find that Charles * * * was guilty of wilful misconduct as that term is defined to you in these instructions.

"The words 'wilful misconduct' have a meaning in law additional to that which they have in common usage. * * *

"You are instructed that in order to be a basis of liability to a guest under our law the wilful misconduct must be something more than intentional and wrongful.

It must be done under circumstances which show either knowledge that serious injury to the guest probably will result, or a wanton and reckless disregard of the possible results.

"[W]ilful misconduct is something more than what might even be called gross negligence. A guest may not recover against his host driver or * * * owner of the vehicle * * * for the negligence of the driver, however such negligence * * * might be classified. The acts and conduct of the driver must amount to wilful misconduct as that term is defined to you herein before the guest, or the heir of a deceased guest, has any right of action.

"It follows, therefore, that even if you find that Oldendorph was negligent in the manner in which he operated his car immediately prior to and at the time and place of the accident, and if you further find that Oldendorph intentionally did something that was wrongful in the op-

fining wilful misconduct. That instruction included a statement to the effect that even if Charles did something that was wrongful in the operation of his car, still a case of wilful misconduct was not established unless his conduct was characterized by that element of wantonness and reckless disregard of the possible results as explained in the instructions. By that instruction the jury was advised in effect that unless a Vehicle Code section was violated with wanton and reckless disregard of the possible results, such violation would not constitute wilful misconduct. The jury was instructed adequately.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; EDMONDS, SCHAUER and SPENCE, JJ., dissenting.



130 Cal.App.2d 334

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

L. C. KEETON, Defendant and Appellant.
Cr. 3056.

District Court of Appeal, First District,
Division 2, California.

Jan. 24, 1955.

Hearing Denied Feb. 16, 1955.

Hearing Denied March 30, 1955.

Proceeding on petition for writ of error coram nobis. The Superior Court, County of Alameda, Charles Wade Snook, J., denied petition and petitioner appealed. The District Court of Appeal, Dooling, J., held that evidence sustained finding that defendant who had pleaded guilty to charge of murder, had committed murder of first degree.

Order affirmed.

eration of said car and which was a proximate cause of the death of young Davis, still a case of wilful misconduct has not been established * * * unless you should further find from a preponderance of all the evidence that young

278 P.2d—61

1. Criminal Law §997(15)

Where record of proceedings on charge of murder showed that defendant had been examined by two court-appointed psychiatrists who found defendant understood the charges against him, defendant could not successfully contend in coram nobis proceeding that he had been unable to understand criminal proceedings.

2. Criminal Law §273

Jury §29(4)

Where defendant had pleaded guilty to charge of murder, he was not entitled to trial by jury, production of witnesses or right to prove that killing was in self-defense.

3. Homicide §253(1)

Evidence sustained finding that defendant who had pleaded guilty to charge of murder, had committed murder of first degree.

4. Criminal Law §997(15)

Where record of proceeding on charge of murder indicated that defendant had been represented by public defender and had made no objection to such representation, defendant could not successfully contend in coram nobis proceeding that he had been denied right of counsel.

5. Criminal Law §1026

Where defendant had pleaded guilty to charge of murder, he was not entitled to right of appeal.

L. C. Keeton, in pro. per.

Edmund G. Brown, Atty. Gen. of the State of California, Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant appeals from an order denying his petition for a writ of error coram nobis.

Oldendorph's conduct was characterized by that element of wantonness and reckless disregard of the possible results as heretofore explained to you in these instructions. * * *

Appellant pleaded guilty to a charge of murder in 1947, the trial judge determined the murder to be in the first degree and sentenced appellant to life imprisonment. The record shows that while the two were seated on the side of their bed appellant fired five shots at his wife thereby killing her. He then fired one bullet into his own head. An officer testified at the preliminary hearing that appellant stated to him that before shooting "there wasn't any quarrel. She just wasn't treating him right."

[1] Appellant's first contention is that by reason of the self-inflicted wound in his head he was not able to understand the proceedings, or as he puts it "was mentally absent from the entire proceeding." The record shows that appellant was examined by two court-appointed psychiatrists who found that he "understands the nature of the charges against him and the possible punishments therefor * * *. Accused was oriented for time, place and person."

Appellant's claim that there was no sworn complaint charging him with murder is contrary to the record. The record shows a sworn complaint, a full preliminary hearing, a holding to answer, an information, an original plea of not guilty and not guilty by reason of insanity, the withdrawal of those pleas and a plea of guilty. Appellant was at all times represented by the public defender.

[2] Appellant claims that he was not allowed a trial by jury, the production of witnesses or the right to prove that the killing was in self-defense. His plea of guilty to the charge of murder is an answer to all of these contentions.

[3] In fixing the degree the court had before it the testimony taken at the preliminary hearing from which the court concluded that he "is of the opinion that the murder is murder of the first degree." The record supports this finding.

[4, 5] Appellant's statement that he was denied the right to counsel is answered by the record. He was represented by the public defender and made no objection to that representation before the trial court. His claim that he was denied the right of

appeal is futile in view of his plea of guilty and the support in the record for the order fixing the degree of the crime.

Appellant appears in pro. per. and his arguments are quite confused. We have examined the record in the light of this fact and find nothing therein to entitle him to the relief sought. We have thought it advisable to treat appellant's contentions on their merits without regard to whether coram nobis is the proper remedy. See *People v. Adamson*, 34 Cal.2d 320, 210 P.2d 13.

Order affirmed.

NOURSE, P. J., and KAUFMAN, J.,
concur.



130 Cal.App.2d 291

Carl C. ALFORD, Plaintiff and Appellant,
v.

Carl Edward BELLO, John Doe I, John Doe II, Jane Doe I, Jane Doe II, John Doe Company I and John Doe Company II, Defendants,

Mike Conrotto (sued as John Doe I),
Respondent.
Civ. 20370.

District Court of Appeal, Second District,
Division 3, California.

Jan. 20, 1955.

As Modified on Denial of Rehearing
Feb. 15, 1955.

Action against trucker and highway permit carrier for injuries to person and property resulting from alleged negligent operation of motor truck and semitrailer on public highway. The Superior Court, Los Angeles County, Alfred E. Paonessa, J., entered default judgment against trucker and judgment of nonsuit for carrier, and plaintiff appealed from judgment of nonsuit. The District Court of Appeal, Vallée, J., held that, where, under evidence status other than that of employer-employee could not be found as between defendant without dis-regarding or rebutting presumption of

trucker's innocence of crime and obedience of law, and trucker, if an employee, was acting within course of his employment at time of accident, inference that trucker was carrier's employee was enough to compel denial of carrier's motion for nonsuit.

Reversed.

1. Automobiles ⇨245(28)

If, in action for injuries to persons and property allegedly resulting from negligent operation of motor truck and semitrailer on public highway, there was any evidence from which jury reasonably could have found that one defendant, as truck operator, was acting as other defendant's employee, motion for judgment of nonsuit as to other defendant should have been denied.

2. Automobiles ⇨77

Trucker could haul legally on his own behalf as independent contractor, rather than as employee of radial highway common carrier, only if trucker possessed valid permit or other type of operating authority to act as the highway carrier. Public Utilities Code, §§ 1061-1073, 3501-3545, 3631, 3632, 3802, 3804.

3. Evidence ⇨60

Person is presumed to be innocent of crime or wrong and to have obeyed the law. Code Civ.Proc. § 1963, subds. 1, 33.

4. Evidence ⇨86

Presumption that one is innocent of crime or wrong and has obeyed law is evidence and, if not controverted, requires trier of fact to find in accordance therewith. Public Utilities Code, §§ 1061-1073, 3501-3545, 3631, 3632, 3802, 3804.

5. Automobiles ⇨244(26)

Evidence ⇨60

It would be presumed that trucker, who had not been issued permit or other operating authority to act as truck carrier of any type, in transporting property at time of collision with third party was innocent of crime and was obeying the law, and, therefore, such presumption was evidence that trucker was not acting as an independent contractor but was acting as employee of highway permit carrier. Code Civ.Proc.

§ 1963, subds. 1, 33; Public Utilities Code, §§ 1061-1073, 3501-3545, 3631, 3632, 3802, 3804.

6. Automobiles ⇨245(28)

Where, under evidence in action against trucker and highway permit carrier, for injuries to person and property resulting from alleged negligent operation of truck and semitrailer on public highway, status other than that of employer-employee could not be found as between defendants without disregarding or rebutting presumption of trucker's innocence of crime and obedience of law, and trucker, if an employee, was acting within course of his employment at time of accident, inference that trucker was carrier's employee was enough to compel denial of carrier's motion for nonsuit. Code Civ.Proc. § 1963, subds. 1, 33; Public Utilities Code, §§ 1061-1073, 3501-3545, 3631, 3632, 3802, 3804.

Miller & Jones and Philip F. Jones, San Fernando, for appellants.

Henry R. Thomas, Wayne Veatch and Henry F. Walker, Los Angeles, for respondents.

VALLEE, Justice.

Appeal by plaintiff from a judgment of nonsuit in favor of defendant Mike Conrotto in an action for personal injuries and property damage resulting from the negligent operation of a motor truck and semitrailer on a public highway.

About 7 p.m. on October 22, 1951, while driving on San Fernando Road in Los Angeles, plaintiff was struck by a heavy truck and semitrailer driven by defendant Bello. Plaintiff sued Bello and Conrotto, alleging that the truck and semitrailer was operated by Bello within the course and scope of his employment as an employee of Conrotto. Conrotto answered. Bello defaulted, and at the trial judgment was entered against him in plaintiff's favor for \$7,500.

Bello was the registered owner of the truck and semitrailer. Bello never had been issued a permit or other operating authority to act as a truck carrier of any type.

Conrotto was a highway permit carrier, operating a string of trucks in California as a radial highway common carrier. His headquarters were in Gilroy with a branch office in Los Angeles. Conrotto had authorized his Los Angeles dispatcher to give Bello hauling jobs contracted for by Conrotto. There was no writing between Conrotto and Bello.

Between September 19 and October 22, 1951, the date of the accident, Bello had used his truck about 16 times to haul goods contracted to be carried by Conrotto under oral arrangements with Conrotto's Los Angeles representative. In each case, the goods were picked up by Bello at the place where he was told to get them by Conrotto's dispatcher. Conrotto paid Bello for the haul at the legal rate less 10 percent and less the amount of the California gross receipts tax chargeable for the haul. All bills of lading and other documents for each shipment were handled by Conrotto's office, not by Bello. All dealings with the shipper were handled directly by Conrotto's office except that the shipper told Bello where the goods were to be delivered when he went to pick them up.

Conrotto never made any inquiry as to whether Bello had authority to operate as a highway carrier nor did he ever order any member of his firm to do so. He had no knowledge from any source whether Bello was an authorized carrier or not.

On the date of the accident Conrotto had a contract to haul a load of floor tile. Bello was told to pick up the load by Conrotto's dispatcher. He did so; and while hauling the load, collided with plaintiff. Conrotto paid Bello \$64.56 for hauling the load. He did not give any hauling jobs to Bello after the accident.

At the close of plaintiff's evidence as to liability, it was stipulated that the motion of Conrotto for a judgment of nonsuit could

be heard and determined. The motion was granted and a judgment entered accordingly. Plaintiff appeals.

Plaintiff contends the evidence raised a presumption that Bello was acting as Conrotto's employee at the time of the accident and that it was error to grant the motion for a judgment of nonsuit.

[1, 2] Bello was hauling for Conrotto, who paid him. In doing the hauling he was acting either as an employee of Conrotto or as an independent contractor. If there was any evidence from which the jury reasonably could have found that he was acting as Conrotto's employee, the motion for judgment of nonsuit should have been denied. Bello could have done the hauling legally on his own behalf as an independent contractor only if he possessed a valid permit or other type of operating authority to act as a highway carrier. Pub.Util.Code, §§ 1061-1073, 3501-3545; *Gilbert v. Rogers*, 117 Cal.App.2d 712, 717, 256 P.2d 574. A "highway carrier" is defined as "every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, engaged in transportation of property for compensation or hire as a business over any public highway in this State by means of a motor vehicle * * *." Pub.Util.Code, § 3511. Section 3543 provides: "No highway carrier shall operate any motor vehicle over any public highway unless there is displayed on the vehicle a distinctive license plate in the form prescribed by the commission, showing the classification to which the carrier belongs. No such license plate shall be issued by the commission until a permit under this chapter, or a certificate of public convenience and necessity under Part 1 of Division 1 has been issued to the carrier." A highway carrier must deposit with the Public Utilities Commission a policy of insurance or a bond of a surety company providing protection against liability upon the highway carrier for the payment of damages for personal bodily injuries to one person in the amount of not less than \$15,000; and against a total liability on account of bodily injuries to more than one person as a

result of any one accident in the amount of not less than \$30,000; and in an amount not less than \$10,000 for one accident resulting in damage or destruction of property. Pub.Util.Code, §§ 3631, 3632. No permit or other type of operating authority had ever been issued to Bello by the Public Utilities Commission. A person who fails to comply with the provisions of the Public Utilities Code with respect to highway carriers is guilty of a misdemeanor. Pub.Util.Code, §§ 3802, 3804.

[3-6] It is presumed that a person is innocent of crime or wrong and that the law has been obeyed. Code Civ.Proc. § 1963(1, 33). The presumptions are evidence and if not controverted the trier of fact is bound to find in accordance with them. 18 Cal.Jur.2d 491, § 67. Bello was transporting property of others for compensation over a public highway by means of a motor vehicle at the time of the accident. The arrangements between Conrotto and Bello were entirely oral. It is presumed that in transporting the property he was innocent of crime and was obeying the law. The presumptions are evidence that he was not acting as an independent contractor since if he were acting as such he would be guilty of a crime. It must then be inferred that he was Conrotto's employee. No status other than that of employer-employee could have been found under the evidence without disregarding or rebutting the presumption of Bello's innocence of crime and obedience of the law. There is no question but that if Bello was Conrotto's employee he was acting within the course of his employment at the time of the accident. The inference that he was Conrotto's employee was enough to compel denial of the motion for judgment of nonsuit.

In Robinson v. George, 16 Cal.2d 238, 105 P.2d 914, a judgment of nonsuit was granted the defendant corporation on the ground the individual defendant was an independent contractor. Reversing, the

court declared in 16 Cal.2d at pages 242, 244, 105 P.2d at page 916:

"The rule, as stated by plaintiff, is that the fact that one is performing work and labor for another is *prima facie* evidence of employment and such person is presumed to be a servant in the absence of evidence to the contrary. * * * [W]here the arrangements between an employer and employee are entirely oral as in this case, a determination as to the relationship of these parties is within the province of the jury. * * * Since practically the only evidence as to the nature of the relationship of the parties is the presumption arising out of the fact that defendant George was rendering services to the defendant corporation, the jury could have found that he was doing it in the capacity of a servant; and, since no evidence was introduced by the defendant corporation to rebut this presumption, we are of the opinion that the evidence would have been sufficient to support a finding of an employer-employee relationship."

Conrotto was a radial carrier. He argues that application of the presumptions that Bello was innocent of crime and that he obeyed the law requires that it be presumed that he (Conrotto) disobeyed the law. The conclusion does not necessarily follow. The fact that Conrotto employed Bello together with his truck to do hauling does not compel the conclusion that he (Conrotto) knew that Bello did not have a permit or other operating authority to act as a highway carrier. In fact, Conrotto testified he had no knowledge on the subject.

In view of our conclusion, it is not necessary to consider other points made by plaintiff.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

Gladys Huette BRUBAKER, Plaintiff and
Respondent,

v.

BENEFICIAL STANDARD LIFE INSUR-
ANCE COMPANY, a corporation,
Defendant and Appellant.
Civ. 20473.

District Court of Appeal, Second District,
Division 1, California.

Jan. 24, 1955.

Rehearing Denied Feb. 15, 1955.

Hearing Denied March 22, 1955.

Action by widow to recover proceeds of two insurance policies on life of her husband. The Superior Court, Ventura County, Walter J. Fourn, J., gave judgment for widow. Insurer appealed. The District Court of Appeal, Drapeau, J., held that where insured, on applying for insurance, had been examined by insurer's physician and found to be in good health, but at that time actually had cancer, which he did not know of, and which caused his death a few months later, clause in policies providing that policy should not take effect unless delivered to insured during his good health did not render policies void.

Judgment affirmed.

1. Insurance ⇨291(1)

That insured, who died of cancer a few months after issuance of insurance policies, did not state in applications, made at time he did not know he had cancer, that he had small firm nodules in his abdomen, was not a failure to disclose that he had cancer and did not void policies.

2. Insurance ⇨256(1)

In absence of fraud or deceit, the mere fact that representations of an insured were proved to be unfounded by subsequent events will not void a life policy.

3. Insurance ⇨146(3)

Insurance policies are to be construed liberally in favor of the insured.

4. Contracts ⇨221(2)

Courts are disinclined to construe the stipulations of a contract as conditions precedent, unless compelled by the language of the contract plainly expressed.

5. Insurance ⇨130(1)

Where insured, on applying for insurance, had been examined by insurer's physician and found to be in good health, but actually had cancer which he did not know of, and which caused his death a few months later, clause in policies that policies would not take effect unless they were delivered to insured during his good health did not render policies void. Insurance Code, § 10953.3.

Moss, Lyon & Dunn, Gerold C. Dunn and Henry F. Walker, Los Angeles, for appellant.

Ben F. Ruffner, Camarillo, Nebron & Blanford and Irwin J. Nebron, Ventura, for respondent.

DRAPEAU, Justice.

The material facts in this case are not disputed. Its decision turns upon the answer to the following legal question: Is an insurance policy void when the insured at the time of its delivery was mortally afflicted with cancer, although when application for the insurance was made, when the insured was examined by the insurance company's doctor, and when the policy was issued and delivered neither the insured nor the insurer knew of the serious character of the illness?

Plaintiff Gladys Huette Brubaker, is the widow of Walter B. Brubaker. She brings this action against the defendant insurance company to collect \$7,000 on two policies of insurance upon the life of her deceased husband.

The insurance company would not pay, and contended that it is not liable because the insured was not in good health at the time the policies were delivered. As stated, this is the determinative question in the case, neither fraud nor misrepresentation being an issue.

The facts, stated chronologically are as follows:

March 8, 1952, Mr. Brubaker went to see Dr. Robert E. Williams, of Camarillo, California. Mr. Brubaker complained that he

had been having abdominal pain for a little over a week. The doctor found upon examination that his patient had tenderness in his abdomen, more especially in the lower right portion, where there was an old scar apparently from an appendectomy. There were some small, tender, firm nodules in the right portion of the abdomen.

The doctor diagnosed Mr. Brubaker's illness as acute gastro-enteritis. X-ray pictures taken of Mr. Brubaker's abdomen showed no abnormalities.

March 14, 1952, Mr. Brubaker signed what the insurance company designated part one of an application for the insurance here in question. The gist of Mr. Brubaker's answers to the questions in the application was that he was in good health and knew of no condition which would make him a poor life insurance risk. All of his statements were made in good faith, and were true so far as he then knew.

March 25, 1952, Mr. Brubaker executed part two of the application, the gist of which was substantially the same as part one. In this part of the application Mr. Brubaker disclosed that he had consulted Dr. Williams for the disorder diagnosed by the doctor as gastro-enteritis.

On this same date, March 25, 1952, Dr. Williams again made a physical examination of Mr. Brubaker. This time the doctor was acting as medical examiner for the insurance company. At that time the doctor could find no change in Mr. Brubaker's condition. So he reported to the insurance company, with a notation that Mr. Brubaker was "quite healthy."

March 28, 1952, the insurance company issued the two policies here in question, and delivered them to Mr. Brubaker April 11, 1952. Mr. Brubaker's wife was beneficiary in both policies.

April 9, 1952, Mr. Brubaker again went to see Dr. Williams. He complained that he was again having abdominal pains. This time the doctor sent his patient to a hospital for X-ray pictures, with the use of barium in the bowel. As a result of these tests an exploratory operation of the abdominal cavity was recommended.

April 24, 1952, the exploratory operation was performed. It was then discovered for the first time that Mr. Brubaker had a cancer of the first portion of the large bowel, and that the disease had spread to lymph nodes throughout the abdomen.

It was not until after the surgery that Dr. Williams told Mr. Brubaker what was really the matter with him, although the doctor testified on the trial that "in retrospect" he believed that all of Mr. Brubaker's symptoms were due to cancer.

November 4, 1952, Mr. Brubaker died.

January 26, 1953, the insurance company tendered to Mrs. Brubaker all premiums received, amounting to \$475.83.

The Superior Court found that at the time of the application, the medical examination, and the delivery of the policies, decedent was acting in good faith, without any knowledge of any cancerous condition or of any other serious disease or disorder of his body, that at the time of Mr. Brubaker's death all premiums had been paid, and that all other things required in the policies of him or of his widow had been done.

As a conclusion of law the court found that the insurance company was bound by the policies, and that the widow was entitled to judgment for \$7,000.

Defendant appeals from the judgment that followed.

The insurance company contends:

(1) That no disclosure of his cancerous condition was made in decedent's application for insurance; and (2) That delivery of the policy during good health was a condition precedent, which is not present in this case.

In support of the first contention, it is asserted that the failure of the insured to mention in the application that he "had small, tender, firm nodules in the right lower portion of his abdomen" voids the policy.

[1] This contention is without merit. It would be a strange medico-legal rule to say that nodules under the skin are certain evidence of cancer of the bowel, and

that the presence of such nodules must be noted in every application for insurance, at the peril of the beneficiaries. Dorland's American Medical Dictionary defines the word "nodule" as coming from the Latin *nodulus*, a little knot, meaning a small boss or node. To state the contention is to refute it.

The second contention does have merit. For the final ruling in this case will set the pattern in California in an important and interesting phase of insurance law. This contention has been given careful study and consideration.

The insurance company argues that the clause in the application for the policy reading as follows is a condition precedent:

"I hereby declare and agree * * * that this application (Part I and Part II) shall form a part of any policy of insurance issued, * * * that any policy issued shall not take effect unless and until the full first premium has been paid and the policy delivered to me during my good health, * * * and during my lifetime * * *."

In an able and comprehensive memorandum of opinion, the trial judge points out that there are divergent lines of decision and reasoning in the United States with respect to the situation here, and that this is apparently a case of first impression in California.

What may be termed the Massachusetts rule supports the contention of defendant that unless the insured is in actual good health at the time of delivery of a policy of life insurance, the insurer is not liable on the policy, at least until under our law, or by a provision in the policy, it is incontestable. See Ins.Code, Sec. 10953.3.

In other states a rule to the contrary has been established and applied. This rule may be stated as follows: The insurer, having the advantage of a medical examination, and dealing with an insured who is apparently in good health, and who is acting in good faith, will not be permitted to avoid the contract if it should develop after delivery of the policy that the insured had actually been afflicted with a dangerous and serious disease.

This situation in the law of insurance has been of great interest to judges, lawyers, and law and text-book writers. A partial list of cases, texts, and articles, follows:

The Massachusetts Rule—actual good health. Wright v. Federal Life Ins. Co., Tex.Com.App., 248 S.W. 325; Packard v. Metropolitan Life Ins. Co., 72 N.H. 1, 54 A. 287; 1 Appleman, Insurance Law and Practice, Chap. 8.

The rule contrary to the Massachusetts rule—apparent good health. Prudential Ins. Co. of America v. Kudoba, 323 Pa. 30, 186 A. 793; Thompson v. Prudential Ins. Co. of America, 196 Minn. 372, 265 N.W. 28. National Life & Accident Ins. Co. v. Ware, 169 Okl. 618, 37 P.2d 905; Chinery v. Metropolitan Life Ins. Co., 112 Misc. 107, 182 N.Y.S. 555; National Life Ins. Co. v. Grady, 185 N.C. 348, 117 S.E. 289.

See, 136 A.L.R. 1516, in which it is said: "The majority of the cases * * * have taken the position that such a provision relates only to changes in the condition of the insured occurring after the making or acceptance of the application for the policy and before its date, issuance, or delivery, at least where in connection with the application there was an examination of the insured by a physician representing the insurer."

Law Reviews.

Delivery in Good Health as a condition precedent to insurer's liability. 24 Iowa Law Review 787; 8 Washington & Lee Law Review 94.

The Delivery in Good Health Clause in Life Insurance Policies. 34 Columbia Law Review 1508; 3 University of Pittsburgh Law Review 159. In this review it is stated: "Included among the majority (*apparent good health*) are Georgia, Illinois, Indiana, Kansas, Kentucky, Mississippi, New York, and Oklahoma. Among the minority (*actual good health*) are Massachusetts, Minnesota, Texas, and Washington." 11 Temple Law Quarterly 262.

This Court is in agreement with the trial judge when he said in his memorandum of opinion:

"In finding for the plaintiff the court is attempting to follow an enlightened view.

It is a matter of common knowledge that science is constantly increasing the life expectancy of everyone. Concurrent with this increase in life expectancy, is an increase of incidence of the catastrophic diseases such as cancer. It is also a matter of common knowledge that these diseases frequently are not detected until they have reached the 'advanced stages'."

It seems to this Court that to follow the harsh Massachusetts rule would leave a gap in time in every life insurance policy, in which the beneficiaries would not be protected with insurance. For even though the premiums for the policies had been paid, even though the insured had complied with every covenant binding upon him in the insurance contract, the policies would be void because lurking undetected within his body was some disease which would kill him sometime.

It seems to this Court that it would be wrong to allow this difficult and sometimes perplexing question of fact to be at large in the contract of life insurance, and to subject beneficiaries to the delay, expense, and uncertainties of determining that fact in legal proceedings. It seems to this Court that in the interest of justice a time should be fixed and certain beyond which that fact shall not be at large, unless fraud or misrepresentation, or some other lawful defense, be present.

[2] Cases involving the issues of fraud and misrepresentation are not controlling under the facts of this case. However, a number of such cases have been cited in the briefs. So it is pertinent here to say that it has long been the rule in this state that in the absence of fraud or deceit the mere fact that representations of an insured were proved to be unfounded by subsequent events would not void a policy of life insurance. In *Chase v. Sunset Mutual Life Ass'n*, 101 Cal.App. 625, 281 P. 1054, application for a policy of life insurance was made April 5, 1927. The policy bears date April 11th. The insured had an attack of illness April 7th, which recurred April 11th.

He was operated on on April 16th, and died on April 22d.

The insurance company defended on the ground that representations of the insured were fraudulent, and that he fraudulently concealed the fact of his illness before the delivery of the policy.

The trial court found that the decedent had no knowledge or apprehension that his life or his health were seriously endangered.

In this case also "retrospectively" it appeared that the decedent had heart trouble which probably could have caused his death, along with a gallstone.

In affirming the judgment for the beneficiary of the insurance, the District Court of Appeal says: "If * * * such representations were honestly made, and were justified by the decedent's then knowledge of his physical condition, the mere fact that the representations of the insured were proved to be unfounded by subsequent events, in the absence of fraud or deceit, would not void the policy." 101 Cal.App. at page 631, 281 P. at page 1056. See cases collected in 26 West's Cal.Digest, Insurance, ¶291(3).

[3] These views find support in two settled principles of our law: (1) Insurance policies are to be construed liberally in favor of the assured, *Wells, Fargo & Co. v. Pacific Ins. Co.*, 44 Cal. 397; and

[4] (2) Courts are disinclined to construe the stipulations of a contract as conditions precedent, unless compelled by the language of the contract plainly expressed. *Victoria S. S. Co. v. Western Assurance Co.*, 167 Cal. 348, 139 P. 807; 12 Cal.Jur.2d Sec. 171, p. 389.

[5] For the foregoing reasons this Court concludes in this case that from the time they were delivered, there being no fraud or misrepresentation, or other legal defense, decedent was insured, and his beneficiary is entitled to the proceeds of the policies.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; CARTER, J., not participating.

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